

GAMBIA WAQF COMMISSION BILL, 2016

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GAMBIA WAQF COMMISSION BILL, 2016

A BILL ENTITLED

AN ACT to establish a Commission to regulate waqf in The Gambia, and for connected matters.

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ENACTED by The President and the National Assembly.

PART I – PRELIMINARY

1. Short title and commencement

This Act may be cited as the Gambia Waqf Commission Act, 2016 and shall come into force on such date as the Minister shall, by Order published in the Gazette, determine.

2. Interpretation

In this Act, unless the content otherwise requires –

“Commission” means the Gambia Waqf Commission established under section 3;

“commissioner” means a person appointed as a commissioner under section 5 and includes the Chairperson and the Vice-Chairperson of the Commission;

“Court” means the Cadi Court;

“functions” include powers, duties, obligations and responsibilities;

“Government” means the Government of the Republic of The Gambia;

“manager” means a person appointed as a manager of a waqf under section 26;

“Minister” means the Minister responsible for Finance and Economic Affairs;

“person” includes an individual and a body corporate or unincorporated;

“President” means the President of the Republic of The Gambia;
and

“waqf” means a permanent or temporary donation of the usufruct of any movable or immovable property for a pious, religious or charitable purpose recognised by Islamic law and includes a corporate body or other institution established for this purpose.

PART II – ESTABLISHMENT AND COMPOSITION OF THE GAMBIA WAQF COMMISSION

3. Establishment of the Gambia Waqf Commission

(1) There is established by this Act, the Gambia Waqf Commission.

(2) The Commission shall be a body corporate with perpetual succession and a common seal and may –

- (a) sue and be sued in its corporate name;
- (b) enter into contracts and acquire, hold and dispose of property; and
- (c) do such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate.

(3) The application of the common seal of the Commission shall be authenticated by the signature of the Chairperson, the Vice-chairperson or any other commissioner authorised by the Commission in writing to sign on behalf of the Commission.

(4) A document bearing the imprint of the common seal of the Commission is deemed to be properly sealed, unless the contrary is proved.

4. Composition of the Commission

The Commission shall consist of –

- (a) one commissioner nominated by the Ministry of Finance and Economic Affairs, who shall be the Chairperson;
- (b) one commissioner nominated by the Supreme Islamic Council, who shall be the Vice-Chairperson;
- (c) one commissioner nominated by the Ministry of Justice; and
- (d) three other commissioners.

5. Appointment of commissioners

The President shall, after consultation with the Public Service Commission, appoint the commissioners.

6. Tenure of office of commissioners

A commissioner shall hold office for four years and is eligible for re-appointment for one further term.

7. Remuneration of commissioners

A commissioner shall be paid such allowances as the Minister shall determine.

8. Resignation of commissioners

A commissioner may resign from his or her office by notice in writing under his or her hand addressed to the President, and a resignation shall take effect when the notice is received by the President.

9. Immunity of commissioners

A commissioner shall not be subject to civil or criminal proceedings or be personally liable for any act done or omitted to be done in good faith in the performance of his or her functions.

PART III – FUNCTIONS OF THE COMMISSION AND ANCILLARY MATTERS

10. Functions of the Commission

The Commission shall –

- (a) advise the Minister on all matters pertaining to waqf;
- (b) coordinate and supervise all matters pertaining to waqf;
- (c) encourage and popularise the establishment of waqf throughout The Gambia;
- (d) promote a positive perception of the social, religious and development aspects of waqf;
- (e) publicise the establishment of new waqf;
- (f) prepare programmes and mechanisms for the development of waqf;
- (g) provide appropriate technical support to waqf, assist them to solve their operational problems and to properly fulfill their mandates;
- (h) notify –

- (i) a donor of any irregularity or excess that it observes in the management of waqf property, and
 - (ii) the competent authorities of any contravention by a waqf of the provisions of this Act;
- (i) make recommendations to the Government pertaining to the laws governing waqf;
 - (j) organise symposia, conduct studies and research on waqf;
 - (k) prepare reports containing information about waqf;
 - (l) establish relationship and cooperation with other waqf supervisory bodies in the Muslim world;
 - (m) encourage relationship and collaboration amongst waqf in The Gambia having similar objectives;
 - (n) perform such other functions as may be conferred upon it by this Act or any other enactment of the National Assembly.

11. Independence of the Commission

In the performance of its functions, the Commission shall not be subject to the direction or control of any person or authority.

12. Meetings of the Commission

- (1) The Commission shall meet at such times and at such places as the Commission shall determine.
- (2) The Chairperson shall, at the request in writing of at least two other commissioners, convene a special meeting of the Commission at any time.
- (3) The Chairperson shall preside over meetings of the Commission and the Vice-Chairperson shall preside over a meeting in the absence of the Chairperson.
- (4) The quorum for a meeting of the Commission shall be four commissioners, including the Chairperson or the Vice-Chairperson.
- (5) All decisions of the Commission shall be taken on the basis of a majority vote and the Chairperson or other commissioner presiding shall have a casting vote as well as a deliberative vote.

[Section 26 (a) and (b) of Cap. 4:01]

- (6) The Commission may at any time co-opt any person to advise or otherwise assist the Commission at any of its meetings but the

person co-opted shall not vote on any matter for decision by the Commission.

(7) The Commission shall regulate its own procedure.

13. Disclosure of interest

(1) A commissioner who has an interest, direct or indirect, in any waqf, shall –

(a) disclose to the Commission the fact of such interest and the nature of it; and

(b) not take part in any hearing or decision of the Commission relating to the waqf.

(2) A disclosure of interest by a commissioner shall be recorded in the minutes of the Commission.

(3) A commissioner who contravenes sub-section (1) may be removed from the Commission.

PART IV – FINANCIAL PROVISIONS

14. Funds of the Commission

The funds of the Commission shall consist of –

(a) moneys appropriated to it by the National Assembly;

(b) fees, charges and other moneys or properties which may become payable to or vest in the Commission in respect of the performance of its functions; and

(c) donations or gifts of land, money or other property from any lawful source, if the conditions attached by the individual or organisation donating or making the gift are not inconsistent with the functions of the Commission under this Act.

15. Annual estimates, accounts and audit

(1) The Commission shall, not later than three months before the end of each financial year, prepare and submit to the Minister for approval, estimates of the income and expenditure of the Commission for the ensuing year.

(2) The Commission shall keep proper records and books of accounts of its income, expenditure and transfers.

(3) The Commission shall prepare, in respect of each financial year, a statement of accounts.

(4) The Commission shall, within three months after the end of each financial year, submit its statement of accounts to the Auditor General for audit.

(5) The audited accounts of the Commission and the Auditor General's report on those accounts shall form part of the Auditor General's overall annual report to the National Assembly.

(6) Notwithstanding sub-section (5), the Commission shall present its audited accounts to the Joint Committee on Public Accounts and Public Enterprises (PAC/PEC) of the National Assembly.

16. Annual report

(1) The Commission shall, within three months after the end of each financial year, submit a report to the National Assembly on its business and operations during the preceding year.

(2) The Commission shall, after submission to the National Assembly, publish its report in the Gazette.

PART V – FORMS OF WAQF

17. General forms of waqf

(1) A waqf may be established as a charitable waqf, a private waqf or a hybrid waqf.

(2) A charitable waqf may be established for public services utilities or for persons with special characteristics.

18. Waqf donated for public services

(1) A waqf donated for public services may be established through public facilities run by the State, a public enterprise, public social assistance bodies or a regular waqf.

(2) Subject to the following conditions, this Act applies to all waqf for public services –

(a) if the designated public need has been exhausted, the Commission may authorise the transfer of the waqf funds to other public services;

(b) a waqf donor shall not revoke his or her waqf made in perpetuity except for such emergency cases as may be prescribed and with the approval of the Court;

(c) the revocation of a waqf may be limited to a share of the waqf property, which the Court shall estimate;

- (d) a temporary waqf may not be revoked before its term expires;
- (e) a temporary waqf may be renewed for the same period or for further periods;
- (f) a temporary waqf may be transformed to a waqf made in perpetuity, by tacit agreement, when its term expires;
- (g) a temporary waqf which has been transformed to a waqf made in perpetuity shall continue to exist with the consent of the waqf donor (if he or she is alive) or with the approval of the waqf donor's heirs (if the waqf donor is dead);
- (h) if some of the waqf donor's heirs approve that the waqf shall continue to exist and some of them disapprove, the waqf shall be considered as a waqf made in perpetuity only in proportion of the shares of those heirs who approved that the waqf shall continue to exist;
- (i) a condition stipulated by a waqf donor which is contrary to Islamic law is invalid; and
- (j) if a waqf is donated for a public service or a public body and the waqf donor has appointed a manager for the waqf, that waqf manager shall preserve the waqf property, develop it, invest it, pay the waqf income to the beneficiaries and ensure compliance with the waqf donor's stipulated conditions.

19. Mass waqf

(1) Several donors may, for a common objective (in the case of a single waqf) or for multiple objectives (in the case of several waqf) establish a mass waqf under such conditions as may be prescribed.

(2) The terms of a mass waqf may not be changed without the consent in writing of all its donors who are still alive.

(3) The provisions of section 18 (2) are applicable to mass waqf in the same way as they are applicable to waqf donated for public services.

PART VI – THE ESTABLISHMENT OF A WAQF AND ANCILLARY MATTERS

20. Establishment and legal effect of a waqf, etc.

(1) A waqf may be established by one or more persons.

(2) A person who establishes a waqf may donate his or her

property as usufruct and the proceeds for charitable purposes.

(3) A waqf takes effect on the date on which a donor declares his or her intention in speech, in writing or through a gesture or other action which indicates the donor's willingness to donate.

(4) If a donor has declared in writing that he or she intends to establish a waqf, that donor shall cause a waqf establishment deed to be drawn up, authenticated by a Notary Public and registered by the Registrar General of the Ministry of Justice.

(5) When a donor has declared an intention to establish a waqf –

(a) the waqf becomes a separate legal entity;

(b) the property donated to the waqf becomes waqf property and is transferred to the waqf; and

(c) the waqf donor's conditions become applicable.

(6) A person may, within ninety days from a waqf donor's declaration of intention to establish a waqf, lodge a notice of objection in writing with the Commission on the grounds that the waqf has failed to comply with the conditions governing the implementation, validity or applicability of a waqf or the procedures for the establishment of a waqf.

(7) If the Commission determines that an objection is in order, the Commission shall –

(a) take the necessary measures to suspend the legal effects resulting from the establishment of the waqf in the same manner as it may take corrective measures on matters of non-compliance with form; or

(b) refer the matter to the Court for decision.

(8) A person who is aggrieved by a decision of the Commission may, within sixty days from the date of the notification of the decision, appeal to the Court against that decision.

21. Right of appeal to the Court

Notwithstanding section 20 (6), a person may lodge a notice of objection in writing directly with the Court concerning the failure of a waqf to comply with the conditions governing the implementation, validity or applicability of a waqf or the procedures for the establishment of a waqf.

22. Conditions for the validity of a waqf

(1) The conditions for the validity of a waqf are –

- (a) the waqf donor shall have the legal capacity to donate, in accordance with Islamic law;
- (b) the waqf property shall be owned by the waqf donor;
- (c) the waqf property may include ordinary shares, corporate shares or partnership shares whose use is authorised by Islamic law;
- (d) property shall not be donated for a beneficiary who is not recognised as eligible by Islamic law;
- (e) if a waqf donor is a non-Muslim, the waqf beneficiary has to be recognised as eligible by Islamic law and by the waqf donor's religious law; and
- (f) the beneficiary shall accept the waqf, if the beneficiary is an individual who, or a body that, has been designated by the waqf donor by name.

(2) The following shall not invalidate a waqf –

- (a) the waqf donor is not a Muslim;
- (b) the waqf beneficiary has not approved of the waqf, if the beneficiary is an individual who, or a body that, has not been designated by the waqf donor by name;
- (c) the waqf property is still in the possession of the donor; or
- (d) the waqf contains an invalid condition.

23. Conditions for the commencement of a waqf

The conditions for the commencement of a waqf are –

- (a) seeking the consent of the heirs of a waqf donor, after the death of the waqf donor, in respect of a waqf that exceeds one-third of an inheritance;
- (b) paying the waqf donor's debts, or soliciting the consent of the creditors of the waqf donor if the waqf donor's debt exceeds the value of his or her assets;
- (c) releasing the pledge, if the waqf property is under a mortgage.

24. Right of a donor to stipulate conditions relating to the waqf

(1) A waqf donor may include conditions of his or her own choice in a waqf.

(2) A valid condition included by a waqf donor in his or her waqf shall have the weight of a legal provision in its understanding and in its meaning.

(3) A term used by a waqf donor shall have the meaning that is closest to the meaning intended by the waqf donor, in accordance with the customs and traditions at the time of declaration of the waqf, even where the customs and traditions are different from linguistic rules.

(4) If a waqf contains a valid condition, that condition shall be applied unless it is contrary to the interest of the waqf itself or the interest of the beneficiary of the waqf or it jeopardises the achievement of a legal objective by the donor.

(5) If two valid conditions conflict, those conditions shall be combined where possible.

(6) If two valid conditions that conflict cannot be combined, the latest in time shall be applied.

(7) Except for the circumstances provided for under section 21, a waqf donor may amend the conditions of his or her waqf partially or totally.

(8) If it is proved that the enjoyment of a waqf has been effective after a financial contribution by a waqf donor, the waqf donor shall not amend the conditions of his or her waqf.

(9) A person other than the waqf donor or the waqf donor's representative shall not modify any clause of a waqf, except as may be provided under this Act.

(10) A condition which is contrary to Islamic law is void.

25. Waqf of fixed duration and waqf made in perpetuity

(1) A private waqf shall be of fixed duration.

(2) A charitable waqf and partnership shares donated for a hybrid waqf may be of fixed duration or be made in perpetuity.

(3) A waqf which is not expressed, or does not purport, to be of fixed duration, is deemed to have been made in perpetuity.

(4) Except for the circumstances provided for under sub-sections (1), (2) and (3), the following waqf shall be considered as being

made in perpetuity –

- (a) waqf for a mosque;
- (b) waqf for cemeteries;
- (c) waqf donated by a person who dies without having revoked his donation, if the waqf was not of a fixed duration; and
- (d) waqf considered by the Court as not being of fixed duration.

PART VII – THE MANAGEMENT OF A WAQF

26. Appointment of a manager

- (1) A waqf may be managed by one or more persons.
- (2) The waqf donor or the waqf donor's representative shall appoint a waqf manager.
- (3) In some circumstances, the Commission may appoint a waqf manager.
- (4) The waqf manager is the custodian of the waqf property and the designated representative of the waqf beneficiaries.
- (5) A waqf whose value exceeds a certain threshold shall be managed by a Board.

27. Functions of a manager

- (1) A waqf manager is responsible for the custody, upkeep and investment of waqf property.
- (2) A waqf manager shall –
 - (a) retain, for at least three years, the accounting documents and cash vouchers of the waqf;
 - (b) prepare an annual report on the management of the waqf, in compliance with such criteria as may be prescribed;
 - (c) submit copies of the annual report to the waqf donor, together with a copy to the Commission;
 - (d) submit to a qualified auditor or firm of auditors for auditing, waqf accounts which exceed a certain threshold; and
 - (e) perform such other functions pertaining to the management of the waqf as the waqf donor, the waqf donor's representative or the Commission (as the case may be) may

determine.

28. Remuneration of a manager

(1) The waqf donor or the waqf donor's representative shall pay the waqf manager such salary or allowances as the waqf donor or the waqf donor's representative may determine.

(2) In some circumstances, the Commission may fix the salary or allowances of a waqf manager, within the threshold of salaries paid for similar services.

29. Removal of a manager

(1) The waqf donor or the waqf donor's representative may remove a waqf manager and appoint a new waqf manager.

(2) In some circumstances, the Commission may remove a waqf manager and appoint a new waqf manager.

PART VIII – THE INVESTMENT OF WAQF FUNDS

30. Direct investment

(1) Waqf funds may be invested in any purpose recognised by Islamic law which provides secure returns.

(2) In investing waqf funds, priority shall be given to basic social sectors in accordance with such conditions as may be prescribed.

31. Indirect investment

A waqf manager may entrust to any specialised and eligible institution the total or partial investment of waqf funds through the appropriate investment forms recognised by Islamic law.

32. Exchange and replacement

Subject to the approval of the Court, waqf property may be exchanged or replaced in accordance with such procedures as may be prescribed.

33. Negligent investment by a manager

(1) A waqf manager shall invest waqf property in accordance with sound Islamic investment principles.

(2) If the returns on an investment made for two consecutive fiscal years is insignificant compared to the average income of similar investments, a waqf manager is deemed to have been negligent and the matter may be brought before the Court.

34. Reserve fund

- (1) A waqf shall establish a reserve fund.
- (2) The reserve fund shall be used for the prescribed purposes including the maintenance, renovation or replacement of the waqf property, if the property has deteriorated or is damaged.

PART IX – WAQF INCOME DISTRIBUTION SCALE, ETC.

35. Income distribution scale

- (1) Waqf income shall be invested in areas defined by the waqf donor in accordance with the provisions of this Act.
- (2) The rights of waqf beneficiaries shall be determined by the income generated by the waqf property and not by the waqf property itself.
- (3) If a waqf donor has so specified, the waqf beneficiaries may directly use the waqf property.
- (4) A waqf manager may enter into agreements with the waqf beneficiaries about the use of the waqf property based on the share of each of the waqf beneficiaries and in accordance with such rules as may be prescribed.

36. Nullification of the right of use

- (1) If a waqf beneficiary –
 - (a) refuses the right of use;
 - (b) kills the waqf donor or kills the person from whom the waqf beneficiary holds the right of use, regardless of whether the waqf beneficiary is, in relation to the crime, the principal offender or a secondary offender; or
 - (c) has given false evidence which has resulted in the death sentence being carried out on the waqf donor,

the right to use that waqf shall be void.

- (2) The right of the descendants of a waqf beneficiary to use a specific waqf shall not be affected if those descendants are beneficiaries of the waqf in their own right.

37. Expenditure on purposes not specified by the donor

- (1) Subject to the approval of the Court, where a waqf donor has

died, the waqf property or the waqf income may be used for a purpose (including the settlement of an obligation) which was not previously specified by the deceased, in accordance with such rules as may be prescribed.

(2) Subject to section 35, a waqf manager may –

- (a) spend the income of a charitable waqf;
- (b) spend the share of a hybrid waqf which has been allocated to charitable activities; or
- (c) use the waqf property,

to alleviate the effects of natural disasters occurring in places hosting the waqf in accordance with such rules as may be prescribed.

(3) Subject to section 35, an ascendant, a descendant, a spouse or a close relative (up to the fourth degree) of a waqf donor who has expressed an essential need shall have his or her need satisfied from the waqf property or the waqf income in accordance with such rules as may be prescribed and with the approval of the Court.

38. Waqf income donated to charity in general

(1) The following waqf income is deemed to be or to have been donated to charity in general –

- (a) a waqf whose use is not specified by the donor;
- (b) a waqf whose use is no longer known;
- (c) a waqf whose beneficiary is unknown, has not been heard of for two years or has no living descendants;
- (d) a waqf donated to an individual who has refused to use it and for which no other beneficiary is known; and
- (e) a waqf donated to a charity institution which does not exist or have any more needs.

(2) Where a waqf beneficiary re-appears after two years, he or she may claim –

- (a) the used waqf income;
- (b) the unused balance of the waqf income; and
- (c) the future waqf income, if the waqf income has been used up at the time of his or her re-appearing.

39. The allocation of quotas in a hybrid waqf

(1) If a waqf is considered as a hybrid waqf and its distribution scale has not been defined in this Act, the waqf income shall be divided into equal shares for individuals and for charity activities.

(2) If a waqf has un-assessed payment orders, the Court shall assess those orders.

40. Special judgment for the beneficiaries of descendants

(1) If a waqf is donated to descendants according to a specific generational order and the waqf beneficiary dies or is deprived of the use of the waqf for some reason, the waqf income shall be shared as follows –

(a) a direct descendant of the waqf beneficiary shall receive the waqf beneficiary's share;

(b) a person of the waqf beneficiary's generation shall receive the waqf beneficiary's share, if the waqf beneficiary has no direct descendants;

(c) a person of the generation succeeding the waqf beneficiary's generation shall receive the waqf beneficiary's share, if the waqf beneficiary is not survived by a person of his or her generation.

(2) If a birth is registered in the first generation, the right of use shall vest in a newborn with effect from the date of the newborn's birth.

41. Limitation period for objecting to the right of use

A person who has been informed of the right of use of waqf property or waqf income may object to its use by the waqf beneficiary within two years from being so informed.

PART X – LEGAL PRINCIPLES RELATING TO WAQF FUNDS

42. The principle of intentional non-use or limitation

(1) Waqf funds shall not be deliberately used unless in cases provided for by this Act and such rules as may be prescribed.

(2) Waqf funds shall not be alienated or given as collateral.

43. Nullity of control or of appropriation by prescription

(1) Any attempt to take over the ownership or control of waqf

property or to pursue special rights over waqf property, even by prescription, is invalid.

(2) The Court shall order a person who misappropriates waqf funds to repay the funds.

44. Selection of a quota from divisible waqf property

If waqf property is divisible without any resulting damage, a waqf beneficiary or a manager of a quota donated to charity in a hybrid waqf may request the Court to select his or her quota from that waqf property.

PART XI – CESSATION OF A WAQF, ETC.

45. Cessation of a waqf

(1) A waqf shall completely cease to exist –

- (a) subject to section 25 (4), if the specified term expires, where a waqf is of fixed duration;
- (b) if the waqf donor's objectives have been achieved, where a waqf was established for specific individuals;
- (c) if the waqf beneficiaries disappear or cannot be traced, where a waqf was established for specific individuals;
- (d) if the waqf donor revokes the donation, in the specific cases provided for under this Act;
- (e) if the share of the waqf beneficiaries becomes insignificant in view of their social conditions and there is no available property substitution that can generate satisfactory income; and
- (f) if the waqf property disappears or is ruined.

(2) A waqf may partially cease to exist in such circumstances as may be prescribed.

(3) A waqf may be dissolved by a decision of the Court if –

- (a) the dissolution is announced within such deadline and in accordance with such procedure as may be prescribed; and
- (b) the Court ensures that all of the parties concerned, including the donor or the donor's heirs and the Commission, participate in the dissolution procedure.

(4) When a waqf ceases, the waqf property shall be transferred to

the waqf donor (if he or she is alive) or to the waqf donor's heirs (if he or she is deceased).

(5) The cessation of a waqf shall not affect the rights of bona fide third parties who had acted acquired their rights and acted in good faith during the existence of the waqf.

46. Tax exempt status for certain waqf funds, etc.

(1) The funds donated as charitable waqf and the quotas reserved for charity work in a hybrid waqf shall be exempt from all taxes and treated in the same manner as public funds.

(2) The documents, files, registers, archives and electronic media containing special documents of a waqf shall be subject to the same rules as official public documents.

(3) A manager of a regular waqf and his or her employees shall be subject to the same rules as State officials managing a waqf donated for public services.

PART XII – MISCELLANEOUS PROVISIONS

47. Power of the Court to decide generally

The Court shall decide on any matter relating to waqf for which no provision has been made by this Act or any other enactment of the National Assembly in accordance with Islamic law.

48. Regulations

The Minister may make regulations generally for the effective implementation of this Act and for any other matter which is consistent with the purposes of this Act.

49. Savings of existing waqf

(1) A waqf which was operating immediately before the coming into force of this Act shall continue to be in operation under and for the purposes of this Act as if that waqf had been registered under this Act, for a period not exceeding twelve months after the date on which this Act comes into force.

(2) The Registrar General of the Ministry of Justice shall –

(a) after consultation with the Commission and twelve months after the date on which this Act comes into force, publish in the Gazette the list of waqf registered and operating under this Act; and

(b) update the list from time to time.

(3) A waqf which is not on the list of registered waqf published in the Gazette shall not advertise, continue to advertise, or otherwise hold itself out to the public as a waqf.

OBJECTS AND REASONS

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HON. ABDOU KOLLEY
MINISTER OF FINANCE AND ECONOMIC AFFAIRS