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CHARITY BEGINS AT HOME: A COMPARATIVE STUDY OF ENGLISH AND ISLAMIC LAWS

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ABSTRACT *The concept of charity is an old notion under both English and Islamic laws. As far as common law is concerned this concept is developed by the courts in many years back while under Islamic law, this notion is governed by the main sources of Islam i.e., Qur'ān and Sunnah of Prophet (S). The notion charity begins at home is a common saying in English language, but under legal speaking it seems that charity never begins at home under English law whereby the best charity in Islamic law always begins at home. 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 and 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 on the other hand, the issue of charity gives priority to the family members before considering those who are outside the family. This paper will examine in detail this notion under both laws in order to find its applicability.*

KEYWORDS: *Charity, home, law, Islamic, trust, waqf*

1. INTRODUCTION

From the outset it must be known that charity in law has a technical meaning (Kerry 2007: 9) but not a statutory definition, and the legal concept of charity has been developed by the courts over the several centuries. The courts have also refrained from attempting to define charity. Before the Charitable Uses Act 1601 was passed, there was some discussion as to the whether a definition of charity should be formulated but it was decided that, the benefit of flexibility which allowed the scope of charity to keep pace with changes in the society, where the advantages of certainty which a statutory definition might be expected to provide (Elizabeth 1988: 1). It has been suggested that the advantages of a definition could be illusory in that it might

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result in a fresh spate of litigation and provide a set of undesirable distinction (Maurice and Parker 1984: 1).

The definition of charity as given in the preamble of the 1601 Act has always been the most common definition despite the Act itself having been repealed. However, section 3 of recent charities Act 2011 in England and Wales has given a wide guidance as to what purposes are charitable. The lists have been provided below:

> (a) the prevention or relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the advancement of health or the saving of lives; (e) the advancement of citizenship or community development; (f) the advancement of the arts, culture, heritage or science; (g) the advancement of amateur sport; (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; (i) the advancement of environmental protection or improvement; (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage; (k) the advancement of animal welfare; (l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services; (m) any other purposes.

Under Islamic point of view, the word charity has a wider meaning and the word which is used to denote the term 'charity' in Islam is *sadaqah,* which means a pious act. Thus in Islam to help a weary traveler is *sadaqah* and it does not necessarily mean alms to the poor only. 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 (Syed 1976: 213). 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 reliving his poverty or to provide against his falling into indigence.

A donation if made for pious purpose even if it is made without intention of obtaining the reward from Allah is considered as *sadaqah* since Allah will bless all donations irrespective as to whether the gift was made with the intention of obtaining the rewards of Allah. If a person makes provisions for his personal or for his family's future needs, is a pious act even if there is no intention of the part of the person making a gift. But here it must be known from the beginning that, in 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 important of *sadaqah* can be seen in *Qur'ān* and hadīth of the Prophet (S). In the Holy *Qur'ān, Allah* 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 stead fast in your prayers and practice regular charity* (Surah Al-Bakars 2: 177). A *hadīth* to the effect is where the Prophet (S) is quoted as having said: *Giving alms to the poor has the reward of someone alms; but the giving to the kindred has two rewards.*

As to the nature of this paper, it is advisable to look the definition of *waqf* and its classifications. *Waqf* from the philological point of view means detention, stoppage, checking, restraining or restricting. It is emanated from Arabic word literally means to prevent or to restrain. Cyril (1989: 417) defines *Waqf* as the giving of property by will or by gift in perpetual to the Islamic state for pious work or for the public good. Again *waqf* is defined to mean 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 (Abdallahi 1978: 57). This definition connotes 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 (Abdallahi 1978: 57)

Muslim jurists differ in ascertaining the meaning of *waqf* as a result of their differences of opinions over 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 meaning there are two elements which must be drawn, firstly, the right of the owner continues and secondly, that the usufruct is to be devoted to some charitable or pious purposes (Asaf 1974: 274).

Imām Shafi'i is of the view that when a *waqf* is declared the ownership of the thing immobilized is transferred to Allah; which means that such object ceases for men to be subject to the right of private property and that it belongs neither to the founder nor to the beneficiary. To the latter belongs the usufruct alone and he may enjoy it either personally or by an intermediary (Nawawi 1914: 232). Imām Malik on the other way is of the view that, a *waqf* may be limited as to the time or as to a life or several lives. And after the expiration of the time or extinction of the life or lives specified, it reverts in full ownership to the founder or his heirs (Syed 1976: 497)

2. CLASSIFICATION OF CHARITY UNDER ENGLISH LAW

According to the section 3 of Charities Act 2011, charity in its legal sense comprises thirteen divisions. Among thirteen divisions, some important divisions are described below:

2.1 Charity 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 (Kerry 2007: 93). 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* (1950),[1] where in considering a bequest for building cottages for old women 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.'

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[1] 66 TLR (PT 2) 510 at 511.

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 have reached the point when for example, they stand in need of soup dispensed free at a soup kitchen. In the second sense, the word poverty is used relatively and 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 man made disaster were held to be charitable.

But on the other side of a coin in *IRC v. Baddeley* (1955)[2], 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.

2.2 Charity 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 (Maurise & Parker 1984: 30). 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 (Kerry 2007: 95).

In *Re Shaw* (1958),[3] 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 as to whether the beneficiaries are rich or poor and whether or not fees are paid.

As to the meaning and scope of education, in *Incorporated Council of Law Reporting for England & Wales v. Attorney General* (1972),[4] 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.

Education is not confined to the provisions of formal education only. In *Re Koeppler's Will Trusts* (1985),[5] it was held that the concept of education is wide enough to cover the promotion of conferences at which intensive discussions take

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[2] 1 All ER 525.

[3] 1 All ER 245.

[4] 1 Ch. 73 at 102.

[5] 2 All ER 869.

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.

Concerning with research activities, in order to be a valid charity there are certain conditions to be fulfilled. It was held in *Re Hopkins Will Trusts* 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.

2.3 Charity 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. According to the renowned case *The Commissioners for Special Purposes of the Income Tax v. Pemsel* (1989) AC 531, 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. 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. As per the decision of the case of *Commissioner of Valuation v. Trustees, Newry Christian Brothers* (1971) NI 114, the courts will require evidence that a gift to a religious organisation satisfies the public benefit test.

In order for system of belief to be regarded as religion it must involves faith in a deity. Here it means that religion under this scope is that which involves man's relation with God and ethics. According to the case *Bowman v. Secular Society Ltd* (1917) AC 406 also the religion must be monotheistic in order for a trust in advancement of religion to be a valid charitable trust.

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 things are done in a variety of ways which may be comprehensively described as pastoral and missionary. 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 decide 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 (Elizabeth 1988: 11).

2.4 Charity for other Purposes Beneficial to the Community

This category provides a wider scope for the development of charity law and also 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 (Riddall 1996: 105). 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 the charity as not fall under this category.

3. CLASSIFICATION OF CHARITY UNDER ISLAMIC LAW

Basically *Waqf* is known as charity under Islamic Law and it has been discussed in detail below:

3.1 Classification of *Waqf*

Classification of *waqf* varies from one scholar to another. For example, Siti (2006: 16) 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-dhurri*) as prescribe in the *waqf* deed (Siti 2006:16).

Some scholars, such as Syed Ameer Ali and Mohd Zain Hj Othman 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 will consider 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.

4. APPLICABILITY OF THE NOTION - CHARITY BEGINS AT HOME

Starting with English law, they consider the issue of public benefit, where even though a trust falls within one of the four heads of charity as classified by Lord Macnaghten in Pemsel (1989) case, it must satisfy the test of public benefit in order to be legally charitable except for the trusts for the relief of poverty (Charles 2000: 2078). 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 (Elizabeth 1988: 16). Public benefit is the hallmark of a charity within a common law context. (Kerry 2007: 106).

The dividing line between private and public benefit and the measure of the benefit which should be conferred varies in each and every classification of charity (Kerry 2007: 106).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 (Kerry 2007: 106).

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. It must be known that under common law, a gift for the benefit of particular individuals is considered as a private trust despite the fact that the need of individual is great; it is not accepted as charitable.

A gift for the immediate distribution to the donor's next of kin will be interpreted as a gift for individuals and will not be charitable. In Islamic law on the other way, great emphasis is placed on providing for one's own children, descendants and kinsmen and it is regarded as the charity yielding the greatest reward from Allah.

To insist 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 as stated by Lord Greene MR in the case of *Re Compton* (1945) Ch. 123, 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* we may see that most of the English courts fail to understand the nature of the community and exclude those descendants of the donors. If we scrutinise this test well, we may reveal 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 (Syed Khalid 2005: 258).

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. We can see 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.

But now 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. 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 (Riddal 1996: 114). 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 (Riddal 1996: 114). 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 (Riddal 1996: 114).

For example, although a trust for the advancement of religion is prima facie charitable, nevertheless there remains the overriding question as to whether the gift is in fact beneficial to the public. 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 (Elizabeth 1988: 18)

Concerning with Islamic law, no one can deny that, the notion 'charity begins at home' is fully applicable where all Muslim jurists unanimously agree as regard to legality of *waqfs* made in favour of the *waqif's* descendants (Syed 1976: 286). Again on among the basic principles of philanthropy in Islam is that charity must be practiced at home first (Samiula 2007: 98). 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. Islam advises the believers to spend for kith and kin first and then at the end other people in society who are in need and seek help (Samiula 2007: 98). 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 anybody else.

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). It is better and it is lawful to keep some property for the self and for family members than to give all in philanthropy when is said in the *Qur'ān* that: *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* (Qur'ān, Sūrah At-Taghābun 64: 16).

In the Holy *Qur'ān Allah* 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* (Qur'ān, Sūrah Al-Baqarah 2: 177). To emphasis the importance of giving charity to the family members Allah 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* (Qur'ān, Sūrah Al-Baqarah 2: 215)

There cannot be any good or reward in giving outside home, when people at home are in need of charity. The most important thing is that people looking after family responsibility will not be devoid of rewards promised for other charities. The Prophet (S) said: *Whatever you spend for Allah's sake will be considered as a charitable deed even the handful of food you put in your wife's mouth* (Sahih Bukhari 4:51:5 and 7).

This notion is emphasised by the hadīth of Prophet (S) where Abū Huraira was reported the Prophet as saying: *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.*[6]

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[6] Sahih Muslim, vol. 2 translated by AH Siddiq, p 480.

Also it is reported in one hadīth where it is said that Saad Ibn Abi Waqqas had quoted the Prophet (S) as saying that: *to give to one's child or wife is sadaqah (*Sahih Bukhari 806). 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 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.* 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* (Mishkat Ul Masabih vol- II, 491).

5. CONCLUSION

From the above discussion we can see that the notion charity begins at home used to be applicable in English law but now days it no longer exist due to the changes introduced. However, on the other side, Islamic law confers with wider meaning of charity and insists the need to create trust in favour of one's spouse, descendants or collaterals. So to say simply, the notion charity begins at home has got roots in Islamic law because even at the time when English law applied this notion it is said that they took this idea from the concept of *waqf* based on family as mentioned in Islamic law and the bad thing is that they failed to acknowledge it.

Again, the concept of charity in the preamble of statute of Elizabeth I is vague where in Islamic law the test of charitable is the approval of Allah and not the discretion of the courts which seems to be predominant situation in the English law. However, to give full discretion to the courts to decide what is and what is not charitable tantamount to continue complicating this issue.

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