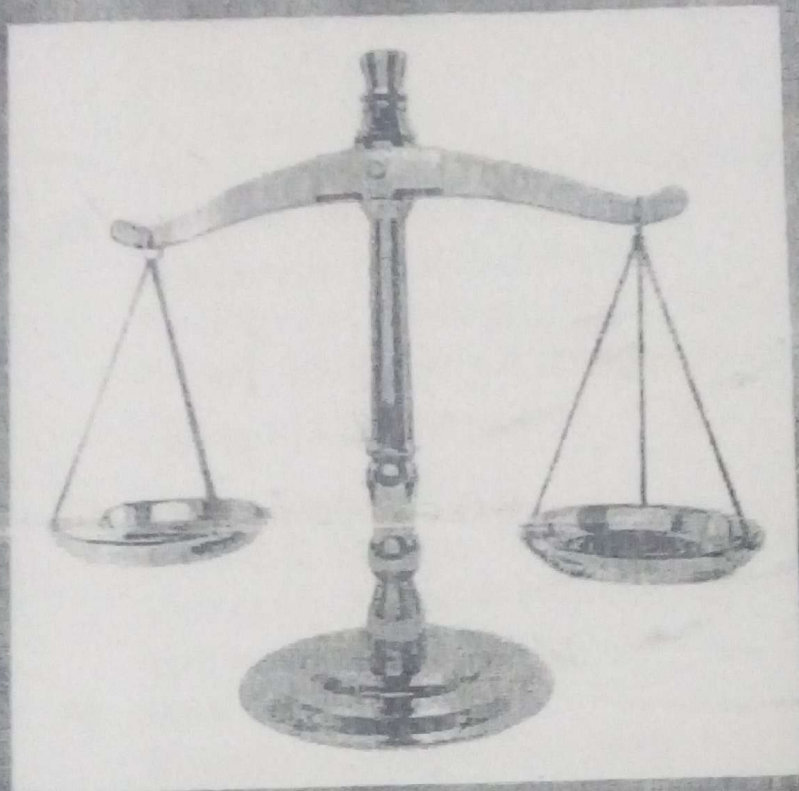
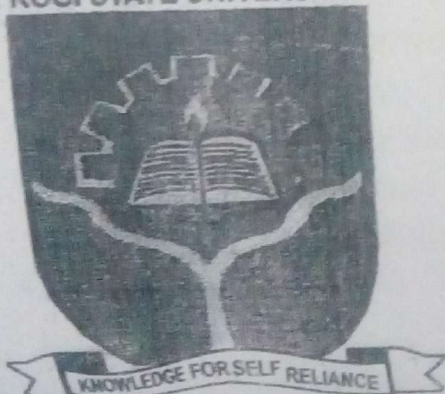


Topical Issues In the Nigerian Law: A Book of Readings



KOGI STATE UNIVERSITY



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CHAPTER FORTY

THE NOTION 'CHARITY BEGINS AT HOME' IN ENGLISH AND ISLAMIC LAWS: A COMPARATIVE EVALUATION

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Summary of the Chapter

The aphorism 'charity begins at home' has assumed some legal significance in the law of charity. This is true of the English and Islamic laws. However, the application of this lofty saying seems to have been displaced under the English charity law. In juxtaposing this notion under Islamic and English Law, the chapter analyses the definitions and objects of charity, discusses how charity is classified under common law and further analyses the concept of waqf and its classification under Islamic law. Finally, the paper exposes the application of the aphorism of charity begins at home from the perspectives of English and Islamic laws to show its relevance in both laws.

Introduction

The notion of charity is an old concept under Islamic and English laws. Under English common law, this concept is developed by the courts many years ago while under Islamic law, the notion is governed by the main sources of Islamic law i.e. *Qur'an* and Sunnah of Prophet (s.a.w). The notion 'charity begins at home' is a common saying in English language, but legally speaking, it is doubtful whether charity actually begins at home under English law.

Under English law, a charity must be established for the benefit or a sufficiently important section of the public rather than for the benefit of private individuals. This is the main justification for the legal and fiscal concessions granted to charities. Public benefit is the hallmark of a charity within a common law context. But in Islam, family members have priority in matters of charity. This is before considering those who are outside the family.

Against the above backdrop, this paper will examine in detail this notion under both laws in order to find its apt application legally speaking. In doing this, it examines the definitions and objects of charity. It also discusses how charity is classified under common law. It further analyses the concept of *waqf* and its classification under Islamic law. Finally, the paper analyses the application of the aphorism of charity begins at home from the perspectives of English and Islamic laws to show where the saying belongs.

Definition of the term Charity

At the outset, it must be mentioned that charity in law has a technical meaning¹ but not a statutory definition.² The legal concept of charity has been developed by the courts over the years. The courts have also refrained from attempting to define charity. Before the Charitable Uses Act, 1601 was passed; there were discussions as to whether the definition of charity should be formulated.

¹See *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, where the Macnaghten L.J. said of 'charity' that of all the words in the English language bearing a popular as well as a legal signification I am not sure that there is one which more unmistakably has a technical meaning. For more detail see Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study* (London: Routledge, 2007), p. 19.

²In England and Wales, a limited definition was provided in the *Recreational Charities Act* 1958 and will be available in the forthcoming charities legislation.

However, it was decided that there should be room for flexibility which would allow the scope of charity to keep pace with the changing society. In the same vein, a statutory definition might offer certainty needed on the meaning of charity.³ On the contrary, it has been argued that the advantages of a definition could be illusory in that it might result in a fresh spate of litigation and provide a set of undesirable distinction.⁴

The definition of charity as provided in the preamble of the 1601 Act has always been the most common definition despite the fact that the Act itself has been repealed. It has been the practice of the courts to look at the preamble of 1601 Act for guidance as to what purposes are charitable. The Preamble lists the following as charitable:

*The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers; and mariners, school of learning, free schools and scholars of universities; the repairs of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of house of correction; marriages of poor maids; supporting, aid and help of the young tradesman, handicraftsmen and persons decayed; the relief of redemption of prisoners or captives and the aid or ease of and poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.*⁵

³ Elizabeth Cairns, *Charities: Law and Practice* (London: Sweet & Maxwell, 1988), p. 1.

⁴ See the case of *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1972] Ch. 73, at 94. Also Sir William Grant M.R., in the case of *Morice v Bishop of Durham* [1805] 8 Ves 399, said that "charity" that in its widest sense it denotes, all good affections that men ought to bear towards each other, in its most restricted and common sense, relief to the poor. For further discussion see S.G. Maurice & D.B. Parker, *Tudor on Charities* (London: Sweet & Maxwell, 1984), p. 1.

⁵ This Act was repealed and replaced by the Mortmain and Charitable Uses Act, 1888. But again the 1888 Act had repealed by section 38 of the 1960 Act. However, despite repealing the provision preserving the Preamble, the 1960 Act on the other hand in section 38(4) provides that any reference in any enactment or document to a charity within the meaning, purview or interpretation of the Statute of Elizabeth I [1601 Act] or the preamble shall be construed as a reference to a charity within the meaning which the word bears as legal term according to the law of England and Wales. See Maurice & Parker, *Tudor on Charities*, p. 3.

The 1960 Act which repealed the previous two Acts, defines charity to mean: "Any institution, corporation or not, which is established for charitable purpose and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities." From this definition, it is clear that the 1960 Act has done nothing which could change the substantive law of charity. This can be seen from the developing body of case laws which are built upon the foundation of the preamble to the 1601 Act. The term charity could still be defined to mean "every endowed foundation and institution taking or to take effect in England and Wales and coming within the meaning, purview and interpretation of 1601 Act."

The above shows that charity in the legal sense is a highly technical term. It has been established that, in order to have a charitable status in law, a trust must not only be for a charitable purpose⁶ but must also be for public benefit. The preamble of 1601 Act still plays big role to the definition of charity where it is mentioned that a trust established for one of the purposes mentioned in the preamble has been accepted as being of charitable purposes. But the question remains what will be the position where a purpose is not included in the preamble.

This question has been answered by Grant M.R. in the case of *Morice v. Bishop of Durham*⁷ when he argued that the categories of charity purposes are not closed, and that a purpose not on the list may be charitable nonetheless, provided it is within the spirit and intendment of the Act. From this decided case, it can be seen further that even though the Preamble of 1601 Act plays a pivotal role on the issue of charity and charitable purposes, it is not necessary for a purpose to be listed in the Preamble in order for it to be regarded and classified as charitable.

⁶ See I. G. Riddall, *The Law of Trusts* (London: Butterworths, 1987), p. 95.
⁷ [1805] 10 Ves 522.

However, a new Charity Act, 2011 of the United Kingdom has been put in place. Thus, the word charity for the purpose of law of England and Wales means an institution that is established with the aim of being benevolence to people or institution and which is subject to the control and management of the High Court in exercising its jurisdiction with regard to charities.⁸ For a charitable institution to be recognised as one under the United Kingdom law, it must be for any of the following purposes: the prevention or relief of poverty; the advancement of religion; the advancement of education; the advancement of citizenship or community development; the advancement of health or the saving of lives; the advancement of arts, culture, heritage or science; the advancement of human rights, conflict resolution or reconciliation or the advancement of amateur sport; promotion of religious or racial harmony or equality and diversity; the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage; the advancement of environmental protection or improvement; the advancement of animal welfare; the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or the ambulance services; and any other purposes within subsection (4).⁹ It is seen from the provision of the Charity Act that charity which is offered or given for the benefit of an individual or person whose beneficiary are known is not qualified as a charity.¹⁰

⁸ See Section 1(a) and (b), Charity Act, (c.25) 2011 of the United Kingdom. Note that this Act came into effect on 14 March 2012. It is an Act of Parliament and sets out the modalities for the regulation and registration of all charities in England and Wales. The Act replaces the *Recreational Charities Act 1953* and virtually almost of the *Charities Acts 1992, 1993 and 2006*. But it does not replace the aspect sections in those *Charities Acts* which provided for fundraising which are yet to effect, for example *Charitable collections in public places*. The new Act does not make changes to the law but merely consolidated into one for ease of reference and accessibility. 2011 Act rather than previous Acts.

⁹ See generally, section 2 of the Charity Act.

¹⁰ See for example the decision of the court in the case *Oppenheim v. Tobacco Securities Trust Co Ltd* [1951] AC 297. The case concerned a trust established by a man who owned a large stake in the British American Tobacco company. He established a trust to provide for the education of the children of employees or ex-employees of the company. Despite the considerable size of the class (the members of the group amounted to around 110,000 people at that time), the court held Lord Macmillan dissenting, that the trust could not be charitable on the basis that it was not of public benefit. Lord Macmillan's view, in order to show public benefit, the identity of the members of the class must not be defined by means of a 'personal nexus'.

From Islamic law perspective, the word charity has a wider meaning and the word *Sadaqah* which means a pious act is used to denote the term 'charity' in Islam. Thus, in Islam, to help a weary traveler is *sadaqah* and it does not necessarily mean alms to the poor only.¹¹ In a technical sense, the word *sadaqah* means an offering or gift made with the object of obtaining the approval of Almighty, or a reward in the next world.¹² For example, a gift given to a friend is not a *sadaqah* since there is no pious intention. However, it can be regarded as a *sadaqah* if it is made with the intention of relieving friend's poverty or to provide against his falling into indigence.

Similarly, a donation if made for pious purpose even if it is made without intention of obtaining the reward from *Allah* (s.w.t.) is considered as *sadaqah*. The reason is that *Allah* (s.w.t.) will bless all donations irrespective of whether the gift was made with the intention of obtaining the rewards of *Allah* (s.w.t.). If a person makes provisions for his personal or for his family's future needs, it is considered as a pious act even if there is no intention of making a gift. However, it must be said that on the issue of charity, Islam gives priority to the family members before considering those who are outside the family. This point will be discussed at length later.

The enforcement or importance of *sadaqah* can be seen in *Qur'ān* and hadīth of the Prophet (s.a.w). In the Holy *Qur'ān*, *Allah* (s.w.t.) had ordained to the effect:

*To spend of your substance, out of love for him for your kin, for orphans, for the needy, for the wayfarer, for those who ask and for ransom of slaves; To be steadfast in your prayers and practice regular charity.*¹³

¹¹ Syed Ameer Ali, *Mohammedan Law*, vol. 1, 5th Edition (Lahore: Law Publishing Company, 1976), p. 213

¹² Ibid, p. 214.

¹³ A. Yusuf Ali, *The Holy Qur'ān- Text, Translation and Commentary*, *Sūrah Al-Baqarah*, 2: 177.

Islam advises the believers to spend for kith and kin first and then at the end to other people in society who are in need and seek help.⁶⁸ The believers should not or cannot be concerned only about others and give everything in charity-spouses and children have more rights to the property than any other person.

The institution of *waqf*, in which the *waqif*'s family and descendants are the immediate recipients of the benefaction, owes its origin from the *Qur'ān* and to the direct rulings of the Prophet (s.a.w). It is better and it is lawful to keep some property for one's self and for family members than to give all in philanthropy. This is evident in the *Qur'an* where it says:

*So fear Allah as much as ye can; listen and obey and spend in charity for the benefit of your own souls. And those saved from the covetousness of their own souls, they are the ones that achieve prosperity.*⁶⁹

In another verse of the Holy *Qur'ān*, Allah (s.w.t.) had ordained to the effect that:

*To spend of your substance, out of love for him for your kin, for orphans, for the needy, for the wayfarer, for those who ask and for ransom of slave; To be steadfast in your prayers and practice regular charity.*⁷⁰

To emphasise the importance of giving charity to the family members Allah (s.w.t.) stipulates that:

*They ask thee what they should spend (in charity). Say: Whatever ye spend that is good, is for parents and kindred and orphans and those in want and for wayfarers, and whatever ye do that is good Allah knoweth it all.*⁷¹

This notion is emphasised by the hadīth of Prophet (s.a.w) where Abū Huraira reported the Prophet as saying:

⁶⁸Ibid.

⁶⁹*Qur'ān, Sūrah At-Taghābun*, 64: 16

⁷⁰*Qur'ān, Sūrah Al-Baqarah*, 2: 177

⁷¹*Qur'ān, Sūrah Al-Baqarah*, 2: 215

Of the dinar you spend as a contribution in Allah's path, or to set free a slave, or as a sadaqah given to a needy, or to support your family, the one yielding the greatest reward is that which you spent on your family.⁷¹

Also it is reported in one hadith where it is said that Saad Ibn Abi Waqqas had quoted the Prophet (s.a.w) as saying that: "to give to one's child or wife is sadaqah."⁷² In Islam, there is an obligation in some cases legal, in others semi legal or moral to provide for the maintenance to the parents, descendants and kinfolk in general.

The principle underlying these conceptions which are wholly foreign to the English law is directly traceable to the rule enunciated by the Prophet (s.a.w.) when he said:

When a Muslim bestows on his family and kindred, with the object of earning the approval of Allah, it is sadaqah, although he has not given to the poor, but to his family and children.⁷³ Again it is said to the effect that: "Giving alms to the poor has the reward of one alms, but the giving to the kindred has two rewards."⁷⁴

Even in matters of will, charity will be valid only if the property bequeathed fall within one-third of the net estate of the donor.⁷⁵ This position was based on the tradition of the Prophet (s.a.w.) reported by Sa'ad Ibn Waqqas who said:

The prophet came to visit me in my sickness. I was then at Mecca and did not like to die at a place where I migrated. The prophet of God said "God shall have mercy on Ibn Nafra." I said to the prophet, "O prophet, I am wealth and my only heir is my daughter. Permit me that I make a will of my entire property." He said, "No". I said, "Should I make a will of two-third of my property."

⁷¹ Sahih Muslim, Vol. 2, (trans) by A.H. Siddiq, 480

⁷² Sahih Bukhari, 806

⁷³ Mishkat Ul Masabih, Vol. II, 491

⁷⁴ See section 26(1), Muslim Wills (Selangor) Enactment 1999. See also Akmal Hidayah Halim, Administration of Estates in Malaysia Law and Procedure, (Sweet and Maxwell Asia, 2012) pp. 78-79

a. *Trusts for the Relief of Poverty*

Although there is a presumption that the public benefit test is now virtually automatically satisfied in relation to gifts for the relief of poverty, nonetheless practice in this context has led to some curious idiosyncrasies becoming part of charity law.²⁷ This kind of charity is mentioned in the preamble of 1601 Act as the first object. In the preamble it is referred differently as the relief of aged, impotent and poor people. This is stipulated in by Dankwerts J in *Re Glyn*²⁸ where in considering a bequest for building cottages for oldwomen of working classes of the age of 60 years or upwards, adopted a disjunctive construction, and he said: "I have no the slightest doubt that this is a good charitable bequest. The preamble of the Statute of Elizabeth refers to the relief of aged, impotent and poor people. The words 'aged, impotent and poor' should be read disjunctively."

In the law of charities, the word 'poverty' is used in two senses. In the first sense, it is used in an absolute sense to indicate the condition of those who live at low economic level as to the extent that when for example, they stand in need of soup dispensed free at a soup kitchen.²⁹ In the second sense, the word 'poverty' is used relatively and it indicates the condition of those who for some reason stand in some special need, or who are less well off than they were. Here, it means that a trust is for the relief of poverty if it is for the benefit of those who have come down in the world. Under this ground, trusts for the relief of people who have suffered as a result of some natural or manmade disaster were held to be charitable.³⁰

²⁷ See Kerry O'Halloran, p. 93

²⁸ [1950] 66 TLR (PT 2) 510 at 511

²⁹ See *Biscoe v Jackson* [1887] 35 Ch. 460. An intention to relieve poverty can be inferred also from a stipulation that to be eligible persons must have an income below a specified period.

³⁰ See *Habourn Aero Components Ltd's Air-Raid Disaster Fund* [1946] Ch. 86, *Re North Devon and West Somerset Relief Fund Trusts* [1953] 2 All ER 1022

However, on the other hand in *IRC v. Baddeley*,³¹ it was held that a trust by which certain land was to be held for the promotion of the religious social and physical well being of certain persons by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well being of such persons who were otherwise of insufficient means to enjoy the advantages offered was not a trust for the relief of poverty.

a. Trusts for the Advancement of Education

The charity for the advancement of education has been recognised as a charitable trust in very early years. As to this category of charity, there is no need for any element of poverty but it must be for an educational purpose which the law regards as charitable and it must fall within the spirit and intendment of the preamble of 1601 Act (Elizabeth I).³² The public benefit test is more difficult to satisfy in application to trusts for the advancement of education than the trusts for the relief of poverty or for the advancement of religion.³³

In *Re Shaw*³⁴ it was held that gifts for the advancement of education generally are considered as charitable. Again, that particular education must be beneficial i.e. educational value to the community and this benefit must be available to the public or to a sufficient important section of the community. Education by itself is charitable irrespective of whether the beneficiaries are rich or poor and whether or not fees are paid.³⁵

With regard to the meaning and scope of education, in *Incorporated Council of Law Reporting for England & Wales v. Attorney General*,³⁶ the phrase 'advancement of education' has been said to extend to the improvement of a useful branch of knowledge and its public dissemination. Here, it means that education has been interpreted widely and extends far beyond the encouragement of the teaching in schools and colleges.

³¹ [1955] 1 All ER 525.

³² S.G. Maurice & D.B. Parker, p. 30.

³³ See Kerry O'Halloran, p. 95.

³⁴ [1958] 1 All ER 245.

³⁵ Simultaneously, schools in the private sector which charge fees may be charitable provided they are not run for profit. See Elizabeth Cairns, p. 6.

³⁶ [1972] 1 Ch 73 at 102.

Education is not confined to the provisions of formal education only. In *Re Koeppler's Will Trusts*,³⁷ it was held that the concept of education is wide enough to cover the promotion of conferences at which intensive discussions take place on a variety of academic subjects between people of influence in their own countries who would both learn from the process and instruct other participants.³⁸

Concerning the research activities, in order to be a valid charity, there are certain conditions to be fulfilled. Thus, in *Re Hopkins Will Trusts*,³⁹ it was held that the research must either be of educational value to the researcher, or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover. Education in this context extends to the formation of literary taste and appreciation.

a. Trusts for the Advancement of Religion

As far as the trust for the advancement of religion is concerned, there are two conditions to be fulfilled in order for it to be a valid trust. The first condition is that the religion must be of a kind which is accepted by the courts as a religion; and secondly is that, the activities of the charity will tend to promote or advance that religion.⁴⁰ A religious charity must not only be so constituted as to satisfy the legal definition of religion, including having objects or purposes of a religious nature, but its activities must also advance religion. The courts will require evidence that a gift to a religious organization satisfies the public benefit test.⁴¹

³⁷ [1985] 2 All ER 869

³⁸ The promotion of physical and recreational education in schools and universities has been held to be charitable despite the fact that the promotion of sport itself is not considered to be charitable. In *I R C. McMullen* [1981] AC 1, where a trust to provide facilities for football and other sports for pupils at schools and universities was held to be a valid charitable trust. In other words it was held that, the encouragement of sports at schools and universities generally is charitable. It is further emphasized that, the concept of education changes as the social values change and that an activity which a century ago would not have been regarded as forming an integral part of the educational curriculum may well be so regarded now.

³⁹ [1965] Ch. 669

⁴⁰ For more detail as to the conditions of a valid trust as to the advancement of religion see *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1989] A.C. 531 at 583; *Dunne v Byrne* [1912] A.C. 407, and *Gilmour v Coats* [1949] A.C. 426.

⁴¹ See *Commissioner of Valuation v Trustees, Newry Christian Brothers* [1971] NI 114.

In order for system of belief to be regarded as religion it must involve faith in a deity. Here it means that religion under this scope is that which involves man's relation with God and ethics.⁴² Also the religion must be monotheistic in order for a trust in advancement of religion to be a valid charitable trust.⁴³

In this context, the advancement of religion means to promote it, to spread its message even wider among mankind; to take some positive steps to sustain and increase religious belief. These are done in a variety of ways which may be comprehensively described as pastoral and missionary.⁴⁴ Once the power to decide whether charity is within the charitable purposes is under the discretion of the courts, these courts have throughout the centuries decided variably on what act amounts to advancement of religion. One of the criteria is the maintenance of places of worship including the upkeep of churchyards, and the provision of furniture as well as the maintenance of the structure itself.⁴⁵

a. Trust for Other Purposes Beneficial to the Community

This category provides a wider scope for the development of charity law and meets the needs of the modern society in establishing new charities. However, this category as other discussed categories must be within the spirit and intendment of the preamble of 1601 Act.⁴⁶ The donor's belief that the purposes are beneficial is not in itself sufficient to constitute a valid charitable trust. The element of public benefit is very important and if the court could not find this element, it can hold that the charity does not fall under this category.⁴⁷

⁴² *Re South Place Ethical Society* [1980] 1 W.L.R. 1565.

⁴³ However in the case of *Bowman v Secular Society Ltd* [1917] 1 A.C. 406 at 449, the position of Buddhism and Hinduism which is generally accepted to be religious despite the fact that their fundamental belief do not involve belief in one single God unlike Islam, Christianity and Judaism. They are regarded as exceptions and are accepted as religion for the purposes of charity.

⁴⁴ See *United Grand Lodge v Halliwell Trustees Ltd* [1957] 3 All E.R. 281.

⁴⁵ Elizabeth Curzon, p. 11.

⁴⁶ See J. G. Riddall, p. 105.

⁴⁷ See *The National Anti-Corruption Society v I.R.C.* [1948] A.C. 31.

Classification of Waqf under Islamic Law

Classification of waqf under Islamic law varies from one scholar to another. For example, Sir Mubashir¹ divides waqf into two categories i.e. waqf 'amm, and waqf khass. The former type of waqf is for general or public purposes. It indicates "a dedication in perpetuity of the capital and income of an asset recognised by Islamic law for religious, charitable or educational purposes." It is created for the people at large without any restriction to a particular individual or purpose.

The latter (waqf khass) includes private waqf and family waqf. It denotes "a dedication in perpetuity of the capital and income of an asset, recognised by Islamic law for religious, charitable or educational purposes, dedicated for specific purpose or for a particular individual, including the founder's family or his descendants (known as *al-waqf al-ahli* or *al-waqf al-dharr*) as prescribe in the waqf deed."

Some scholars such as Syed Ameer Ali² and Mohd Zain Hj. عثمان³ classify waqf into three categories, i.e. waqf 'amm, waqf khass and quasi-public waqf. The quasi-public waqf are those trusts, the primary and initial object of which is partially to provide for a general purpose, and partially for the benefit of particular individuals or class of individuals who could even be from the settlor's own family. This paper considers most the family waqf because this category is peculiar as compare to English law. Another reason is that this category of waqf proves the existence of the notion that charity always begins at home in Islamic law.

¹Sir Mubashir Mahmood, *Waqf in Malaysia: Legal and Administrative Perspectives*, Kuala Lumpur University of Malaya Press, 2006, p. 45.

²Ibid.

³Syed Ameer Ali, *Islamic Law*, 10th Edition, (London: Law Publishing Company, 1979) p. 213.

⁴Mohd. Zain Hj. عثمان, *Islamic Law with Special Reference to the Institution of Waqf*, Kuala Lumpur: Private Minister's Department, 1962, p. 171.

Applicability of the notion 'Charity begins at home'

Starting with English law, it is submitted that the law considers the importance of public benefit even where a trust falls within one of the four heads of charity as classified by Lord Macnaghten in *Pemsel's* case. Thus, it must satisfy the test of public benefit in order for it to be legally charitable except for the trusts for the relief of poverty.⁵³ A charity must be established for the benefit or a sufficiently important section of the public rather than for the benefit of private individuals and this is the main justification for the legal and fiscal concessions granted to charities.⁵⁴ Public benefit is the hallmark of a charity within a common law context.⁵⁵

The dividing line between private and public benefit and the measure of the benefit which should be conferred varies in every classification of charity.⁵⁶ Whether or not the element of public benefit is satisfied is a question of law for the judges to decide on the evidence before them and the donor's opinion as to what is public benefit is immaterial. In English law, the contribution made by charities to addressing the social inclusion or social benefit is well recognised by the government.⁵⁶

In the same vein, the very element of public benefit is presumed to be present in educational and religious trusts unless the contrary is proved. But in respect of trusts created for other purposes beneficial to the community, the requirement to prove the presence of the element of public benefit is very important since not all purposes which are beneficial to the community are charitable.

⁵³Charles Mitchell and Susan R. Moody *Foundations of Charity*, (London: Hart Publishing, 2000), p. 207.

⁵⁴Elizabeth Cairns, p. 16.

⁵⁵See Kerry O'Halloran, p. 106.

⁵⁶*Ibid.*

⁵⁷For example the then Minister of England and Wales responsible for charities declared: "Charities are a major force for good in society. They can reach out to some of our most marginalized and deprived communities and provide a strong voice for those who need it. The Government is committed to a diverse, expanding and vibrant voluntary sector. We are achieving this by helping charities to realize their full potential to change lives and help transform communities." See *Ibid.*, p. 195.

Also, the exclusion of family members in established charity. English courts have always resorted to the 'Compton test' in determining whether or not potential beneficiaries form a section of the community. This test is stated by Lord Greene M.R. in the case of *Re Compton*,¹⁷ where the trust was created for educating the descendants of three named persons. According to this test, the court held that no beneficiaries can constitute a section of the public where the nexus is one of common employment or common descent and the members are numerically negligible.

From the 'Compton test' it can be seen that most of the English courts fail to understand the nature of the community and exclude those descendants of the donors. If one scrutinizes this test well, he may realize that, to constitute a section of the public is a question of degree whereby in its starting point it must include member of the family. This is not something strange because in early days, 'uses' and charitable trust could validly be created in favour of children, spouses and relations as well as for religious and charitable objects in the same manner as in the case of waqf in Islam. The position under English law has changed since then, but initial resemblance with waqf is noteworthy.¹⁸

To prove the above point, there is an ancient English institution called educational provision for "Founder's kin" whereby descendants of the donor are entitled to receive certain educational benefits and the trust was still regarded as charitable. Giving to one's own children is regarded in this case as charitable.¹⁹ It can be observed that public benefit is an inherent part not only for charity under English law but even in Islamic law where the waqf for the benefit of children involves this aspect. The rule is that once the line of descent becomes extinct, the benefit of a family waqf goes to the poor. That is the ultimate object of every waqf, both public and private is public benefit.

¹⁷ [1945] Ch 123

¹⁸ Syed Khalid Rashid, "Whether Common Law Concept of 'Uses' and Trust Originated from Waqf?" (KIM Law Journal, Vol. 9 no. 1 (2005): 258

¹⁹ See *Re Scarisbrick* [1951] Ch 612

However, currently, under common law, the charity in favour of the descendant is no more regarded as a charitable trust and they focus only on the public interest and forget about individuals regardless their needs.⁶⁰ The wider meaning of the term 'public benefit' is that it must be in the interests of the public as a whole that purposes of the trust should be carried out.⁶¹ This does not mean that the trust must not be contrary to public policy, or to the national interest, though clearly, if the trust contains these effects the rule would not be satisfied.⁶² The requirement is not merely negative but it is positive in nature and there must be some discernable benefits to the public at large from the existence of trust proposed and the court must be satisfied that some discernable benefit will result from the existence of the trust.⁶³

For example, although a trust for the advancement of religion is *prima facie* charitable, nevertheless, there remains the question as to whether the gift is in fact beneficial to the public.⁶⁴ The trust must not simply be made for the benefit of the adherents of the particular religion themselves. The courts will only look into the fact as to whether the trust is beneficial to the public and the courts will not consider the merits of the beliefs which are to be prompted provided that they have a religious tendency and do not undermine morality of religion.⁶⁵

Islamic law on the other hand lays much emphasis on providing for one's own children, descendants⁶⁶ and kinsmen and it is regarded as the charity yielding the greatest reward from *Allah* (s.w.t.). Thus, it is beyond reasonable doubt that the notion 'charity begins at home' is fully applicable in Islam. The reason is that all Muslim jurists unanimously agree to the legality of *waqfs* made in favour of the *waqif's* descendants. Again, one among the basic principles of charity in Islam is that charity must be practiced at home first.⁶⁷ This basic principle rests on the fact that the best object of charity is anything that is given by a wealthy person from the money that is left after his expenses.

⁶⁰ *Ibid.* p. 258-259

⁶¹ J.G. Raddall, p. 114

⁶² *Ibid.*

⁶³ See *Re Pitt Rivers* [1907] 1 Ch. 403

⁶⁴ *National Anti-Vivisection Society v IRC* [1948] A.C. 31 at 65

⁶⁵ Elizabeth Carns, p. 18

⁶⁶ Syed Amrullah, p. 266

⁶⁷ Samia Hasan, *Philanthropy and Social Service in Islam: Principles, Prospects, and Practices* (Kuala Lumpur: A.S. Noor, 2007), p. 38

In one *hadith* the Prophet (s.a.w) is quoted to say:

*Giving alms to the poor has the reward of someone alms; but the giving to the kindred has two rewards.*¹⁴

It is pertinent at this juncture to examine the definition of the term '*waqf*' and its classifications. *Waqf* from the literal point of view means detention, stoppage, checking, restraining¹⁵ or restricting.¹⁶ This word emanated from Arabic word which literally means to prevent or to restrain. In this context, *Waqf* is defined as the giving of property by will or by gift in perpetuity to the Islamic State for pious work or for the public good.¹⁷ Again, *waqf* is defined as the detention of the corpus of a donated property in the notional ownership of itself, while granting its usufruct in charitable purposes either immediately or ultimately in the future.¹⁸ These definitions connote that the institution of *waqf* enjoys ownership of the second type that is the allegorical ownership, which is the legal or notional ownership and that the *waqf* acquires its legal personality on this basis.¹⁹

Muslim jurists differ in ascertaining the meaning of *waqf*. Their differences of opinions relate to the nature it should take. In Islamic legal terminology, *waqf* means primarily to protect a thing, to prevent it from becoming the property of a third party. Imām Abū Hanifa defines *waqf* as the tying up or retaining of the corpus of the donated property in the ownership of the appropriator, while devoting its usufruct, benefit and produced to charitable purposes. From this perspective, there are two elements which must be drawn: the continuation of the right of the owner and second that the usufruct is to be devoted to some charitable or pious purposes.²⁰

¹⁴ Mishkat U.I. Masabih, vol II, as cited in Ameer Ali, p.215.

¹⁵ *Sahih Muslim*, Vol. 3, p. 867 English trans. by Abdul Halim Siddiq

¹⁶ Cyril Glasse, *The Concise Encyclopedia of Islam*, (1989), p. 417

¹⁷ Ibid.

¹⁸ A. A. Abdallahi, "A New Definition of Waqf: On the Basis of which the Legal Personality of Waqf is Established," *The Journal of Islamic and Comparative Law*, vol. 7 no. 57 (1978): 57

¹⁹ Ibid.

²⁰ Asaf Fyzee *Outlines of Mohammedan Law*, 4th Edition (Delhi: Oxford University Press, 1974), p. 274

All Muslim jurists are in agreement that in Islamic law, the main purpose of creating a *waqf* is to acquire closeness to *Allah* (s.w.t.) as well as merits thus reducing all other purposes to be merely subsidiary. The general rule in Islam is that all purposes which are considered to be religious, charitable, or pious are valid purposes for which a Muslim can validly create a *waqf*.²⁴ However, all works of public utility which are not illegal or immoral are also allowed and they are considered as pious deeds in the same sense as those of prescribed purposes of charity.

The basic test in determining whether an act is pious is dependent on the principles of Islamic law. A valid *waqf* for example may be made in favour of hospitals, rest houses and schools but not in favour of a gambling house or for a shop which deals with the sale of wine. Furthermore, it has been argued that the ultimate object of a *waqf* is to benefit the poor, since even in a *waqf* created in favour of a *waqif's* relation or children. The charity upon the extinction of the beneficiary is reversed either implied or expressly to the general poor.²⁵ The general principle is that the object of dedication of *waqf* must be clearly specified. However, in the event the *waqf* fails to specify the object to which it should be applied for, the *waqf* is still considered valid under Islamic law.

Classification of Charity under English law

Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.²⁶

²⁴Ronald Keyvet Wilson, *Muhammadan Law: A Digest*, (Pakistan: Law Publishing Company, 1928), p. 353.

²⁵Syed Ameer Ali, p. 276.

²⁶See Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study*, (London: Routledge, 2007), p. 195. Also see Francesca Quint, *Running a Charity*, (Great Britain: Jordan Publishing Limited, 1997), p. 1.

*He said, "No" I said "Permit me for a third." The prophet replied, "You may make a will of a third, although this is also too much. To leave after your heirs well to do is better than you leave them poor and want whilst others meet their needs."*⁷⁷

The above tradition gives credence to the argument that Islamic law gives priority to one immediate family, a donor is not allowed to bequeath all his property at the detriment of his dependant, hence the charity begins at home. This is unlike the English law position where a donor may bequeath all his properties to a dog.⁷⁸

Conclusion

From the above discussion, the aphorism 'charity begins at home' is well rooted in Islamic law. This is despite the fact that the saying is in English language and was applied by the English law those days. Currently, the saying seems to have been displaced in English law. This is especially true of the English law of charity. The reason is that the hallmark of the validity of charity under the law is its object being the public. The law does not generally view charity made to members of the family as falling within the scope of charity. However, Islamic law on the other hand has a wider meaning of charity. It lays emphasis on the need to create trust in favour of one's spouse, descendants or collaterals. This had for many centuries been practiced in Islam under the concept of *waqf*.

Again, one point of departure between the English charity law and Islamic law seems to be the nature and purpose of the approving authorities. While the test of validity of charity seems to be determined by wide discretion given to the courts, (the preamble of statute of Elizabeth I), the object of charity in Islam is to seek the favour of Allah (s.w.t.) and whether a charity has reward in the sight of Allah (s.w.t.) is for Him to determine.

Recommendation

- Widening the concept of charity in English law as it applies in Islamic law will have an effective socio-legal benefit to the public as well as aiding the practicability of the purpose of charity within the society.

⁷⁷ Al-Bukhari, Sahih al-Buhari, vol.4, translated by Muhammad Mushin Khan (Lahore: Kazi Publication, 1979), p.3. See also the case of *AbdulRahim v Abdul Hameed & Anor* (1983) 1 CLJ 133.

⁷⁸ See section 2 of the Charity Act, 2011 which allows a donor to bequeath to animals.