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Piae Causae Foundations, Waqfs, Trusts. Legal-Historical Interactions

Summary

The word "charity" originates from Old English and means "Christian love of one's fellows." The most popular Abrahamic religions all created their own forms of charity, which, however, resemble each other. The spirit of giving, whether of time, money or resources, becomes a focal point of activity during their holiday seasons. The paper aims to present the similarities, differences and potential legal and historical interactions between the Christian *piae causae* foundations, the Hebrew *heqdesh* and the Islamic *waqf*, on the one hand, and the specific Anglo-Saxon trust, on the other. The study also commemorates the Institute of Islamic Research, which operated successfully at the University of Kaposvár between 2013 and 2018.

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Introduction: Religion and Charity

Religion had always been a fundamental part of charity law, even in the face of increasing numbers of atheists and religious critics worldwide (Morris, 2017). Charity means voluntary assistance and support to those in need. It is a humanitarian act, often associated with the notion of religion. The word "charity" originates from Old English and means "Christian love of one's fellows" (Stevenson, 2010:293). Aside from this original meaning, charity is etymologically linked to Christianity, with the word originally entering into the English language through the Old French word "charité", from the Latin "caritas", a word commonly used in the Vulgate New Testament to translate the Greek word *agape* (ἀγάπη), a distinct form of "love".1

The most popular Abrahamic religions – Judaism, Christianity and Islam – all created their own forms of charity, which, however, resemble one another (Smith, 1998). The

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spirit of giving, whether of time, money or resources, becomes a focal point of activity during their holiday seasons.

Charity in the Abrahamic Religions

In Judaism, *tzedakah* appears as a Hebrew term literally meaning righteousness but commonly used to signify charity. As, however, it is an act which is commanded by the Torah, and so not voluntary, the practice is not technically an act of charity. Jews give *tzedakah*, which can take the form of money, time or resources, to the needy, out of "righteousness" and "justice" rather than voluntary benevolence, generosity or charitableness. The Torah requires that 10 per cent of a Jew's income be given to righteous deeds or causes, regardless of whether the receiving party is rich or poor (Donin, 1972:48).

The recognition of the Christian Church by emperor Constantine was a gradual recognition of the Church as a legal person, and thus church property. Churches, as legal personalities could thus be instituted as heirs and receive donations under a will. Emperor Justinian also admitted monasteries and foundations *(piae causae)* to property for charitable purposes, and so these (legal) institutions also acquired legal personality. The establishment of foundations as legal persons in Mediaeval Europe allowed wealthy but pious gentlemen to endow monasteries and other organisations pursuing religious or charitable purposes *(piae causae)* with land and properties, possibly in perpetuity (Panico, 2016). In mediaeval Europe during the 12th and 13th centuries, Latin Christendom underwent a charitable revolution (Brodman, 2009:1). Rich patrons founded many leprosaria and hospitals for the sick and poor. New confraternities and religious orders emerged with the primary mission of engaging in intensive charitable work. Mediaeval charity was primarily a way to elevate one's social status and affirm existing hierarchies of power (Davis, 2014).

The voluntary sector plays an incomparably more important role in Muslim societies. Islam, as a religion, lays considerable emphasis on pious deeds. Islam, as a way of life, however, spells out the basic principles of the legal institutions of charity such as *zakah, sadaqah* and *waqf,* in order to achieve well-being for the *ummah. Ummah* is a common Arabic word meaning "nation." The term takes on religious connotations in the Qur'an, where God is said to have sent a distinct messenger to each *ummah.* The messengers given special prominence as recipients of the scriptures and as founders of an *ummah* are Moses, Jesus and Muhammad (Falus, 2016). As the concept of *ummah* correspond to our understanding of "nation", it does not exactly have the same meaning. The term "nation" is a strictly political concept; it may be defined as a community of people possessing a given territory with their own government; while membership in the *ummah* involves commitment to a particular religion. To the Muslim way of thinking, *ummah* represents a universal world order, ruled by an Islamic government in accordance with the *Shari'ah,* the Islamic religious law. For exmaple, the basis of the Islamic banking system and Islamic financial products is *Shari'ah* law, this is why the aforementioned transactions and products are called *Shari'ah*-compatible (Varga–Cseh, 2018). The word *Shari'ah* literally means "the clear path to follow" (Bakar, 2014:51–53).

In the various Muslim states voluntary charities can take different forms, including *zakah* and *sadaqah.* Paying *zakah* – also as the third of the five pillars of Islam – is an obligation for a Muslim who possesses assets that cover a specific amount *(nisab)* and reach the time period of a year *(hol).* Since *zakah* is comparable to a welfare fund or even more to a source of funds that will help other Muslims in the society to improve their life, people who possess sufficient assets can help people who are poor or who have less. People who have possessions can

help others in the society by giving *zakah*. This is the format that is hardly observed in other religions apart from Islam. Technically, *zakah* is a fixed ratio collected from the surplus wealth and earnings of Muslims (Varga, 2018). It is then distributed to prescribed beneficiaries for the welfare and the infrastructure of a Muslim society in general. It is paid on the basis of the net balance after a Muslim has spent on basic necessities, family expenses, due credits, donations and taxes (Cseh, 2018). In order to be liable for *zakat,* a Muslim should possess wealth in excess of the *nisab* level for one lunar year (called *hijri* in the Islamic Calendar and comprising 354 days). The lunar year begins on the date the wealth is obtained. This means that if the assets are in the owner's possession at the beginning and end of the lunar year, the *zakat* tax is applicable. In many modern societies *nisab* is considered equivalent to a governmentally determined poverty threshold. The Muslim institution of voluntary donation, which literally means "charity" is *sadaqah* , and can be given to people of any religion.

The potential of *waqf* as an Islamic foundation2 can be discerned by consistent insistence on the non-transferability of the ownership rights to property. Once a piece of property is donated for a charitable purpose, the owner ceases to have any claims over it, because in Islam all property is said to belong to no one but Allah. The trustee, in the form as a single person or a group of individuals, must manage the property for the generation of income which is then distributed as specified by the donor (Mohamed, 1991:118–119).

Clearly, philantropy is a universial antropological phenomenon, as we find obligatory help to those in need in all major cultures, religions and languages. In Arabic there is *zakah* for obligatory alms, and *sadaqah*, which means charity and philantropy. In Hebrew *tzedakah* equals a traditional, Jewish community-oriented practice of phylantropy. It is support to the poor to help them become self-sustaining. In this meaning it is very close to the Islamic concept, which considers begging a sin.

Interreligious Similarities between Heqdesh, Piae Causae Foundations and Waqf

The institutions of the *hekdesh*, *piae causae* foundations and *waqf* show remarkable similarities (Hennigan, 2004:51). There are five basic conformities between the above-mentioned legal institutions:

1) All were founded through the relinquishing of property by an individual who dedicated these properties to a particular purpose, eg. religious or public services, education, etc.

2) By the act of donation, the owner gives up control over the institution he created.

3) The institution created is placed under the administration of a trustee selected by the donor.

4) Only the proceeds of the transferred property are to be used to realise the mission of the institution, but the principle capital (foundation assets) had to remain untouched.

5) These institutions were dedicated to God and envisioned as surviving the death of the founder.

The *waqf* and the pious foundation, however, also share a further remarkable similarity: both provided the opportunity to limit the circle of beneficiaries to the descendants of the donor. *Waqf*s and foundations developed in two main forms. The former legal institution can be established as a *waqf khairi*, a charitable foundation for the benefit of everybody; or as a *waqf ahli*, a family foundation in support of the donor's descendants. The pious foundation could also be founded for the benefit of the public, as a "charitable foundation", or as a *fidei commissum*, where the creator secured the transfer of the property from one generation to the subsequent ones (Adam, 2017).

Table 1: Similar legal features of heqdesh, a piae causae foundation and waqf

	HEQDESH	PIAE CAUSAE FOUNDATION	WAQF
The donation of a property for a particular purpose	+	+	+
The donor gives up control over the institution	+	+	+
The institution is administered by a trustee	+	+	+
The principal remains untouched	+	+	+
Established "in perpetuam", dedicated to god	+	+	+
Mazy be established for the benefit of the family/descendants of the donor	–	+	+

Source: Edited by the author

Since *waqf* shared many characteristics with *piae causae* foundations and heqdesh, several scholars (Hennigan, 2004) suggest that it started developing on the basis of the former.

Middle Eastern Repercussions: Trusts

However, the interaction also works the other way round in legal history. Several law historians argue (Walker, 2016:208) that a historical connection to Islam is a "missing link" that explains why English common law is so different from classical Roman legal systems that hold sway across much of the rest of Europe (Devichand, 2018). In 1955 Henry Cattan (1955) also noted that the English "trust" is remarkably similar to, and probably derived from, the earlier Islamic institution of *waqf*.

Having lost all contact with Rome, Mediaeval Europe became acquainted with philanthropic endowments through the Islamic *waqf* system. This is attested to by Monica Gaudiosi (1988), who studied the origins of English trusts. Gaudiosi puts to test the conventional wisdom, prevailing among European scholars, that English trusts are rooted in Roman or Germanic laws. She challenges this view by arguing that these trusts developed from a Mediaeval English institution for holding land known as the use. Furthermore, considering the Roman *fidei commissum* first, she reminds us that the link between this institution and English trusts had already been dismissed by the 19th century on the grounds that not only were the similarities between the two institutions merely superficial, but also, while the Roman device was purely testamentary, the early English use seldom arose by will.

The legal institution of a trust established in Mediaeval England took a special path: first the common law countries adopted and applied it and then the other states of the British Commonwealth. In contrast, in countries regulated by civil or mixed legal systems, the institution of the trust was primarily artificially introduced due to economic demand. The defining characteristic of a trust is that the founder transfers property (ownership or right) to the trustee, and the latter is obliged to manage it for the benefit of the beneficiary specified by the trustee. The property of the trust property belongs to the trustee, but it is obliged to manage it separately from its own property, as the beneficiary also has a right of ownership, and in a civil law perspective, this right is close to ownership right. It follows from the structure of the trust that in Anglo-Saxon law it is

not a contract, since the trustee acts as a fiduciary, and the beneficiary may also take action against third parties in the case of misconduct or an unpaid disposal of the trust. In summary, the beneficiary has a contractual claim against the trustee and has a claim *in rem* in respect of the assets. In the course of the analysis of the trust, it must also be taken into account that, compared to the Anglo-Saxon regulations, other legal institutions and legal constructions corresponding to the functions of the trust have also been established in mixed and civil-law systems. From a functional point of view, in the broadest sense, the legal institutions corresponding to a trust are primarily required to implement asset segregation, to treat the position of the trustee not merely as a contracting party, but also as an official position. The beneficiary, however, must also have the legal option to take action against third parties in the case of misconduct or the free disposal of the assets. If a legal relationship satisfies these conditions, it shows significant similarity to the legal scheme of the Anglo-Saxon trust.

The basic points of Gaudiosi and Cattan's arguments are as follows:

Whereas the separation of ownership from usufruct was not a new legal concept, the settlement of usufruct on the endowed property for successive generations in perpetuity for a charitable purpose was an institution which was created by the classical Muslim jurists of the first three centuries of Islam. There is no evidence that such a complex system of appropriating the usufruct to varying and successive beneficiaries existed prior to Islam (Cattan, 1955:205). The emergence of the trust coincides with a period of increased contact between Europe and the Muslim world. Indeed, the Franciscan friars, who are believed to have introduced the use in England, were active in the Middle East. Saint Francis, himself, spent the years 1219 and 1220 on Islamic territory.

Jerusalem was a particularly significant point of contact between England and the Muslim world because of the presence of the Orders of the Templars or the Hospitalers. Since it is well known that these orders had been influential in the development of the Inns of Court in fourteenth-century England, the transmission of legal institutions from the Islamic world to England has already been demonstrated.

More importantly, the similarity between Islamic *waqf*s and English trusts is striking. Under both systems, property is reserved and usufruct is appropriated for the benefit of specific individuals or for a general charitable purpose. The *corpus* becomes inalienable; and estates for life in favour of successive beneficiaries can be created at the will of a founder without regard to the law of inheritance or to the rights of the heirs, and continuity is secured by successive appointments of trustees.

It has been argued that ther is a major difference between the two systems: whlie in the English case, the trustee is considered to be the owner of the trust, in the Islamic *waqf* the trustee *(mutawalli)* is not considered to be the owner. In reality, the trustee is no more the owner of a trust than the *mutawalli* could be the owner of a *waqf*. The main function of both is to administer the property for the benefit not of themselves but of the beneficiaries specified by the trust or *waqf* (Çizakça, 2000:11–13). Another alleged difference concerns duration: the *waqf* must be perpetual, while a trust, except if charitable, cannot be perpetual. It must be remembered, however, that in England trusts could originally be made in perpetuity until the rule against perpetuities came into force. It has been argued, however, that there is one very important difference: the purpose of the *waqf* or the trust. A trust may be made for any lawful objective, a *waqf*, by contrast, must be charitable. Charitability is a *conditio sine qua non* for all *waqf*s including family endowments (Cattan, 1955:212).

Table 2: Comparative table of waqf and trust

	WAQF	TRUST
motive	religious	no religious motive needed
founder as beneficiary	impossible, only under Hanafi law	possible
objective	for the benefit of the ummah	any lawful object
property is entrusted to	Allah	the trustee
managers' legal position	the mutawalli is only a manager	the trustee has a right close to that of the owner's
termination	"in perpetuam" (cannot be terminated under any circumstances)	can be terminated as stipulated in the trust deed
revocability	irrevocable	revocable
corpus	immobilised	immobilised
usufruct	used for the benefit of the ummah	used for the objective stated in the deed

Source: Edited by the author based on Çizakça, 2000:11–13

Trusts in Hungary Today. Recent and Applicable Hungarian Regulation

If we accept the theory of Cattan and Gaudiosi, we can state that one of the legal institutions of traditional Islamic law, the *waqf*, is partly applied in Hungary nowadays, as a result of an intercultural legal and historical interaction in the regulation of trust. Chapter XLIII of the new Hungarian Civil Code (Act V of 2013) regulates fiduciary contracts in the framework of mandate-type contracts.

"Section 6:310 [Fiduciary asset management contract]

(1) Under a fiduciary asset management contract, the trustee shall manage, on his own behalf and for the benefit of the beneficiary, the assets transferred to his ownership, and the rights and obligations transferred to him by the fpunder (hereinafter "trust property"), and the founder shall pay the fee."

Under Hungarian law, a fiduciary trust agreement results in an *in personam* legal relationship, which, however, also carries *in rem* features. The Hungarian regulations largely follow and comply with the express Anglo-Saxon trust institution (Menyhárd, 2013:144). On the other hand, the structure of the Hungarian regulation recognises the separation of the managed assets from the trustee's own assets, assings an office to the trustee, considered as a non-contracting party, and provides the beneficiary (and the trustee) with the opportunity to claim compensation from third parties in the case of misconduct or if the assets are free of charge (Sándor, 2016). The predominantly dispositive regulation in the Civil Code contains general substantive legal provisions. Detailed rules regulate trustees and their activities in Act XV of 2014, and 87/2014 (III. 20) apply to fiduciary trustees and their activities. The Hungarian legislation ensures the widest possible freedom of establishment by setting up a trust relationship not only in a contract, but also by a unilateral legal declaration or will. The obligation to register trusts is clearly necessary for fiscal and validity reasons:

"Section 18/A (1) Fiduciary asset management contracts concluded by ad hoc trustees shall be drawn up in a notarial deed or a private deed countersigned by an attorney-at-law or bz an in-house legal counsel registered by the Bar Association."

In Hungary, regulation is two-tiered. A profit-oriented trust asset management company may only operate with the permission of the National Bank of Hungary, while in the case of a non-profit, occasional fiduciary trust agreement, the agreement must be registered by the National Bank of Hungary.3

"Section 11 (1) If, on the basis of the request, it can be established that the applicant meets the operating requirements for fiduciary asset management companies, its request contains the data described in Section 10 (1) and the applicant has attached the annexes as per Section 10 (2), the Authority shall issue the licence.

(2) The Authority shall obtain the applicant's certificate of incorporation from the companies register electronically, by means of a direct query."

However, this legal institution no longer carries any charitable purpose, and has nothing to do with religion or faith, since charity is possible to exercise through the legal institution of the foundation.4

Conclusion

In the Hungarian Civil Code, fiduciary property management is comparable mostly to the Anglo-Saxon trust. The Hungarian regulation can also be considered to represent a high standard in an international comparison, and its main advantage is its flexibility. The more rigidly regulated German "Treuhand" differs more from the Hungarian than from the Anglo-Saxon trust. Despite the fact that the Hungarian Civil Code regulates it as a contract, the management of fiduciary property is seen not merely a contract, but rather a special legal relationship (Bodzási, 2018).

Although the assets transferred to the trust are not an independent legal entity, as in the case of foundations, the trust seems to be more than a simple contract. This is indicated, among other things, by the fact that in addition to a contract, fiduciary management as a legal relationship can also be established by a unilateral legal transaction (such as a will). The legal relationship may also continue after the termination of the contract or unilateral declaration of establishment.

Taking into account the above characteristics, a legal and philosophical approach may still result in the natural legal explanation that this legal institution also originates from the charitable foundations where the aim is to provide the most effective assistance possible to achieve legitimate goals.

Notes

1 *Charity*. Online Etymology Dictionary, www.etymonline.com/word/charity.

2 In: *The Encyclopaedia of Islam*, Vol. IX. 59–99.

3 Section 11.; Section 19 of Act XV of 2014.

4 Act V of 2013, Part Six, Section 3:378-404.

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