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**THE APPLICATION OF PUBLIC BENEFIT  
REQUIREMENT OF CHARITABLE TRUST IN WAQF  
COURT JUDGMENT:  
A REVIEW**

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**ABSTRACT**

*Waqf* is a form of voluntary charity and its purposes are recognised by Islamic law as religious, pious or charitable. Charitable trust is a public trust where the settlor may aim to create certain purposes. Both *waqf* and charitable trust share the same objective, which is for the benefit of the community at large. The objective of this article is to reveal how the requirements of “public benefit” in charitable trust are applicable to *waqf* cases. In determining the validity of a charitable trust, the requirement of public benefit is essential, particularly under the last three charitable purposes, namely advancement of education, advancement of religion, and other purposes beneficial to the community. Besides, the personal nexus test is applied in the case

of charitable trust to ensure no personal linkage between the founder and the beneficiaries. These two elements are necessary to establish a valid charitable trust. The English court will first filter out such a case to ensure that there is no infringement of other people's rights and exploitation of the charitable trust's privilege. Public benefit requirement and personal test are also applicable in cases relating to *waqf* cases. In *waqf*, the Islamic law prescribes two categories, which are "*Waqf Khairi*" (Public *waqf*) and "*Waqf Ahli*" (Family *waqf*). However, family *waqf* is treated as "non-charitable under the influence of English law of trust" because it infringes the rule against perpetuities. The methodology used in this article is doctrinal legal research focusing on the legal principle as well as the cases of public benefit requirement, the personal nexus test, and the rule against perpetuities in charitable trust and *waqf*. This article found that the requirement of public benefit is applicable in public *waqf*, but not for family *waqf*. Despite that, family *waqf* should be maintained as it is a great channel for wealth distribution and succession planning.

**Keyword:** Public benefit, charitable trust, *waqf*, purpose of charity.

## INTRODUCTION

Malaysia is a multi-racial country where the majority and native people are Malays whose religion is Islam. This has led to the establishment of special constitutional and legal provisions under Article 3 of the Federal Constitution, which characterise Islam as the main religion of the nation with provisions for the practice of Christianity, Hinduism, Buddhism, and other religions. The legal system is predominantly the English common law-based civil law with important space created for the application of Islam on certain subjects, which are the main concerns of Muslims and which the British colonials were chary of interfering with.

In a multi-religious society in which Islam is the religion of federation, the application of English law of trusts is inapplicable or at least not without the modification that is allowed under the proviso for adjustment to local circumstances under the Civil Law Act 1956. The law on equity and trust is within the purview of the civil court. According to Fullarton (2006), trust is a unique way to own a property;

“It is a legal relationship created under the laws of equity whereby property (the corpus) is held by one party (the trustee), for the benefit of others (*cestui que trust* or beneficiaries)” (p. 4).

Generally, there are two common classifications of trust, namely private trust and public trust, or better known as charitable trust. The main difference between these two is the requirement for public benefit in the latter. As far as charitable trust is concerned, the requirements of public benefit and personal nexus are necessary to be established based on particular cases. The application of both requirements varies according to the purposes of the trust, namely the advancement of education, advancement of religion, and other purposes beneficial to the community.

This article explores the relationship between the requirement of a valid charitable trust under the English law as applied in England and other Commonwealth countries including Malaysia in matters concerning *waqf*. The decision of the Privy Council in the case of *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdury*<sup>1</sup>, ruled that “Islamic family endowment is invalid as charitable trust because they opposed English rule against perpetuities”. Therefore, this article intends to clarify the issue of family *waqf* being treated as a non-charitable trust and subsequently come out with proposals and justifications.

### **Public benefit requirement AND purpose of charities**

Definitions of charity are wide and no single definition can completely explain its multifarious aspects. There are three possible ways of defining charity, which are “firstly by listing the purposes that are deemed to be charitable, secondly by adopting a charity definition based on the classification of Lord Macnaghten, and lastly by defining charitable purposes as purposes beneficial to the community” (Great Britain, 1989).

Charitable trusts are public trusts where the settlor may aim to create certain purposes that are beneficial for the community at large. However, the Income Tax Act does not define the meaning of charity and what constitutes a charitable institution. In *Income Tax Commissioner v Pemsel*, Lord Macnaughten classified charitable trust

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<sup>1</sup> (1894) 22 I.A. 76

under the following four grounds: i) “the relief of poverty”; ii) “the advancement of education”; iii) “the advancement of religion”; and iv) “other purposes beneficial to the community” not failing under any of the above heads. A trust cannot be charitable unless it meets the requirement of public benefit as understood by law. The public benefit elements are directed at specific aspects of a charitable nature (Mills, 2016, p. 269).

The term “public benefit” is used generally to define a charitable purpose. There are two tests of public benefit, namely:

- i) an organisation’s purposes must be beneficial in a way the law regards as charitable; and
- ii) are public in character.

The two tests may be distinct, whereby the purposes are either beneficial but with no public element in character, or alternatively not beneficial but with public elements included. The test of charitable status is only met when both tests are passed. However, the failure of either test could mean that the purposes are not for public benefit.

#### 1) Trust for the relief of poverty

Poverty alleviation in a trust will not be maintained as being for public benefit if the beneficiaries are identified as individuals. As for relief of poverty, it is impossible to prove the element of public benefit since poverty usually refers to a lass of person and not the public as a whole. On the other hand, in the case of *Re Scarisbrick*<sup>2</sup>, trusts for the relief of the seller’s poor relations were recognised. At first instance, the judge ruled that “the trust for relation was not a valid charitable trust because the recipients did not constitute a segment of the poor, but only single poor persons”. Upon appeal, the Court then ruled that “the arrangement was a true charitable trust for poverty alleviation”. Gifts and trust for poverty alleviation are an exception to the general law, which are applied to all other types of benevolent activity that must be shown to be an element of public benefit.

In *Re Segelman*<sup>3</sup>, a trust for the poor and needy in a community containing only 26 individuals connected to the testator at the time

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<sup>2</sup> [1951] Ch 622

<sup>3</sup> [1996] 2 WLR 173

of the hearing was found to be a legitimate charitable trust. Chadwick J held that “although this case was very near to breach the rule that relief should not be restricted to named individuals, it was saved by the inclusion of after-born issue of the 26 identified beneficiaries within the class of potential beneficiaries who might themselves be or become poor” (Watt, 2016, p. 212). In fact, it was held that “the trust to support class members who were not per se disadvantaged, but who may need financial assistance from time to time, falls on the benevolent side of the line” (Hepburn, 2013, p. 383).

In *Downing v Federal Commissioner of Taxation*<sup>4</sup>, property was left for the purpose of improving the health of the dependants of any member or ex members of Her Majesty’s naval, military or air forces, or the naval, military or air forces of the Commonwealth. The question at issue was whether, pursuant to section 8(5) of the Estate Duty Assessment Act 1914-1970, the property that passed under a gift in the will of the deceased of the entire balance of the residual estate was exempted from tax. The High Court held that “for the relief of poverty, the donor had made an effective gift and Walsh J noted that the word poverty applies to a person who is subject to some degree of financial need, although not in abject poverty”.

In addition, the family relationship between beneficiaries does not invalidate such trusts. In the case of *Dingle v Turner*<sup>5</sup>, the testator left his residual property to the trustee of fund compensation for the family business, namely poor employees. The House of Lords “upheld the gift, although all the potential beneficiaries were defined in terms of employment by a common employer”. Lord Cross said that “he did not consider the distinction between personal and impersonal relationships when identifying a section of public to be satisfied”. He stressed that “it was ultimately a matter of degree whether the class of possible beneficiaries was a section of the public, taking into account both the class numbers and the purpose of the trust”. Furthermore, Lord Cross proposed that account should be taken of the availability of tax privileges when determining whether the public benefit is satisfied. In general, the trust should not be benevolent if the founder of the trust’s intent is to gain tax benefits.

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<sup>4</sup> [1971] HCA 38

<sup>5</sup> [1972] AC 601

## 2) Trust for the advancement of education

A valid trust for the advancement of education must also be shown to be for the public benefit. “The public benefit requirement has been construed in education cases to mean that there must be no link, whether by way of family, employment or organisation, between all the beneficiaries and the purpose itself must benefit a sufficiently large portion of the community” (Hepburn, 2013, p. 383). The case of *Re Compton*<sup>6</sup> involved a trust for educating the descendent of three named persons. The Court of Appeal had to determine whether the intended beneficiaries were a valuable section of community. “A specified class will represent an appreciable section of the community if (i) they were not numerically negligible, and (ii) the value that differentiated them from the community as a whole did not depend on their relationship with a particular individual. The court held that the present trust was not charitable in applying this test”.

The decision in the case of *Oppenheim v Tobacco Securities Trust Co. Ltd*<sup>7</sup> followed the Compton rule. The case was a trust set up by a man who owned a large interest in the British American Tobacco company. He set up a trust to provide for the education of the children of employees or ex-employees of the company, given the considerable size of the group members, of which at that time only consisted of 110,000 participants. The House of Lords held that “a trust to educate employees’ children, though many, is a private trust and it should not be funded by the court or any taxpayer”. It would mean that “the trust in educating the children of tobacco workers living in Bristol would be charitable, but it would not be a trust in educating the children of tobacco workers employed by W.D & H.O Will in Bristol, although they are the only tobacco workers employers in Bristol”. According to the personal nexus test, it is not fair for all possible beneficiaries to be connected to the same company. In this regard, the employers might seek to provide tax-free benefits to employees by providing education for their children, and this will only be effective if a public benefit is identified (Virgo, 2012, p. 175).

Furthermore, the integrated approach taken by the courts in identifying education has upheld the establishment of trust in the advancement of

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<sup>6</sup> [1945] 1 All ER 198

<sup>7</sup> [1951] AC 297

the arts. In this aspect, however, the courts may find themselves called upon to exercise value judgement as to artistic merit. In the case of *Re Pinion*<sup>8</sup>, the testator’s attempt to set up a museum of his furniture and works of art was struck down. Wilberforce J. held that “the trust was not charitable as all the expert witnesses were of the opinion that the objects were of no artistic merit, but rather a mass of junk, thus not reflecting artistic education for the benefit of public”.

Apart from that, a trust in the promotion of sports shall be maintained as a trust in the advancement of education where the sports refer to a school or university or is generally considered to be for the benefit of those participating in an educational institution.

“Sports have also been likened to the charitable nature of cultural education and the arts, purposes that were identified as charitable in the Section 2(2)(f) of Charities Act 2006 (UK) under the head of the advancement of the arts, culture, heritage or science”. In *IRC v McMullen*<sup>9</sup>, trust in supplying infrastructure for football and other sports for pupils in schools and universities was considered to be charitable. The Court noted that “the definition of education changes over time, so that things that were not previously considered to fall within the scope of advancement of education may well apply now”.

The Court further held that “legal conception of charity and the educated man’s ideas about education were not static but evolved with changing ideas about social values; that, while the mere playing of games or enjoyment of amusement or competition was not per se charitable, nor necessarily educational, the totality of the process of education consisted in a balance between spiritual, moral, mental and physical elements, was not limited to formal instruction within the school or university campus and did not exclude pleasure in the exercise of skill; that the limitation in the trust deed to pupils of schools and universities was a sufficient association with the provision of formal education to prevent any danger of vagueness in the object of the trust or irresponsibility or capriciousness in its application by the trustees; and that accordingly, the trust, being designed to improve the balance between the various elements that went into the education of the young, was a valid charitable trust as being for the advancement of education”.

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<sup>8</sup> [1965] Ch. 85

<sup>9</sup> [1981] AC 1

### 3) Trust for the advancement of religion

In the case of *Thornton v Howe*<sup>10</sup>, the Court ruled that “the law stands neutral as between religions and is not required to scrutinise the doctrines of any religion unless it is said to be subversive of all morality”. The fact of this case is that a trust for printing, publishing, and propagating the sacred writings of Joanna Southcott was considered as a charitable trusts, which if given out of pure personality for advancement of religion will be enforced and regulated. “In respect to charitable trust for printing and circulating works of a religious tendency, this Court makes no distinction between one sect and another unless their tenets include doctrine adverse to the fundamentals of all religion or be subversive of all morality in which case this court will declare the bequests void”.

However, it was held that in the case of *Gilmour v Coat*<sup>11</sup>, “a public benefit must be established as a matter of proof and cannot be based on religious convictions”. The Court further stated that “a trust for an association of strictly cloistered and purely contemplative nuns, though undoubtedly for the advancement of religion was held not to be charitable as lacking the element of public benefit”. Lord Simonds noted that “a benefit such as that which may derive from the example of pious lives was so indirect, remote, and imponderable that it could not possibly constitute a public benefit”.

### 4) Other purposes beneficial to community

The fourth category is a broad category covering a wide variety of confidence that does not fall within the other three classifications. Trust under this category must be within the spirit and intendment of Preamble 1601 and for the benefit of an appreciable section of the public. According to *AG v National Provincial and Union Bank of England*<sup>12</sup>, “where a testator by his will directed his trustee to apply one fifth of his residuary estate for such patriotic purpose or objects and such charitable institution and object in the British Empire as they should select in their absolute discretion. The expression patriotic purpose is vague and uncertain”.

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<sup>10</sup> (1862) 31 Beav 14

<sup>11</sup> [1949] AC 426

<sup>12</sup> (1924) AC 262



Viscount Cave held that charitable trusts are limited to the purposes of this head of classification, namely i) “beneficial to the community”; ii) “not within any of the other three heads”; and iii) “recognised by the law as charitable”. The Court held that the gift was not a valid charitable donation as it was not exclusively for charitable objects.

In *Incorporated Council for Law Reporting v AG*<sup>13</sup>, the Court took a very liberal approach. It was stated that if an object is useful to the society, it will increase the expectation of a trust; the question is whether there is any reason to hold it outside the scope of the 1601 statute. The Council applied for charitable status for its law reporting activities. The Revenue appealed against the decision by Foster J that the Council ought to be registered as a charity. The Court dismissed the appeal and the company should have charitable status. Although subscriptions were sold, the trading profits were not allocated to members, and the aims were charitable. The approach has not been widely adopted. Therefore, it seems that there is merit in Lord Reid’s more constrained interpretation in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*<sup>14</sup>. It is not necessary to list all the purposes that fall under this fourth heading. Those which have been affirmed by the courts involve trust for animals; however, “a trust to provide a refuge for animals where they would have no contact with human being was struck down on the grounds of an absence of public benefit”<sup>15</sup>. In the case of *Murdoch v Attorney General*<sup>16</sup>, Zeeman J held that a trust for the benefit of animals generally was not charitable because a gift benefitting animals is not *per se* of benefit to the community”.

A trust for a hospital or to promote health is also valid under this heading, although some may also be upheld on the basis of the relief of poverty in the case of *Le Cras v Perpetual Trustee Co Ltd*<sup>17</sup>. In the case, Lord Wilberforce found that “the trust to St Vincent’s Private Hospital was a valid charitable gift, on the basis that such a gift is *prima facie* good as it provides medical treatment for the sick which in modern times is deemed as a public benefit”. The evidence showed that a need existed for the type of accommodation and treatment

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<sup>13</sup> (1972) Ch 73

<sup>14</sup> (1968) 3 All ER 215

<sup>15</sup> Re Wedgwood, Allen v Wedgwood (1915) 1 Ch 113, CA)

<sup>16</sup> (1992) 1 Tas R 117

<sup>17</sup> [1969] 1 AC 514

provided by this hospital and although the charges were not low, it could not be said that the poor were excluded, and that “the gift to St. Vincent’s Private Hospital was accordingly a valid charitable bequest”.

## **PERSONAL NEXUS TEST: RATIONALE AND CRITICISM**

### **The Rationale: Prevention for Misuse of Fiscal Advantages**

A Personal Nexus test maintained “that the applicants are required to demonstrate that there is no direct relationship between the settlor and the class of beneficiaries, but rather that there is a sufficient public benefit (essentially impersonal and not personal)”. This personal nexus test provided “what seemed to be much-needed protection to prevent the misuse of charitable trusts simply in order to exploit the accompanying financial privileges”. *Lord Cross in Dingle v Turner* identified that “the creator of trust seeking to obtain tax advantages should also be regarded as a relevant factor for a legitimate motive in seeking charitable status but cannot be regarded as a purpose in its own right” (David & Virgo, 2013, p. 219). This is the reason why the personal nexus test is very important in determining charitable trust. The rationale behind the rule of personal nexus, which was illustrated in the landmark case of *Oppenheim*, is that it is difficult to make a decision in the case of a private trust that aims to benefit from the charitable status by saying that it supports the public sector. Furthermore, the personal nexus test provided a comprehensive attempt to prevent corruption.

### **The Criticism: Inconclusive Test to Apply to All Charitable Cases**

In his dissenting opinion in *Oppenheim*, Lord McDermott dismissed this test as arbitrary and illogical. The personal nexus test was criticised by Lord McDermott as “inconclusive and unsatisfactory in all cases, whether a trust purpose is sufficiently public to qualify as charitable, preferring instead a general review of the specific circumstances and factors rather than a clear and definitive test”. Lord Cross in *Dingle v Turner*<sup>18</sup>, adopting the views of Lord McDermott’s dissent in *Oppenheim*, argued that the test should be dismissed and that

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<sup>18</sup> [1972] A.C. 601

the Courts should consider the facts of each case instead, particularly (i) “the size of the class”, (ii) “the purpose of the trust”, and (iii) “the fiscal privileges enjoyed as a consequence of charitable status”. It is proposed that this would be an appropriate alteration as it would allow for more accuracy in deciding whether the trusts in question actually merit the status of ‘charitable’. There is an argument saying that once the trust has been declared as a valid charitable trust, the fiscal or financial privileges do not apply automatically. The Inland Revenue Board should take reasonable steps by filtering out the particular cases.

This personal nexus test does not apply in the case of *Re Segelman*<sup>19</sup>, where the Court held that there was no application for charitable trusts to avoid or alleviate poverty on the basis that a donation for poverty alleviation is “no less charitable” because those whose deprivation is to be lifted were limited to a specific class of connections or employment.

Besides, in the case of *IRC v Educational Grant Association*<sup>20</sup>, the Court and Inland Revenue followed a flexible approach to charitable trust, thus upholding the rule that where a trust is for the good of private persons, it cannot be a charitable trust. Nevertheless, in that case, there was a trust established with the apparent purpose of charity to hold the property on trust for the education of the children of the United Kingdom. In fact, the trust was operated predominantly by the trustee to provide funds for the education of the company employees’ children and also the children of Metal Box’s employees. The company’s employees and their children’s programme paid for 80 percent of the trust fund. The remaining 20 percent was allegedly used for charitable purposes. It was held that “on these facts, because the trust was run as a de facto private trust, there could be no permissible exemption from tax on charitable status”.

Therefore, the personal nexus test is not a conclusive test applied to all charitable cases. The Court has to first scrutinise the facts of the case, particularly the purpose of the charity itself so that the test will be applicable in the appropriate manner.

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<sup>19</sup> [1995] 3 All ER 676

<sup>20</sup> [1967] Ch 123

## CONCEPT AND PRINCIPLE OF *WAQF* IN ISLAMIC LAW

The word *waqf* literally means to “stop, prevent, detain or to keep in custody”. In legal terms, according to Syed Ameer Ali (1976), *waqf* is defined as a perpetual dedication of a certain property to Allah SWT by devoting its benefit to religious and charitable causes (p. 237). In other words, *waqf* is a kind of voluntary charity that is highly encouraged in Islam. It is endowed for a charitable purpose in perpetuity and stands out as one of the greatest achievements along the history of Islamic civilisation (Budiman, 2014).

Three basic principles of *waqf* are irrevocability, perpetuity, and inalienability. When an owner declares his property to be public *waqf*, his relatives cannot amend this status. This will ensure that the *waqf* will continue to benefit the society, and at the same time, the founder will continue to get rewards from Allah. It must also be perpetual to ensure no confiscation of the *waqf* property by other persons and only the Maliki School of Law permits the creation of *waqf* for a limited time (Ab Rahman et al., 2017). Besides, a *waqf* property cannot be subject to “any sale, disposal, mortgage, gift, inheritance or any alienation unless there is an exchange of property of equal value” (Mujani & Yaakub, 2017, p. 456).

In Islamic law, a *waqf* established in support of the founder’s parents, his children, grandchildren, and progeny (*dhurriyyah*) is known as *waqf ahli* or *waqf dhurri/zurri*. In addition, contribution is identified as *waqf khayri* for the support of public welfare avenues and different segments of society, such as mosques, educational institutions, scholars, and the poor (Mustafa al-Bugha, 1990). Historically, for the benefit of the entire community, most Islamic *waqf* are public. Meanwhile, *waqf mushtarak* signifies dedication of one’s property partly for the welfare of the public and partly for the benefit of one’s family (Mahmud & Shah, 2012, p. 49). Usually, under this type of *waqf*, the endower (*waqif*) will specify the target beneficiary (usually the descendants) and later assign the benefit for broader welfare purposes (Yaacob, 2013).

However, family *waqf* has been treated as “non-charitable under the influence of English law of trust because it infringes the rule against perpetuities”. In Malaysia, only *waqf khayri*, pure religious

*waqf* (termed as *waqf khas*), and cash or share *waqf* are available. The existence of *waqf zurri* (*waqf fi ahli*, *waqf al awlad*) is hardly traceable in Malaysia.

### THE IMPOSITION OF ENGLISH LAW IN DECIDING *WAQF* CASES

One of the most important decisions on the validity of *waqf* was delivered by Lord Arthur Hobhouse in 1894 in the famous case of *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdury* (1894) 22 I.A. 76. The deed was executed by the first and second defendants in respect of all their immoveable property on 21<sup>st</sup> December 1868. Without specifying the different items of the property, they named themselves as *Mutawalis* and identified themselves as such for a number of years in collection papers and other documents related to property management. In 1874, however, they announced that they had revoked the *waqf* because of their needs and then dealt with the property as if there were no *waqf*. The first defendant was heavily involved in the lending, mortgage, and alienation of several land properties. This case was initiated by his sons as heirs in 1888 to claim that all the property is *waqf*, to regain from the transferred all the properties alienated by their father, and to expel him from being the *Mutawali*.

The Court affirmed the decision of the High Court of Calcutta who held “that a small portion of the property had been well expended to charity but that as for the rest of it, despite some terms purporting to be *waqf*, the settlement was basically nothing but a permanent family arrangement and, as such, contrary to the Mohamedan Law”. In *Mohamed Ahsanullah Chowdhry v Amarchand Kundu*<sup>21</sup>, the Court claimed that they have not been referred to, or can they consider some source to show that, under Mohammedan Law, “a donation is as valuable as a *waqf* unless there is a significant contribution of the land for charitable purposes at some time or other. In any event, such a *waqf* is not valid if the primary purpose is to aggrandise the family of the settlor and the donation to the charity is illusory either because of its small amount or because of its confusion or the remoteness of its objective existence”.

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<sup>21</sup> (1889) 17 IA 28; ILR Cal 498

The Privy Council held that an Islamic family endowment was invalid under Mohammedan Law. Such an endowment could only be valid when significant benefits were reserved for charitable purposes. The most significant feature of this ruling was that it was supposedly based on the construction of Islamic law. The main principle used behind this case is, in essence, the well-known English law against perpetuity. This rule discourages the creation of perpetual interests in land because it takes land away from circulation in the market and is thus economically against public interest. In this situation, under the influence of the English trust law, a family *waqf* is regarded as non-charitable. The family *waqf* is thus stripped of the privileges and immunities given to the charitable *waqf*. Family *waqf* generally, is subject to various taxes. In India, they are subject to “the laws of income tax, land reform and estate duty, as well as the laws of Evacuee Estate”, which have a crippling effect on them. In assigning *waqf* for the benefit of descendants and relatives, the endowers generally have the welfare of their progeny in mind, a matter emphasised in *Shariah* (Sadique, 2015).

This decision caused outrage among Muslim scholars and jurists in India, and the Indian legislature passed the Mussalman Waqf Validating Act VI of 1913 as a result of representations and protests. As the Act was not retrospectively enforced, another validating act was passed in 1930, thus saving from invalidity any family *waqf* with the ultimate object of charity, whether created before, on or after 1913.

### **Malaysian Cases Concerning *Waqf* Issues**

In the case of *Re Syed ShaikAlkaff*<sup>22</sup>, an Arab testator executed a trust deed that directed his executors to purchase lands and houses in Singapore or Batavia or Sourabaya and turn them into *waqf* of the lands and houses so purchased and distribute the rents and profits thereof, after payment of necessary expenses, in “good works” in the following manner: “(i) to distribute among such of the blood relatives of the testator, his father Syed Abdulrahman and his brother Syed Abdullah as were in indigent circumstances; (ii) to distribute the usual meal or rice to the poor on the eve of Friday; and (iii) to spend the balance in ‘good works’ at the discretion of the executors at Terim and its districts and Saion and Mecca and Medina”. The testator died

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<sup>22</sup> [1923] 2 MC 38

in 1910, and in 1923, the next of his kin questioned this bequest. The Court found that “it was incorrect to assume that a purpose, which is religious in the eyes of a devout Muslim, is considered to be a religious purpose under charity law”. Therefore, the learned judge ruled that “the *waqf* is too common to be considered a legal charity for the purposes of *amur-al-khaira*, which means the activities that refers to charity”. Since the bequest is not charity, the property was passed to the next family.

In *Hadjee Esmail bin Kasim v. Hussain Beebee Binte Shaik Ali Bey*<sup>23</sup>, the testator ordered that the income and profits from a one-third share should be applied from time to time for “a) other ceremonies in the testator’s memory; b) alms to the poor; c) pilgrimages to Mecca; d) yearly remittance of such sums of money as his trustee should think proper to the testator’s brother and sister who were then in India; and e) to provide for the maintenance of any of the testator’s children and their descendants and other relatives who might be destitute”. The Court held that “(b) and (e) were charitable purposes, (a) and (d) were found to be not charitable for uncertainty, and as for (c) the pilgrimages to Mecca, the Attorney General had asserted that this purpose was religious and therefore prima facie charitable. The Court rejected this position stating that there are neither evidence nor indeed any suggestion that these pilgrimages can do anything more than merely give solace to the pilgrim and possibly his family, and it was not charitable”.

In the case of *Tengku Mariam Binte Tengku Sri Wa Raja & ANOR V Commissioner for Religious Affairs, Trengganu & Ors*<sup>24</sup>, the plaintiffs claimed a declaration inter alia, *waqf* made by one Tengku Chik bin Abdul Rahim as void and of no effect. Under the terms of the *waqf*, the property was settled on the family and relatives of the donor with an ultimate gift for religious purposes. The *waqf* also provided for a few immediate gifts for charity. It was alleged that the donor of the *waqf* also reserved power to revoke the *waqf*. The Court held “that the *waqf* was invalid as (a) it was in fact a permanent family arrangement and that the immediate gifts to charity and the ultimate gift to charity were illusory, and (b) the donor’s reservation of the revocation power was incompatible with the basic idea under the *waqf*”. In 1970, an appeal

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<sup>23</sup> [1911] XII SSLR 74

<sup>24</sup> [1911] XII SSLR 74



was made against the decision and the judge of the Federal Court held that “although the *waqf* was illegal, its validity cannot be challenged by the parties as they or their predecessors had agreed to abide by the decision of the Mufti in this case and the court held that the *waqf* was invalid because the provisions found in the *waqf* were subject to such unclear contingencies that the entire *waqf* was invalidated”. The unclear contingencies refer to the dedications that were made to the dependents on the death of several families or branches thereof and their relatives in order of nearness or affinity.

On the other hand, in the case of *Haji Embong Bin Ibrahim & Ors V Tengku Nik Maimunah Hajjah Binte Almarhum Sultan Zainal Abidin & ANOR*<sup>25</sup> on 13 June 1961, the first respondent made a document that asserted to be a *waqf* by making a number of arrangements for her relatives and other persons with an ultimate disposition to various religious and charitable objects. She then wrote to the Religious Affairs Commissioner, Terengganu, to withdraw the *waqf*. She also executed a document directed at giving up her share to the second respondent in the Chenderong Concession. She then brought a suit seeking a declaration that the said purported *waqf* was void. Harun J. in the High Court [1979] 1 MLJ 257 held that “the *waqf* was valid but only to the extent of one-third of the *waqf* property. Three of the recipients appealed against the ruling that the *waqf* was entirely valid and that the one-third restriction applied only to a *waqf* made by will or during death. On the other hand, the respondents lodged a cross-appeal arguing that the *waqf* was completely invalid”. The Court allowed the appeal on the three grounds. “Firstly, the Islamic Waqf Validating Enactment 1972 has retrospective effect and applies to the *waqf* in the present case. Secondly, the *waqf* in this case was valid as (a) it dealt not only with the income or profits from the Chenderong Concession but also the very land itself, and (b) the dispositions to strangers were valid under Islamic law and were saved by section 2(3) of the Enactment. Thirdly, the one-third limitation contained in section 61 of the Administration of Islamic Law Enactment 1955 being confined only to *waqf* or *nazar* made by way of will and death-bed gift, has no application to the *waqf* in the present case”. The court decided that “family *waqf* is valid according to Islamic Waqf Validating Enactment No. 10/1972 in which the enactment declares that a *waqf* will not be held invalid merely because among other purposes of the

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<sup>25</sup> [1980] 1 MLJ 286



*waqf* are the following four objects, namely first, the *waqf* is for the support and maintenance of the parents, children or descendants of the settlor in whole or in part, given that the ultimate gift remains for the benefit of the needy or for any other reason recognised by Islamic law. Second, in the case of the *Hanafi* faith, “the *waqf* is for the maintenance and support of the settlor during his lifetime and the payment of his liability from the rentals and income of the property, provided that there is an ultimate gift for the benefit of the poor or any other purpose recognised by Islamic Law”; third, the ultimate benefits reserved for the poor or other purposes recognised by Islamic Law are limited or deferred until the parents, children or descendants of the settlors are completely extinct; and fourth, the *waqf* is for the benefit of outsiders, i.e. individuals other than the settlor’s parents, children or offspring”.

Moreover, the Court in the case of *In The Estate Of Hadji Daeing Tahira Binte Daeing Tedelleh Deceased), Haji Samsudin V Badruddin Bin Hadji Papang And Others*<sup>26</sup> held that “the proposed expenditure in this case was a charitable one and that the mere use of the word ‘feast’ does not bring it outside the scope of charity. In this case, the settlor in disposing of the residue of her estate declared that the trustees should apply it inter alia to provide yearly at the date of her death in memory of her parents and sisters and herself a feast for poor persons of the Mohammedan religion in accordance with Mohammedan custom”.

Therefore, in cases where there is a dispute concerning the validity, nature and formation of *waqf*, the *Shariah* court is the right channel to determine such issues, provided that the parties to the proceedings are Muslims. The *Shariah* Court has the authority and control to authorise or declare the status of certain assets to be considered as *waqf*. This is to give effect to the provision in the Federal Constitution and the right that each respective state has on the administration of Islamic laws (Syed Abdul Kader & Md Dahlan, 2009).

However, it is important to note that the remedy sought must also be within the powers of the *Shariah* Court and that it is not only sufficient for the *Shariah* Court to have subject matter jurisdiction (Abu Bakar, 2010). This was illustrated in the case of *Shaik Zolkaffily bin Shaik Natar & Ors v Majlis Ugama Islam Pulau Pinang*

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<sup>26</sup> [1980] 1 MLJ 286

*dan Seberang Perai*<sup>27</sup>, where the Federal Court decided in favour of *Shariah* Courts notwithstanding that the *Shariah* Court's enactment did not provide the remedy sought as invoking a certain remedy may be a ploy for defeating the jurisdiction of the *Shariah* Court. Abdul Kadir Sulaiman J said that "the fact that the plaintiff may not have legal standing to the *Shariah* Court would not make the civil court's jurisdiction to exercise the power". This means that where a party does not have the remedy explicitly provided for this in the relevant statute pertaining to Muslims, "it is not for the courts to legislate and confer jurisdiction on the civil courts, but for the State legislature to provide the remedy. The role of the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures, which were prescribed in Article 74 of the Federal Constitution".

### **ANALYSIS ON THE REQUIREMENTS OF VALID CHARITABLE TRUST APPLIED IN *WAQF* CASES**

From the above authority and principle, it shows that the public benefit element has also been satisfied in *waqf* cases. The conflict arises when determining the validity of family *waqf* because the ultimate purpose of a gift must be pious, religious, and charitable in nature. If the *waqf* is for perpetual family settlement, the Court will uphold that the *waqf* is not a valid charity. This is the reason why the personal nexus test is strictly implemented in trust for advancement of education, i.e. to ensure that there is no exploitation or infringement of fiscal privilege. One of the critics about family *waqf* is that it has been purposely created to avoid tax. Some argued that family *waqf* is also resorted to in order to protect the family property from arbitrary confiscations of the rulers.

In addition, many countries such as Egypt started to abolish family *waqf* due to the decision of the Privy Council in Abu Fata's case. The court decided that perpetual family settlement is not valid because it infringes the English rule against perpetuities under common law. This rule indicates that no interest in property is valid unless it has been in existence for at least twenty-one years after some life or life at the time of interest creation. It was also argued that when

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<sup>27</sup> [2003] 3 MLJ 705(FC)

the court permits family *waqf* to be considered as a charitable trust, it will exclude the *waqf* land from market circulation and is thus economically undesirable.

Moreover, in Malaysia, the practice of family *waqf* is very limited and discouraging. Most of the State *waqf* enactments do not have a clear provision for *waqf ahli* except for a few such as Waqf Enactment Perak 2015. Section 10(2)a of Waqf Enactment Perak 2015 mentions “*wakaf ahli*” or “*wakaf zurri*” as a *waqf* dedicated by the *waqif* to his family or a specific person or persons for the purpose of charity. However, Waqf Enactment Selangor 2015 and Waqf Enactment Terengganu 2016 used the term “*waqf* for beneficiary”. In some states, they used *waqf khas* to refer to family *waqf* (Mohamad Suhaimi, 2018). The administration of Islamic law statutes, among others, states that the creation of family *waqf* must obtain the permission from the Sultan (Mohamad, 2018).

In other aspects, even though family *waqf* is not valid as a charitable trust, it is an ideal tool for wealth preservation and succession planning. Labuan International Business and Financial Centre Malaysia (LIBF) has taken a proactive and progressive initiative by introducing an Islamic Foundation product, which accommodates *waqf ahli* and facilitates wealth management based on principles of *Shariah* (Mohamad, 2018). This is a very important aspect to take into consideration as opposed to blaming each other when the conflict remains unresolved. There are two proposals to ensure an efficient and effective family *waqf* system, namely:

- a) Family *waqf* in a temporary period
- b) The validity of family *waqf* for poor relatives as charitable for tax exemption purposes

### **Family *Waqf* in a Temporary Period**

Despite the restrictions in creating *waqf ahli* in Malaysia, the provision for *waqf khas* in the Waqf Enactment in most of the Malaysian states can serve as a basis for creating family *waqf*. Among others, the *waqif* can identify a certain specific purpose of *waqf*, which may also include his family member. However, family may be subject to a certain time period because there are arguments in the Maliki School that permit

*waqf* to be temporary. According to Ab Rahman and Amanullah (2017), an essential features of *waqf* is not limited only to perpetuity; hence some jurists such as Maliki School of Islamic Law approve the application of temporary and perpetual *waqf*. Thus, there is a need for temporary *waqf* to be enacted and applied as it provides the best interests of donors, beneficiaries, and community at large (p. 175). The Maliki School has a different view of the perpetuity of *waqf*. It opposes perpetuity as one of the essential *waqf* conditions. According to the Maliki view, “it is appropriate to create a *waqf* within a particular period in which, after the completion of the specified time, the founder is in a position to deal with the subject matter”. This is also the opinion of Abu Yusuf, as reported by Ibn Hammam: “If it is known that Abu Hanifah allowed the *waqf* property to be given to the heirs, he should also have allowed a *waqf* for twenty years because there is no difference (between both situations) at the very beginning”.

Ahmad Dardir indicated that “perpetuity is not a prerequisite for a valid *waqf*, and is therefore valid for a period of time and after that ownership is transferred to the founder”. Ad Dasuqi further clarified that “it is permissible to perform *istibdal* since perpetuity is not the condition of a valid *waqf*”. On the other side, Al Khatib Al Shirbini permits temporary *waqf*, but after the former, the founder will declare the latter as beneficiary. According to Al Mawardi, “if the founder wishes to do so on the basis of the principle, the condition of the founder is equivalent to a *Shariah* ruling”. Maliki School of Thought allows the founder to revoke and sell the property. Al Mawardi also added that “if a person can donate part or all of his property, he is also allowed to donate part or all of it for a period of time” (Jafri & Noor, 2019).

The justification above shows that *waqf* can be formed on a temporary basis and this signifies that family *waqf* for a certain period of time does not contravene the English ruling against perpetuities. It may be suggested that the temporary period for family *waqf* will only be effective upon the permission and willingness of the founder in order to respect his wishes towards family *waqf*. In addition to this, the true meaning of perpetuity in *waqf* is to generate an accumulation of capital that can be used to build infrastructure and social services for the community. The continuous and perpetual benefit of *waqf* property for the community is the main requirement of perpetuity in *waqf*.

## **The validity of family *waqf* for poor relatives as charitable for tax exemption purposes**

Charitable trusts enjoy several distinctive advantages under the law. The House of Lords in *Dingle v Turner* “divided these rights into two groups. The first deals with the exemption of charitable trusts from the beneficiary principle, the certainty of objects, and the second is the fiscal privileges”. Beneficiary principle requires there to be appointed person(s) who are able to enforce performance of the trust while the certainty of objects refers to certainty as to the person(s) for whom the trust was made.

Family relationship does not invalidate the charitable trust. This principle was illustrated in the case of *Dingle v Turner*, where the testator left his residuary estate to a trustee to pay pensions to the poor employees of a family company. The House of Lords held that “a trust for poor employees was capable of being a valid charitable trust; that in the field of poverty trusts, the distinction between a public or charitable trust and a private trust depended on whether as a matter of construction the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular poor persons, the relief of poverty among them being the motive of the gift; and that the trust in the instant case was a valid charitable trust”.

Under *Shariah* law, the act of giving to poor people has always been considered as an act of greater virtue. The use of one’s wealth for charity or one’s own vulnerable family to meet the needs of other poor people in general is the recommended act, as the former had the twin claims of blood and need, whereas distinct from the latter, whose claim was limited to need alone. It is narrated in a Hadith that “charity on a poor person is charity (alone); whereas (charity) on a blood-relative is two, charity and maintaining family ties”<sup>28</sup>.

## **CONCLUSION**

Looking back at the above discussions, it can be seen that in order to determine the validity of charitable trust, the English courts are stricter in implementing the personal nexus test in trust for the

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<sup>28</sup> See hadith reported by Al-Tirmidhi (658), Chapter of Zakah; Ibn Majah (1844), Zakah.

advancement of education rather than other purposes of charity. The Court took preventive steps to ensure that there is no exploitation of financial privilege imposed on a charitable trust. The requirement of public benefit in charitable trust is also applicable in *waqf* cases; nevertheless, it is subject to certain requirements that are perpetual in nature. It must also be noted that the Privy Council's ruling in *Abu Fata's* case that an Islamic family endowment, i.e. family *waqf* was invalid as a charitable trust had greater impact on the foundation of *waqf* institutions all around the world. The main principle underlying this case was the well-known English rule against perpetuities and it was decided that family *waqf* infringes the rule due to the lack of a public benefit element. The study also found that the public benefit requirement is very important for determining the validity of *waqf* and that there is no issue concerning public *waqf* because its ultimate goal is for the benefit of the public. However, family *waqf* had been treated otherwise. Even so, family *waqf* should be preserved because it is an ideal tool for wealth preservation and succession planning. There are two proposals to ensure an efficient and effective system of family *waqf*. Firstly, the court should consider the status of temporary family *waqf* because this does not contravene with the rule against perpetuities and because the Islamic law for *waqf* allows it. Secondly, family *waqf* for poor relatives should also be treated as charity because family link does not invalidate charitable trust for poor descendent.

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