THE HARMONY THAT EXISTS BETWEEN WAQF & TRUST

By
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This paper attempts to briefly test the following three hypotheses:

A. Could it possibly be said that 'uses' and trust originated out of the concept of *waqf*?

B. Whether a close harmony actually exists between the various legal provisions of *waqf* and trust?

C. Could *waqf* and trust possibly help each other to further develop?

A. The Possibility that 'uses' and Trust Originated Out of the Concept of *Waqf*

More than four hundred years before the advent of 'uses' and trust in Common law, the institution of *waqf* was already a well developed concept in Islamic law. It became possible because of the attention given to it by the early Muslim jurists and who made it a developed branch of Islamic law by the end of the second century of Islam, ie, some 1200 years from now. The concept of *waqf* owes its origin to a pronouncement made by the Prophet (S.A.W.S.) in reply to a question enquiring about the best way of giving in charity. Tie up the corpus, said he, and give away the fruits (usufruct)- *habbis al-asla wa sabbil ath – tham-arata.*[1] The whole edifice of the law of *waqf* was erected by the

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[1] This hadith is reported in every compilation of *ahādith: Bukharī, Muslim, Abu Daud, Tirmidhi, Nasā'i, Ibn Majā, Musnad* of Ahmad b. Hanbal, etc.

Muslim jurists on the basis of the full text of this hadith, and "there is no evidence that such a complex system of appropriating usufruct as a life interest to varying and successive classes of beneficiaries existed prior to Islam".[2]

On the contrary, there are certain scholars who have argued that the idea of 'uses' and trust in Common law might have originated from the concept of *waqf*, as at the time when 'uses' made their appearance, the institution of *waqf* was already a well-developed concept and was widely used in Arabia and in those parts of Jerusalem area where Crusaders might have come in touch with it. Henry Cattan was one of the first to float this thesis in 1955 when he said:

> "The similarity between the Islamic institution of *waqf* and the early English conception of a trust is striking. Under both concepts, property is reserved, and its usufruct appropriated, for the benefit of specific individuals, or for a general charitable purpose; the corpus becomes inalienable; estates for life in favour of successive beneficiaries can be created at the will of the original owner without regard to the law of inheritance or the rights of the heirs and continuity is secured by successive appointment of trustees or *mutawallis*."[3]

A few years earlier, Thomas[4] also expressed similar views, so also Athar and Khalid[5], Badr[6] and Weeramantry[7]. The last mentioned sounded a note of caution by

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[2] Shafi'i, *Kitab al-Umm*, vol.4, 58 (Cairo, 1961) and Al-Dasuqi, *Hashiyāt ᶜalā Sharah al-Kabir bi Abiᶜal-Barakāt al-Dardir*, vol.4 (1931-34), p.75 cited in Mohd Zain bin Haji Othman, *Islamic Law with special Reference to the Institution of Waqf*, (Kuala Lumpur, 1982), p.11, See also, Henry Cattan, "Law of Waqf", in Majid Khaduri, and Liebesny (eds.), *Law in the Middle East*, vol. 1 Washington, 1955), p.205. The views expressed by Heffening and Schacht about the possibility of some Roman Byzantine influence on the development of waqf is rejected by Muslims and others alike. See, Heffening in *Encyclopedia of Islam*, vol.2, p.1098; Schacht, Joseph, "Early Doctrines on Waqf", *Mel Koprulu*, (1953), pp.443-452 1964), p... and S.Athar Husain S.Khalid Rashid, *Waqf Laws and Administration in India*, 2nd ed (Lucknow, 1973), pp.6-7. (first published in 1968).

[3] Henry Cattan, *Supra* n.2 at 213

[4] Thomas, "Note on the Origin of Uses and Trusts – Waqfs", 3 Sw.L.J. 162 (1949)

[5] S.Athar Husain and S.Khalid Rashid, *supra* n.2 at 158-161

[6] Badr, G.M., "Islamic Law: Its Relation to Other Legal Systems, *American Journal of Comparative Law*, vol.26, (1978), p.185.

[7] Weramantry, C.G., *Islamic Jurisprudence : An International Perspective*, (The Other Press, Kuala Lumpur, 2001), first published in 1988, by Mac Millan, London.

saying "The *waqf* trust similarity only indicates the *possibility* of the connection and not the *fact* of such a connection".[8] Unfortunately, very little attention has been given by the Western scholars to this theory of possibility of the influence of the Islamic law of *waqf* on the early development of 'uses' and trusts. Instead, the whole attention was focused successively on the possibility of the Roman and then Germanic influence.[9] In recent years, however, some scholars have expressed doubts against the theory of Roman and Germanic influences, and the possibility of the influence of *waqf* on 'uses' and trust is re-emphasized and also supported by fresh evidence. Monica Gaudiosi has extended the scope of this debate by contending that the format in which dedication by certain properties of Lord Merton in favour of the Merton College, Oxford University through the Statutes of 1264 was made, reveals a close similarity between this document and a typical *waqf* deed, so much so that, to put it in her words, "Were the Merton document written in Arabic, rather than Latin, the Statutes could surely be accepted as a *waqf* instrument".[10] According to her, this close resemblance might be due to the influence of the concept of *waqf* brought into England by the Franciscan Friars from Jeruselam; it also comes out from the pattern on which inns of Court in London were established, which exhibited close resemblance with the inns of mosques in Jeruselam and Baghdad of those days.[11]

Let us re-visit the unfinished discussion about this possibility and make an attempt to briefly examine the origin of 'uses' and trust with a view to see the extent, if

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[8] *Id* at 74
[9] See, Holdsworth, *A History of English Law*, vol.4, 3rd ed. (1945), p.417
[10] Monica G.Gaudiosi, "The Influence of the Islamic Law of Waqf on the Development of the Trust in England : The Case of Merton College", *University of Pennsylvania Law Review*, vol.136, p.1231 at 1254 (1988)
[11] *Id* at 1255

any, to which the theory of influence of *waqf* on 'uses' is sustainable. The paper also undertakes a brief comparative journey through such provisions of trust which bear uncanny resemblance with parallel provisions in the law of *waqf*.

1. Inconclusive Theories of the Origin of Trust

It is well settled that the concept of trust emerged out of 'uses', the medieval English devise for holding land. In its early history, that is, before the enactment of the Statute of Uses, 1535, 'uses' were yet not known by the name of 'trust'. It may be useful to examine the origin of '*uses*' and to see how these came into being.

'Use' was a devise that was used to avoid payment of feudal dues to the Lord whenever an heir succeeded to the feudal land. The passing of the land from one generation to another attracted the payment of feudal dues which was avoided when the owner of the land, called *feoffor*, vested the land in a number of '*feoffees* to uses' to be held by them for the use of the *cestui que use*. As it was unlikely for all the *feoffees* to uses to die together, and those who died were at once replaced, it became possible to perpetually vest the land in *feoffees*, requiring them to use it for the benefit of certain beneficiaries.[12]

Upto the 19th Century, the Roman concept of *fideicommissum* was considered the model on which 'uses' were based and developed.[13] Then this theory gave way to German theory, which was given support by Maitland[14], Holmes[15] and others. But both of these two theories have their own limitations, leaving the question of origin of use still

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[12] See, for example, Hanbury and Maudsley, *Modern Equity*, 13th ed. (Stevens & Sons, London, 1989), p.9
[13] W.Holdsworth, *A History of English Law*, 3rd ed. Vol.4, (1945), p.410
[14] F.W.Maitland, "The Origin of Uses", *Harvard Law Review*, vol.8 (1894), p.127 at 129
[15] Holmes, "Law in Science and Science in Law", *Harvard Law Review*, vol.12 (1899) p.443 at 445-446.

unsettled. A quick look at both these theories would be helpful in further discussing this issue.

1.1 Roman Theory

The central point of this theory is that 'uses' emerged out of the concept of *fideicommissum* which may be described as follows:

> "..... when a Roman testator found that his prospective beneficiary was incapacitated to receive a testament, he transmitted to his legatee the intended legacy through a person capable of receiving (it).... Trusting... that the legal beneficiary would honor his moral obligation and pass the legacy to the real beneficiary of the trust."[16]

This theory is criticized on the ground that *fideicommissum* was essentially a testamentary disposition[17]. According to Maitland, "every attempt to discover the genesis of our use in Roman law breaks down, and I have been led to look for it in another direction if the English uses were a *fideicommissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*". [18]The Privy Council, in one of it judgments delivered in 1946, gives three points of distinction between English uses and Roman *fideicommissum* as follows:

> "(1) The distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to the *fidei commissum*. (2) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive; in the *fidei commissum* the ownership of the *fidei commissary* begins when the ownership of the fiduciary ends. (3) In the trust, the interest of the beneficiary, though described as an equitable ownership, is properly '*jus neque in re neque 'ad rem*', against the bona fide alienee of the legal estate it is paralysed and ineffectual; in the *fidei commissum* the *fidei commissary*, once his interest has vested, has a right which he can make good against all the

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[16] Vasey, "Fideicommissa and Uses: The Clerucal Connection Revisited", Jurist, vol.42 (1982), p.201 at 203.
[17] Pollock and Maitland, *History of English Law*, vol.2, 2nd ed. (Cambridge, 1952), p. 239
[18] Maitland, *supra* n.14 at 137

world, a right which the fiduciary cannot destroy or burden by alienation or by charge."[19]

Thus the earlier view that favoured the Roman origin of uses was found to be ill-considered and, speaking legally, the similarities between the *fideicommissum* and *use* appear to be only superficial.[20]

1.2 **The German or Salman Theory**:

Lex Salica was the legal code of the Salian Frannks, a German tribe. In this Code, a third party, known as *Salmannus* (Salman in anglicized spelling) was employed to help transfer property for specific purposes to be carried out during the lifetime or after the death of the person conveying it. According to Holdsworth, the Salman held the property given to him "on account of or to the use of another... (and he was) bound to fulfill his trust".[21] The Norman conquest brought Salic law into England. The Salman became the medium for the testamentary disposition of land, as Common law prohibited such dispositions. The idea was also used holding property on account of or to the use of another.

But the difficulty with this theory is that the central ideal of *Salman* is that of an intermediary who is used for the conveyance of land to someone else, while the *feoffee to uses* was more in the nature of trustee. The German theory is also different in the sense that it never conceived separation of usufruct from ownership, the creation of life interest

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[19] *Abdul Hameed Siti Khadija v De Saram*, [1946] AC at 217, per Vicount Simon, Lord Thankerton and Sir John Beaumout, citing with approval Professor R.W.Lee, *Introduction to Roman-Dutch Law*, 3rd ed. (1931), p.372. This judgment has been applied in two subsequent cases: *Abeya-Wardene v. West* [1957] 2 W.L.R. 281 and *Kanayson v. Rasiah* [1928] AC 746 (PC).

[20] Monica Gaudisoi, *supra* n.10 at 1242

[21] Holsworth, *supra* n.13 at 411

and the power of the settlor to direct the passing on of the usufruct from one generation of beneficiary to another.[22]

According to Barton, the difficulty with this theory is that the conveyance of land to a *Salman* does not seem to have been at all a usual form of disposition in the England of the early Middle Ages. We certainly do not find the *Salman* where we should expect to find him. Bracton has nothing to say about the *Salman* and his silence is the more significant since he does mention two conveyancing devices which served a very similar purpose.[23]

1.3 The Franciscan Friars Theory

Franciscans were religious men who had to live without property of any sort or kind, but who nevertheless were entitled to enjoy the usufruct. Franciscans are generally regarded as the conduit through which the idea of uses was introduced in the 13th century England. An English legal historian is of the view that-

> "It is very possible that the case of Franciscans did much towards introducing among us both the word *usus* and the desire to discover some expedient of ownership to those who could yet say that they owned nothing ... the first persons who in England employed 'the use' on a large scale were, not the clergy, nor the monks, but the friars of St. Francis... what we see is a vague idea, which developing in one direction becomes what we know as agency and developing in another direction becomes that use which the Common law will not, but equity will, protect."[24]

However, the question which remains unanswered is the origin of 'use' itself. From where Franciscans got this idea on which 'use' came to be established. It is significant that St. Francis himself went to Egypt in 1219, where at that time thousands of

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[22] See, Henry Cattan, *supra* n.2 at 216
[23] J.H.Barton, "The Medieval Use", 81 Law Q. Rev. 562 (1965)
[24] Maitland, *supra* n.14 at 130 and 136

awqāf were in existence. There is a clear possibility that he might have come in touch with some of the *waqf* institutions and the persons administering them. Popes sent letters to Muslim kings soliciting their permission for the friars to carry on their work. " In the 14th century the Franciscans were finally permitted to reside in Palestine as caretakers for the holy places, but not as missionaries".[25]

During the 13th century, thousands and thousands of persons from Europe and England went to the Holy Land for Crusades. "Between 1095, when the first crusade was launched and 1291, when the Latin Christians were finally expelled from their bases in Syria, historians have formally enumerated eight major expeditions. Many other lesser ventures also took place, and even after 1291 there were attempts to recover what has been lost. The establishment of the Franciscan and Dominican friars in the East during the 13th century made possible the promotion of missions within the Crusade area and beyond".[26]

Since Franciscan friars are generally regarded as the originators of the idea of use, it may probably be logical to suggest that they might have brought back the idea from the Muslim lands where they were stationed and had every chance to be exposed to the idea of *waqf*.

The coincidence of the 13th century 'Renaissance' with the period of Crusades appears very striking. Certain Western writers have honestly admitted that –

> "It would be rash to deny any share in the outburst of intellectual energy which marks the thirteenth century to the new ideas and broadened outlook of those

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[25] *The New Encyclopedia Britannica*, vol.16, 15th ed., p.839 under the title 'crusade'
[26] *Id* at 327

who, having gone on crusade, have seen the world of men and things in a way to which the society of the tenth and eleventh centuries was unaccustomed...."[27]

2. The Theory of the Influence of *Waqf* on Trust

The inconclusive theories about the origin of uses and trust, the involvement of Franciscan friars in spreading the concept of use and the fact that around this time many among them were based in the Holy Land where the institution of *waqf* was existing in its well-developed form, make it reasonable to suggest, as Henry Cattan did, "that the early English uses may have been derived from the Islamic system of *awqāf*".[28]

This thesis propounded in 1955 has not been refuted till now by any Western scholar.[29] On the contrary, it has found support of those who have written on this subject, finding the similarities between the two concepts as remarkable. The possibility of one influencing the other is there, as *waqf* long ante dated the first English gropings towards such a concept.[30]

2.1 Further Proof of this Harmony: Inns of Court May be Modelled on the Pattern of Similar *Waqf* Institutions

Order of Templars and Order of Hospitallers were founded in Jerusalem and then in London around 11th and 12th centuries. Inns of Courts owe their origin to these religious orders, and were probably modeled after similar institutions consisting of

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[27] E.J. Passant, "The Effects of the Crusades upon Western Europe", *Cambridge Medieval History*, vol.5, (Cambridge, 1946), p.331

[28] Henry Cattan, *supra* 2 at 215

[29] Syed Khalid Rashid, "Origin and Early History of Waqf and Other Issues", in Syed Khalid Rashid (ed.), *Awqāf Experiences in South Asia*, (Institute of Objective Studies, New Delhi, 2002), p.24

[30] See, S. Athar Husain and S.Khalid Rashid, *supra* n.2 at 158-161; Monica M.Gaudiosi,, *supra* n.10; Weeramantry, *supra* n.7 at 73-74; Badr G.M., *supra* n.6, at 185 and Syed Khalid Rashid, *supra* n.29 at 24.

mosques with adjoining inn which were the early Islamic law schools. Formal learning in the early Islam was in the mosques. Islamic legal studies, generally extending from four to ten years, required some place where students might reside. Mosques inn complexes served this purpose, particularly in places where there was no *madrasa* which combined in itself both inn and mosque.

George Makdisi theorises about the possibility that inns of court were established on the lines of Islamic educational institutions specializing in legal education. According to him:

> "The origin of inn as on institution of learning in the Christian West, is historically connected with two cities: London, then Paris; and the inns of these two cities are in turn connected historically with the Holy city of Jerusalem. This type of Inn, born in Baghdad and the eastern Caliphate, had moved from there westward to other great cities, among them Jerusalem. There they were attached to mosques as law-schools.... London had three such inns attached to three of its principal churches as law-schools. They dated from the reigns of Stephen and Henry I, that is, between 1135 and 1189. This period follows close upon the time the Templars of Jerusalem established in London the principal House of their Order, in 1128. The scholastic method of disputation (*Khilāf, jadl* and *munāzara* in contrast to *Kalām*, philosophical theology) which was developed by the Islamic legal educationists in the ninth, tenth and eleventh centuries, and taught in the law schools, was also the method used in the inns of court. Both systems used the two methods of teaching developed early in Islam and used in Bologua, Paris, Oxford and elsewhere, the lecture and disputation which in the inns of court were called "readings" and "moots".... Were it not for these medieval Muslim counterpart ... these amomalous phenomenon of English Common Law (ie. Inns of court), without visible source or mainspring, would still have their origins firmly embedded in the musty recess of unrecorded time."[31]

[31] George Makdisi, *Religion, Law & Learning in Classical Islam*, (Variorum, Hampshire, 1991), p.246 (see, the 11th chapter titled "The Guilds of Law in Medieval Legal History: An Inquiry Into the Origins of the Inns of Courts") pp. 233-252

2.2 Still Further Proof of this Harmony: Merton College Oxford was Probably Modelled on the Lines of a Typical Waqf Institution.

Walter de Merton, the founder of Merton College, Oxford was a 13th century English cleargyman, who served as Chancellor of England three times in 1258, 1266 and 1272. He must have watched with interest the establishment of the Inns of court and as Chancellor should have come in touch with those who went on Crusades or visited Jerusalem as pilgrims. In 1262, de Merton obtained a license from his feudal overlord to vest certain properties for the support of the university students. In 1264 he modified his vesting, and thus came into being the 1264 Statutes of Merton College. In its original form it was an un-incorporated charitable trust (which lost this status in 1274 once it was incorporated) which fitted well into the description of a typical *waqf* institution.[32]

Merton begins his 1264 statute with an invocation to God, as if following similar Islamic tradition, then expresses his decision to endow in perpetuity immovable properties belonging to him, clearly identifies them and narrates the objects, which are a mixture of private and public objects. The text of the 1264 statute, originally in Latin, has been translated into English and has been given as appendix to Monica's article.[33] The style, terminology and format of Merton's statues are so different from the style and format of such documents at that time that it has become a source of speculation to determine its source of inspiration. Its style shows the possibility that it has followed the identical pattern of a typical *waqf* deed. But except a few, hardly anyone else cared to explore further this possibility. Monica Gaudiosi is of the opinion that –

> "…. It would seem more reasonable to theorize that de Merton derived the form of his trust from a single source, the Islamic *waqf* rather than such varied

[32] See, Monica M.Gaudiosi, *supra* n.10 at 1249
[33] *Id.* At 1257-1261. This translation from Latin to Engliah has been done by Rev. John Miller.

> institutions (as suggested by a few).... Were the Merton documents written in Arabic, rather than Latin, the statutes could surely be accepted as a *waqf* institution..... Merton College was established during the Crusades, and it would not have been wise for a prominent clergyman and government servant (of such a high ranking) to announce his adoption of an Islamic institution."[34]

B. The Close Harmony Between the Law of *Waqf* & Trust

There is so much of resemblance between the basic legal principles of *waqf* and trust that the two appear to be overlapping concepts. Even such a cursory examination of some of these provisions as undertaken in this paper shows close similarities and a harmony between the two. A comparative examination of these provisions are taken up here. Unless otherwise indicated, all references to the law of trust in this survey are based on Philip H. Pettit's *Equity and the Law of Trust*, 7th ed. (Butterworths, London, 1993), and that of law of *waqf* on Mohd. Zain bin Haji Othman's *Islamic Law: with special Reference to the Institution of Waqf* (Prime Minister's Department, Kuala Lumpur, 1982).

1. Ownership of *Waqf* and Trust Properties

One of the basic difference between a *waqf* and trust which every text-book writer always highlights is that the ownership of a *waqf* vests in Allah while in case of trust, its legal ownership vestsin the trustee and the beneficial (equitable) ownership vests in the beneficiaries. However, a significant matter which deserves attention is that in the formative period of trust, its ownership did not vest in the trustee, but in the church, and thereby in Christ. According to Maitland:

> "... the *dominium* of all that was given to their (ie. Franciscan Friars') use was deemed to be vested in the *Roman church and any litigation about it was to be carried only by Papal procurators*. This doctrine was defined by Nicholas III in 1279. In 1322 John XXII did his best to overrule it, declaring that the distinction between use and property was fallacious and that the friars were not debarred from ownership. Charges of heresy about this matter were freely flung about by

[34] Id. at 1254, 1255.

and against him, and the question whether *Christ and His Apostles had owned goods became a question between Pope and Emperor*, between Guelph and Ghibelline. In the earlier stages of the debate there was an instructive discussion *as to the position of the third person, who was sometimes introduced as an intermediary between the charitable donor and the friars* who were to take benefit of the gift. *He could not be treated as agent or procurator for the friar unless the ownership were ascribed to them.* George IX was for treating him as an agent for the donor. See, Lea, *History of the Inquisition*, iii, 5-7, 29-31, 129-154".[35]

Two significant facts merge from this passage. First, that initially ownership of the property held on 'use' was considered to belong to Christ, in the same way as in the case of *waqf* it belonged to Allah. Secondly, the 'intermediary' between the donor and friars, was treated 'as an agent for the donor', in the same sense in which a *mutawalli* is regarded as an agent of the *wāqif* (donor). It is to be remembered that the concept of trustee was still not existing during that period of English legal history.

2. Perpetuity As a Common Factor

Charitable trust are allowed to be perpetual. All *awqāf* are regarded as charitable, and, every *waqf* is to be perpetual. There is no non-charitable purpose trust in Islamic law, nor any rule against perpetuities. It is to be remembered that all trust could originally be made in perpetuity until the rule against perpetuities was conceived by the later English jurists, and applied to non-charitable purpose trust. Thus, all trusts in their original form were perpetual, similar to *awqāf*.

3. The Three Certainties

The celebrated three certainties of a trust are:

(i) the certainty of intention, (ii) the certainty of subject-matter, and (iii) the certainty of object.

In case of a *waqf* also, its validity depends on the presence of these three certainties. *Niya* or intention is a basic notion of Islamic law. It is the *niya* which makes the difference between *waqf*, *sadaqa* and *hibā*, as all the three involve disposition of

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[35] Maitland, "The Origin of Uses", *Harvard Law Review*, vol.8 (1894), p.127 at 136 (Emphasis added)

property, and use of the word '*waqf*' is not necessary for creating a *waqf*. Hence the *waqif* has to express his intention very clearly, that he intends to create a *waqf*.

For obvious reasons, any uncertainty creeping into the description of the subject matter of a *waqf*, would make it void.

In case a *waqf* is created 'in the name of Allah' or 'general charitable purposes', or such other vague objects, Islamic law infers that the *waqf* is for any and every charitable object as decided by the *mutawalli* or the *qadi*, that is, an uncertainty is not allowed to defeat the creation of such a *waqf*. Similarly, in the law of trust, uncertainty of object is not allowed to defeat a charitable trust. This principle is regarded as an advantage enjoyed by a charitable trust.

4. **Lawful Objects**.

An object which is regarded as legal in the eyes of law is a valid object of a trust.

An object which is regarded as legal in the eyes of *shari'ah* (Islamic law) is the valid object of a *waqf*.

5. **Creation of Trust**

A trust is created when the settlor completely divests himself of the ownership rights in the property he is making trust of, and identifies the objects for the appropriation of usufruct either for a limited time or in perpetuity in favour of certain beneficiaries, present and or future.

A *waqf* is also created in exactly the same manner. It is created when the *wāqif* completely divests himself of the ownership rights in the property that he is making *waqf*, and identifies the object for which the appropriation of usufruct (either for a limited time, as in Maliki law or) in perpetuity in favour of certain beneficiaries, present and/or future is made.

6. **Declaration of Self as a Trustee**

A *settlor* may declare himself to be the trustee, if he so likes. Similarly, a *wāqif* may declare himself to be the *mutawalli*, if he so likes.

7. Trust by an Insolvent Person and Trust With an Intent to Defraud the Creditors

A trust created by a person who later on becomes insolvent is liable to be set aside by the court. Similarly, a trust purported to be created with an intent to defraud the creditors may be set aside by the court.

A *waqf* created by a person who later on becomes insolvent may be set aside by the *qãdi*. Similarly, a *waqf* purported to be created with an intent to defraud the creditors, may be set aside by the *qadi* after giving time to the *wãqif* to pay off his debts.

8. Objects for which a Charitable Trust may be Created

In its earlier days, 'uses' and trusts as a form of charity could be created in favour of children, spouses, relations and for religious and charitable objects. Presently, the ambit of charity is covered by the "four heads" of charity, namely, relief of poverty, advancement of religion, advancement of education, and any other purpose which is beneficial to the community.

A *waqf* may be created in favour of children, spouses, relations and for any religious or public purpose. All the objects both public and private are regarded charitable. The so called four heads of charity in the law of trust and the objects for which a *waqf* may be created are one and the same.

9. Requirement of Public Benefit

No trust may be called charitable unless it has "public benefit" within its objects, that is, it is for the benefit of the community or public. Only trust for the relief of poverty is exempt from public benefit requirement.

Public benefit is inherently present in every *waqf*, even if it is for the benefit of children. Because, once the line of descent becomes extinct, the benefit of a family waqf goes to the poors. That is, the ultimate object of every *waqf* is the benefit of the poors, even though they might not be expressly named therein.

It is to be noted that there is an ancient English institution of educational provision for 'Founder's Kin" whereby descendants of the donor take certain educational benefits and the trust is still regarded as charitable, notwithstanding the lack of 'public

benefit'. The origin of such trusts may be sought in *waqf-i-ahli* (family *waqf*) in which benefits are reserved for members of the family. According to the Privy Council:

"... though there seems to be virtually no direct authority as to the principle on which they (that is, trusts)(for Founder's Kin) rested, they should probably be regarded as belonging more to history than (any) doctrine".[36]

10. **Trust for Public Performance of Some Religious Rites**

A trust for the public celebration of some religious rites, like saying of public mass for the benefit of the soul of a deceased, are treated charitable as these possess the necessary element of 'public benefit', as held in *Re Hetherington* [1990] Ch. 1.

A *waqf* for the public recitation of the verses of the Quran, for the salvation of the soul of a deceased, is a valid object of a *waqf*.

11. **Cy pres' doctrine**

In case the object of a charitable trust has become impossible to fulfill or achieve, or ceases to exist, the trust is applied to another object which is as near as possible to the original object. It is done with the help of *Cy pres'* doctrine.

Cy pres' rule is an inherent part of the law of *waqf*. It is well settled that the *waqf* is diverted to a parallel object as near as possible to the original object, if it has become impossible to achieve it or has ceased to exist.

12. **Appointment of the Trustee**

A trustee may be appointed either by -

a) the settlor, or

b) any person so authorized by the settlor, or

c) the court.

A *mutawalli* may be appointed either by –

a) the *wāqif* (settlor), or

b) the executor of the *wāqif*, or a person authorized by the *wāqif*, or

c) the *qādi*, (court)

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[36] *Mohamed Falil Abdul Caffoor v Income Tax Commissioner* [1961] AC 584 at 602 (PC). Many of such trusts still exist and some new ones are also created.

13. **Remuneration of a Trustee**

The trustee acts in an honorary capacity, unless payment of remuneration is allowed by the settlor, or the court. If it is fixed by the settlor, it may be reviewed by the court.

The position of a *mutawalli* under Islamic law is exactly the same. He acts in an honorary capacity unless the *wāqif* has provided for his remuneration. The *qādi* (court) may fix or review the remuneration.

14. **Removal of a Trustee**

A trustee once appointed cannot be removed by the settlor unless he reserves such a right at the time of the creation of trust.

The court possesses an inherent jurisdiction to remove a trustee in an action for the administration or execution of a trust.

A *mutawalli* once appointed cannot be removed by the *wāqif* unless he reserves such a right at the time of the creation of *waqf*.

The *qādi* (court) possesses an inherent jurisdiction to remove a trustee in an action for the administration or execution of a *waqf*.

15. **A Trust Does not Fail for Want of a Trustee**

A charitable trust does not fail for want of a trustee. The State (or charity Commissioner) acts as a trustee.

A *waqf* does not fail for want of a *mutawalli*. The *qādi* appoints a *mutawalli*, or the State appoints one.

16. **Termination of Trusteeship**

Under both the laws of trust and *waqf*, a trustee and *mutawalli* cannot deviate from the terms of the trust and *waqf*. Their power to effect modification in the mode of implementation of the objects is very limited, and is subject to judicial review.

17. Court's Power to Control Trustee's Action

Where the court finds that a trustee is failing to discharge his duties properly, it may regulate his action, or may even remove him, nothwithstanding anything to the contrary provided by the settlor.

In the law of *waqf*: "The Court's discretion... is very wide, and may be said to be analogous to the powers of the Chancery Court superintending a trustee's actions".[37]

C. Could Waqf and Trust Mutually Benefit from Each Other?

English jurists continued to work to develop the various aspects of the law of trust, bringing it in line with the changes in society and to cover new situations. On the contrary, there was no evolution in the law of *waqf* upto very recently. Very many principles of this law derived by the Muslim jurists long ago were never put to any critical review, with the result that the same rule, devised a thousand years ago is still followed. Whereas English jurists propounded, alongwith so many other rule, the 'rule against perpetuity' and applied it to check certain problems arising out of perpetuity, it is only during the last century that certain Muslim countries tackled this problem through legislation, but confined the coverage to family *waqf* alone. Then, the concept of trust got expanded to areas other than charity and family settlements and now extends to social and commercial spheres.[38]

It is therefore not surprising to find that the law of *waqf* does not have provisions parallel to the following provisions of the law of trust:

1. Resulting trust and Constructive trust;
2. Equitable remedy of 'tracing' which is used to 'trace' the trust property falling into the hands of anyone, except a *bona fide* purchaser for value without notice;
3. 'Knowing assistance' and 'Knowing receipt', on the basis of which even strangers are held liable for breach of trust just like a trustee, if they intermeddle with the trust fund or property or in its administration;

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[37] A.A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd ed. (Oxford Unviersity Press, 1964), p.306

[38] See the comment made on this issue by Henry Cattan, *supra* n. 4 at 217, criticizing the necessary requirement of perpetuity in case of all types of waqf.

4. Duty of the trustee to maintain equality between the beneficiaries who are 'life interest holder' and 'remaindermen', by converting (selling) all such trust assets which are of wasting, future or reversionary nature and consist of royalties, risky investments, etc. and to invest the sale money into secure properties which are income bearing and thus capable of benefiting present as well as future beneficiaries;
5. **The Chillingworth rule** [39] which imposes an enhanced liability on a trustee – beneficiary, who commits a breach of trust alongwith his co-trustee who is not a beneficiary, to indemnify his co-trustee first to the extent of his beneficial interest, thereafter to share equally the remaining liability, if any, with the co-trustee;
6. A trustee cannot set off loss in one transaction against the gain earned in another, unless all the transactions are in furtherance of a common investment strategy.[40]

A careful examination of the law of trust may disclose even some more such rules. Similarly, a close look at the law of *waqf* may be able to find some such provisions which may be useful for the law of trust. For example, the wide concept of charity in Islamic law may help to streamline the law relating to charitable trust. However, there may not be many of such instances.

CONCLUSION

There are clear indications of a close relationship between 'uses'and trust and *waqf*. It is possible that the idea of 'uses' and later on that of trust might have originated from the concept of *waqf*. The similarities between inns of court and similar *waqf* institutions (inns of mosques which served as law schools), and the typical pattern of a *waqf* institution as reflected in the 1264 statute of the Merton College, further strengthen

[39] Laid down in *Chillingworth v. Chambers* [1896] 1 Ch. 685
[40]

the possibility of the influence of *waqf* on the development of trust. The validity of this assumption and the extent of this influence, if any, have yet to be explored fully and established,. However, a *prima facie* case in indeed made out once the numerous overlapping concepts and legal provisions of the two institutions are taken into account. How such a close resemblance between the two institutions, one of which is more than four hundred years older than the other, came to be established, has yet to be adequately explained unless the theory of harmony between *waqf* and trust is accepted.