

A Comparative Study of Endowment & Trust

Mohsen Nedaei¹, Babak Mohammad Reza Pour (Ph.D)^{*2}, Hassan Movasaghi (Ph.D)³

Department of law, college of law, theology & political sciences Tabriz Branch, Islamic Azad University, Tabriz, Iran

Department of law, college of law, theology & political sciences Urmia Branch, Islamic Azad University, Urmia, Iran

Department of law, college of law, theology & political sciences Tabriz Branch, Islamic Azad University, Tabriz, Iran

Received: Dec. 2014 & Published: Feb. 2015

Abstract: Endowment is an important and precedent case in Islamic jurisprudence. It has powerful basics in Islamic law. Articles 55 to 91 of Iranian Civil Law are about endowment. Although it is known in Islam, but it has a long-term history in ancient time and various historical periods. It has other names and little differences in other cultures and legal systems. Trust is a similar post like endowment in Common Law and England legal system. It has lots of similarities with Islamic endowment from viewpoint of form and basics. Although there are some differences as well. Followings are the major basics of Islamic endowment: Endowment formula, Settler of endowment, Beneficiary of an endowment, Subject of Endowment. Followings are the major basics of trust: Intension, Subject and beneficiaries. This paper intends firstly to study any previous records and basics of both concepts of endowment and trust in legal systems and then compare both of them with further conclusion.

Keywords: Endowment, Trust, Settler of endowment, Subject of endowment, Guardian, Beneficiary, Trustee

1. Introduction

“*Endowment*” is a legal term just belonging to Islamic jurisprudent and Islamic countries. It has lots of applications in different Islamic societies. Iranian Civil Law has a specific chapter for this legal concept. Although it has not been mentioned in Holy Quran as endowment but it has been repeatedly stated in various narrations and religious statements. It has been mostly named as “Charity”. There is a specific part of endowment and its issues in jurisprudent discussions. (Sarakhsi, 1971, p. 38)

Also it is obvious in most narrations that Prophet Mohammad (PBUH) has lots of recommendations for charities and kindness. They have named it as “Good Memories” and a real factor of good name in this world and lots of gifts in after world. (Sheikh Sadough, 1983, p. 151) Although the term of endowment is originated in Islam, but in case of a brief review of the history it is obvious that it has been known in various nations either prior to Islam and even in non-Islamic countries under

different titles. We have the term of “Trust” with most similar cases in England Common Law system. (Graham, 2005, p. 11) Charity affairs are known from ancient times among all nations and cultures but with different titles and forms. At present there are various charities and alms with different names and forms. Charity people and humanistic groups may allocate a part of their properties for charity affairs and for public benefits and social services. Then they could maintain them in accordance with national or religious traditions and rules for further profits and special consumptions. It has been developed either in previous times and /or present through different tools of culture and civilization. It is one of the major profitable social services especially in cultural and health affairs. As a result, like “Endowment” in Islamic legal system there are some public charities in England Common Law under the title of “Trust” for the same purposes. Although like endowment we have not all charity purposes exactly in trust but it is possible to apply the case for some

commercial and profitable goals. (Graham, 2005, p. 929). It is one of the major unknown cases in this paper. The other case is pay special attention to some similarities in their forms and nature along with some differences as well. As a result, one of the most important cases which should be specified is determination of all these differences as well. Then we should find out that either the term of trust has the same meaning of endowment or not? Finally, any comparative study of both mentioned systems with different cultural origins may cause an improvement in them. The other point is to illustrate that human being needs to have various systems similar to endowment. Therefore there are different terms with special characteristics in different nations. We want to compare these two legal systems in this research along with common and different points.

2. Real meaning of endowment:

Endowment means stoppage. It is also defined as staying and calmness. (Amid dictionary, 1984, p. 1100) Endowment, in Persian language, means stopping and a little pause. Also it means restart and remain standing and to be calm. (Dehkhoda, 1985, p. 5047) As a result, any settled properties as endowment could not be transacted and is remained just for a special goal. Endowment means any settled properties. For instance it has been said that a school or a piece of land have been settled as endowment.

In order to specify the real meaning of endowment as a legal or jurisprudential title we should refer to jurisprudential and legal contents. Endowment has been defined in Civil Law of Iran. It has been extracted from Imamieh jurisprudential and has been followed in most legal issues and discussions by famous jurists. They have defined it as follows:

“Endowment means to devote the same property and further benefits”. (Article 55 of Iranian Civil Law). But there is not an exact common idea about endowment in jurisprudence. There are various definitions for endowment from various jurists. In spite of little similarities in nature and /or form of endowment but there are different cases for meanings, concepts and their conditions. Some of jurists consider it as necessary as possible. But some others consider it as a real condition for applying of endowment.

In contrast, some other do not believe it anymore. Such differences made it difficult to find out a specific definition for endowment. Followings are some of the most important definitions: Author of famous book of “Sharayehol Islam”, Mohaghegh Helli has defined endowment as follows:

“Endowment means a contract for limiting the original subject and releasing its profits. It means applying the property for any purposes mentioned by settler of endowment”. (Sharayehol Islam, 1985, p. 343) Al-Hilli believed that endowment means stopping the property in a special purpose and prevention from any seized in it. (Al-Hilli, 1984, p. 16) Shahid Avval has stated in Lamae that: “Endowment means detention of original and distribute of properties. (Lamae, 1994, p. 57). Therefore jurists of Imamieh believed that endowment means: Detention of the original and promotion of the properties. (Javaherol kalam, 1996, p. 2) Sheikh Toosi has stated that: “Promotion in the way of God”. They have returned back to this narration of Prophet Mohammad (PBUH) that: “Detent the original of properties and release the properties in the way of God”. It means ignoring of ownership of properties by the owner and applying the properties for charity purposes and to find satisfaction of God. Perhaps it is possible to allocate the case for a special level of society and after making the contract, there is not any ownership and just for public profits and social jobs. Of course, endowment in Islamic jurisprudence means allocation of properties and releasing the profits.

3. Real meaning of Trust

Trust means endowment, confidence, investment fund, property on trust and unity of two companies with similar activities for finding the best market. Trust, in fact is a form of unity of conditions in international sales. (Schmidtovo, 1999, p. 97) The real meaning of this term in relation to endowment and charities includes: transfer of movable or immovable properties along with legal governance to a trustee. He/she is responsible for management and profits of the mentioned property in order to reach to specified owner. There is another definition for this term as: “It means some legal conditions through which the properties or assets of an owner would

be transferred to another person in order to be used for beneficiary of one or more persons. Trust is based upon some specific conditions and situations for meeting profits of both parties. (Hayton, 1989, p. 15) Trust has a real meaning in Common Law of U.S.A and England (Church Special Endowment System). There are some differences between both mentioned systems. As we know, Common Law system has no more written laws and regulations. Therefore the courts play an important role in England. Then all presented definitions for legal concepts are made by law makers instead of lawyers. Also there is not a common meaning for trust by law makers. Anti-trust rules at U.S.A are about incorrect competition with exclusivity in those cases in which companies are combined with each other and/or present some incorrect methods for presenting of unreal prices. (Erfani, 2010, p7). English law makers presented various definitions for it due to its different applications and complex nature as follows: Trust means: "Any relation through which the owner maintain its properties in favor of special persons – even it itself- for some goals confirmed by the law. Therefore all obtained profits would be allocated for beneficiaries and/or persons not trustees". (Padifild, 2007, p. 249). Sometimes this application considers the rights of third parties through which the obtained profits of trust would be applied for non-contractual or third parties (CHITTY ON contracts, p. 1222, 2004). There is another definition for trust as follows: "Trust means a fair obligation through which trustee is obliged to apply any properties under its control for benefit of others named as beneficiaries either he/she is one of them". Trust in another definition means: "A monetary and financial relationship with an owner who is responsible to manage any properties for the benefits of others". (Padifield, 1972, p. 4) Some other law makers focus on trust and believe that it has a special meaning completely different from a contract. Although the origin of trust is an obligation as mentioned as contractual obligation but it has a special contractual nature. (David, 1985, p. 346) According to the mentioned definitions, trust is a form of ownership division either its ownership advantages belong to other people or beneficiaries. In other words, there is a double

form of ownership. Trustee is the legal owner and beneficiaries are ordered ones. In fact, it is acceptable to have such a duality in ownership. This is because a trustee is entitled to have legal ownership rights which make him/her to maintain the properties in favor of beneficiaries. One of the fundamental properties of participation in trust is bearing a control right for both parties in common management. (Khazaei, 2013, p.8)

4.Theoretical basics of endowment

Endowment is a social phenomenon with further relationships with geographical environment and cultural orders of a society. Endowment is effective on social system and political/cultural behaviors and solving of public problems. Also it is under the effects of various social organizations and cultural agencies. Therefore all persons in charge of political & social issues may study endowment from their own viewpoints and present an operational definition in compliance with social orders. Today there are three theoretical and thinking viewpoints in sociology school through which we may find out three social phenomena: Functional theory, Anti-oriented and structuralism. Operational theory followers believe that social life is not a random accident because there are some specific patterns for society and social behaviors. Perhaps these applications are positive or negative. This theory has stated that: All elements and social system including schools, families and state have compatibility with each other in normal conditions. Therefore we may define endowment with various applications as follows:

- 1- Performing of religious ceremonies
- 2- Mental and sentimental satisfaction of settler of endowment
- 3- Assisting poor people
- 4- More developments and progress

Since the endowment is one of the basic behaviors based upon religion and as we know there are lots of applications in a religion, therefor it is useful for more social correlations and better meaning for social life and controls. Endowment means a religious support including tax, one fifth of properties and endowment with some similarities. It is a part of properties and assets allocated for social affairs. But

endowment is a personal and optional behavior. Perhaps the settler of endowment is entitled to have complete controls on properties but tax and one fifth of properties are obligatory. Militant theory is about some social procedures, contrasts, competitions and social unfair conditions. They believe that societies are always subject to some changes. Contrast is the permanent property of them. They believe that two groups are obvious in a society: Rich and Poor people. Endowment is applicable for removing any social unfair conditions and prepare them for further economic justice. Endowment is an important step for performing of economic / social justice. There are lots of samples in history for rise of most heroes and politics resulted from endowment and leading of society towards justice. This school was established in 1920 by an England humanist named as "Radcliff Brown". It means a collection of connected parts with further relations. If we study this idea from viewpoint of endowment, we should study all parts as considered by the Organization of Endowment Affairs. Endowment Organization is a system for meeting administrative and humanistic affairs. Such an attitude may study any problems of endowment organization and other social organizations and manner of management of endowed properties.

5. Theoretical basics of trust

Perhaps we may summarize any reasons for applying of charity affairs at contemporary time of West as follows:

- A- One of the major effects of industrial revolution is great accumulation of wealth in the hands of limited number of businessmen. They were collected from any efforts of workers. Therefore that was led to claims of people. Then gradually charity institutes started to be established. After World War I and start of Communism Revolution at Russia, the situation was unsuitable for businessmen and industries owners and political people. They had no chance just to apply tens of millions of their capital for charity affairs and servicing poor people.

- B- There were heavy taxes at industrial West for commercial and industrial institutes. But charity institutes were exempted for any taxes. Such a tax exemption made most of businessmen to establish more and more charity institutes.
- C- Rise of U.S.A as a superpower and also its role after World War II and then start of Cold War between both East & West superpowers and any efforts of U.S.A and Russia for promotion of their influence were resulted in development of charity affairs throughout the world besides some other political and military functions.

By the way, the major goal of Western Endowment Systems was specified under the title of "Charity". It means performing any jobs just for charity purposes. It is defined as briefly as possible as below:

"Any functions for reducing of pains and betterment of poor people conditions and submission of major social services". In spite of stating some political goals and personal profits it is impossible to ignore that most of Western people make charity jobs just for humanistic motivations. It is something that is obvious in further invitations of charity institutes either through internet and virtual space for this purpose. Sometimes it has been stated as Exclusive Trade. (Richards, 2002, p. 274) Followings are some of the England rules related to Trust in the fields of beneficiaries and regulation of any relationships between trust basics:

- 1- Trustee Act 1925
- 2- Trustee Investments Act 1961
- 3- Recognition of Trusts Act 1987
- 4- Financial Services & Markets Act 2000
- 5- Trustee Act 2000
- 6- Pensions Act 1995 & 2004
- 7- Charities Act 2011

6. Comparing the nature of trust & endowment

As it was mentioned before, trust has a special contractual nature. This is because the owner

makes a trust from one side and also no more people are involved in its presentation on the other. Although it is necessary to have a trustee and its acceptance, but in some cases it is not necessary to have any trustee at the time of making any trusts. (Padifiled, 2007, p. 249). Meanwhile according to the trust, any properties subject to trust would be submitted to trustee along with lots of authorities like an owner. It is an endowment contract according to the Iranian Civil Law. Therefore in contrast with a trust, endowment is a real contract and an accepting party. Secondly the other party of endowment is beneficiary not a guardian or namely a trustee. Therefore in case trust is a form of contract, there are some differences between these two terms. The other point is subject of endowment in special endowment. Therefore it should be accepted by a party while the ownership would be divided in trust. As a result, the legal owner of properties is trustee and real owner of which is beneficiary. But trustee just accepts it not beneficiary. In other words, beneficiary has no more effects on the role of trust. The other difference of endowment and trust is that in endowment we have allocation of real properties and free from any transfer along with further benefits. But in trust, there is not any allocation of real objects but may cause a condition for trusted properties in order to be used in its special purposes. Then all benefits would be transferred to relevant people. In other words, the real benefit of endowment is more profits but with no more limitations. Trustee is entitled to transfer the subject of trust upon the orders of owner or the law and /or change the same into another properties. But it is necessary to respect relevant rules and regulations of trust 1999 as well. (MCKENRICK, 2000, P. 140)

7. Comparison of different types of trust and endowment

The real goal of both systems mentioned in this research may have some common items with each other. It means that both trust and endowment are for public welfare of a group of society and/or charity affairs. It is accompanied with remaining of the original capital (in trust) and /or real properties (in endowment) along with further benefits for beneficiaries or subject of endowment. Perhaps it may applied for

relatives or children of them. Therefore public trust and public endowment are necessary for the first group and also special trust or special endowment for second group as well.

But there are some differences between these two systems as follows:

There is a clear procedure in endowment either public or specific. This means that settler of endowment or subject of it accept to create a form of endowment. But in public trust it should be established as clearly as possible. Therefore in special trust we have clear form of establishment and/or additional or imposed forms.

The second difference is that persons of endowment are limited and free from any attention to their economic situation and social position. But public trust means any trusts due to poverty of some limited and specific number of people. By the way trustee is the special condition of correctness of endowment and trust. (CHITTY ON contracts, 2004, p. 21) Special trust is different from public trust because the latter is subject to exemption and/or special tax discounts. Special trust has not such an exemption but in public endowment it is not necessary to pay any registration and/or legal costs at courts while it is not the case for special endowment. Furthermore, the beneficiary in special trust should be real and specific but in public trust the society is the beneficiary. The courts are obliged to specify any application of its public usages. One of the major factors in endowment is the presence of an object either in special or public endowment without which there is not any form of endowment. Temporary condition is another conditions of public trust. Public trust could be made with an unlimited or temporary periods. But as it was mentioned before, permanent period is the special characteristic of endowment while the temporary endowment is named as imprisoned by jurists. Of course the special endowment in some Arabic countries like Lebanon is limited to benefits of maximum two levels without any permissions for more than two social levels. Special trust from viewpoint of performance should be applied by the beneficiaries in order to be subject of relevant rights. But in public trust,

the official is responsible for required functions. For instance in case of any failure of trustee of its obligations, in special trust the beneficiary is obliged to refer to the court in order to make it to do its obligations. But in public trust, it is the duty of attorney general or the governor. Both the subject of endowment and Endowment Organization are entitled to rise any claims for their benefits in special / public endowment. Department of Endowments is obliged to have required supervision. On the other hand, the legal and auditing branch of department is obliged to make required supervision for dismissal or prevention of any interfere of trustee. All profits belong to the owner in special trust but if the purpose is changes, the profits would be applied for the ideas of the owner. If impossible, the court will consume the same for other charities. But in special endowment if the purpose is stopped the profits would be applied for the benefit of poor people and/or returned back to its hires. In public endowment all profits would be applied for any purposes which are close to the idea of the settler of endowment. Endowment and trust belong to different cultural origins and legal systems. Such a basic differences may cause some fundamental differences in goals, basics and orders issued by both mentioned systems.

Although making good jobs and humanistic functions are acceptable in Islam, but it is better to make any endowments just for making close relationship with God. But as it was mentioned before, trust is basically based upon profitability goals and just for maintenance of personal wealth. Although some other dimensions were added to it. Although in a general form and with some details any management and goals of both above-mentioned systems are similar, but after a comparative study of them we may conclude that trust has some fundamental differences with endowment even with some similarities in nature, subject and authorities of trustee as the manager. With such characteristics of endowment, which are exclusively in Islamic jurisprudence, either before or after Islam and even among other nations and civilizations with similar applications but none of them are exact definition of endowment. Today due to some differences in social conditions and public viewpoints about endowment besides some

misuses of endowment officials and also some interferes and performing of opposite laws there are some damages for any endowments and subjects of it. As a result, the real goal of endowment has been ignored and the obtained incomes are applied in any way in contrast with the real purposes of settles of it. Law making power, Guidance Council, Executive power and Charity Affairs Organization should pay enough attention at the time of law making and approving and performing any laws in order to perform the same in compliance with Islamic orders in order to prevent from any legal damages. Furthermore, in case of any increase in supervision and management of incomes and also profitability of endowments, people will find out real role and importance of endowment and will try to include it in their own program. Upgrading of endowments means better usages of endowed resources in compliance with the motivations of settles and finding optimized goals. Any promotion of endowment in country is possible just by increasing the output and better usages of humanistic and materialistic talents.

References

1. Schmidtovo, Klaum, International Trade Laws, translated by Behrouz Akhlaghi, Farhad , Imam, Seyed Mohammad Asbaghi Namini, Mahmoud Bagheri, Amir Hussein Tayebi Fard and Ismaeil Hemmat Doust, 1st edition, Samt press, 1st version, 1999
2. Khazaei, Hussein, International Trade Laws, Trade participation, 6th volume, Jangal Press, Javdaneh, 2nd edition, 2013
3. David, Rene, Great contemporary legal systems, translated by Dr. Hassan Safaei, Mohammad Ashuri & Ezatollah Araghchi, University Press Center, 1985
4. Dekhoda Ali Akbar, Persian Dictionary, Tehran University Press, 2nd volume, 1985
5. Sarakhsi, Almabsout, 12th volume, Darol Marefa, 1971
6. Sheikh Sadough, Mohammad Ibn Ali, Khesal, Mohaghegh & Ghaffari, Ali Akbar, 1st volume, Teachers Group, Qom, 1st edition, 1983

7. Saheb Javaher, Mohammad Hassan Ibn Bagher, Javaherol Kalam, Darol Kotob Islamieh press, 28th volume, Beirut, 1996
8. Erfani, Mahmoud, International Trade Laws, 5th edition, Jangal press, Javdaneh, 1st edition, 2010
9. Al-Hilli, Tazkerah, Qom press, Alalam Islami Maktab, 2nd edition, 1984
10. Amid, Hassan, Persian Amid Dictionary, Amir Kabir press, 2nd edition, 1984
11. Lamaeh, Shahid Aval, Mohammad Ibn Makki, Qom, Yalda press, Hekmat publication, 1994
12. Al-Hilli, Sharayeol Islam, Tehran University Press, 1st edition, 4th volume, 1985
13. CHITTY ON contracts, First supplement to the Twenty- Ninth Edition, Thomson sweet and Maxwell, 2004.
14. CHITTY ON contracts, VOLUME II, specific contracts, THOMSON sweet and Maxwell, 2004.
15. D. Barker, colin F. padfield, Law Made simple, Routledge, 2007
16. Graham, Moffat, Trusts law, Cambridge university press, 2005.
17. Hayton, D. J, The law of Trusts, sweet and Maxwell, London, 1989.
18. MCKENDRICK, Ewan, contract law, Fourth Edition, Palgrave Publication Company, 2000.
19. RICHARDS, PAUL, Law of contract, Pearson Education Limited, 2002.
20. R.H.Mandseley and E.H,Burn, Trust and Trustees, Butterworts, London, 1978.