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THE MOROCCAN WAQF AND THE COMMON-LAW TRUST: A COMPARATIVE STUDY

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ABSTRACT

Etymologically, the term trust originates from Latin; it means "care". Charitable trusts and *waqfs* are methods of facilitating the intergenerational management of family wealth. Both are thought of as estate-planning vehicles, ensuring that assets of the testate go to certain individuals or organizations. However, whereas the trust has expanded its scope to cover the economic field, the *waqf* in Morocco is still considered a religious exercise. While there are shared features between the Moroccan *waqf* and the trust, they are conceptually and practically different in many aspects, most importantly in their perception of ownership and their contrasting stances regarding endowment duration. Despite the importance of the

trust. The comparative legal methodology has been adopted to study the spirit of the different legal systems. The comparison has revealed the existence of undeniable similarities in terms of the management of endowments, yet the differences are numerous, especially with regard to ownership structure, juristic personality, and perpetuity rules, among others.

Keywords: Charity, common law trust, Morocco, waqf, endowment.

INTRODUCTION

Charity is an act of generosity toward others. The word trust originates from Latin; it means "care" (Abdulmenem, 2017). Charitable trusts and *waqfs* are methods of facilitating the intergenerational management of family wealth (Schoenblum, 1999). Both are thought of as estate-planning vehicles (Scott, 1992), ensuring that those assets go to certain individuals or organizations.[1]

Originally, the concept of *waqf* was an Islamic institution (Khalfoune, 2005). The term *waqf*, which is derived from the Arabic root *waqqafa*, means "causing a thing to stop and stand still" (Çizakça, 1998). The literal meaning of the word refers to "detention" (Solanki, 2019). Ahmed (2004) defined the *waqf* as an act of giving away an asset that had the feature of perpetuity on a permanent basis. Solanki (2019) held that "When a Waqf is created, the property is detained or, is 'tied up' forever and thereafter becomes non-transferable".

Trust has been viewed as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." (Spilios, 2019). The origins of the common law trust, or "use," have been a subject of debate among legal scholars (Berroho, 2012). According to

[1] Spilios, No Good Deed Goes Unpunished: How the New Hampshire Probate Court Has Strengthened the Power of the Attorney General in Charitable Trust Suits, 17 U.N.H. L. Rev. 381(2019).

Holdsworth (2012),[2] the term "use" (ad opus) was derived originally from German law. Jeromos[3] argued that "use" originated from the French words *os* or *oes*. The word "use" has generally been observed in religious and church contexts (Sândor, 2016).

This regard, the Supreme Court of Appeal in *Land and Agricultural Bank of South Africa v. Parker and Others* stated the following: "It may be said . . . that the common law trust, and the trust-like institutions of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead" (Albertus, 2016).

While the *waqf* and the common law trust share many common features, they remain conceptually and practically different, mainly with regard to their conception of ownership and their different views concerning endowment duration. Furthermore, the features of the common law trust have been largely inspired by the common law system, which differed from the civil law to which the Moroccan legal system belonged (Hansmann & Mattei, 1998). Verrucoli (1985) argued that the civil law countries in Europe, for example, have strongly resisted the private trust. Their legal systems offer a relatively close substitute for the charitable trust in the form of the civil law foundation. Indeed, while both the Moroccan *waqf* and the common law trust share many commonalities, they belong to different legal systems.

[2] "The term 'use' is a curious one; it has, if I may say so, mistaken its own origin. You may think that this is the Latin opus from remote times—in the seventh and eighth centuries in barbarous or vulgar Latin you find 'as opus' for 'on his behalf.' It is so in Lombard and French legal documents. In old French this becomes al oes, uses. In English mouth this becomes confused with 'use'"; see: Holdsworth, *A History of English Law, Vol. 3 (Classic Reprint)* (Vol. 3). Forgotten Books. p. 411.

[3] St. Jerome's importance lies in the facts: (1) That he was the author of the Vulgate Translation of the Bible into Latin, (2) That he bore the chief part in introducing the ascetic life into Western Europe, (3) That his writings more than those of any of the Fathers bring before us the general as well as the ecclesiastical life of his time . . . the last age of the old Greco-Roman civilization, the beginning of an altered world. It included the reigns of Julian (361–63), Valens (364–78), Valentinian (364–75), Gratian (375–83), Theodosius (379–95) and his sons, the definitive establishment of orthodox Christianity in the Empire, and the sack of Rome by Alaric (410)." For further details, see: NPNF2-06. Jerome: The Principal Works of St. Jerome. Retrieved from: http://www.ccel.org/ccel/schaff/npnf206.html on 13th January 2021.

It is worth mentioning that the common law trust does not exist in Morocco. Therefore, and in light of the divergence characterizing the Moroccan *waqf* and the common law trust, this paper explores the relevance of the common law trust mechanisms to the Moroccan context, particularly with respect to public order and the Maliki rite. It is undeniable that reconciliation of the Moroccan *waqf* and the common law trust is difficult, but we believe that it is not impossible. This difficulty originates from discrepancies in the perception of the notion of property in both systems. While the civil system tended to take a "conceptual approach" to property, common law has adopted a rather "anti-conceptual" scheme, which has facilitated the growth and development of the common law trust (Matthews, 2013).

One interesting question can be raised in this regard. From the perspective of the Moroccan civil law, will the adoption of the legal structure of the common law trust constitute a significant reform, as a device for intra-family wealth transfers, or will it bring little value to the existing legal doctrine?

This study examines the legal framework of two institutions. The research employs a comparative approach to analyze a possible interaction between the legal structure of the Moroccan *waqf* and the common law trust. The essence of comparison here is to provide a list of recommendations for the enhancement of the effectiveness of the Moroccan *waqf*. Hence, exploring the functional role of both institutions may help us understand a conceptual approach that may lead the Moroccan legal system to adopt the common law trust structure.

RESEARCH METHOD

The main objective of a comparative methodology in legal research is to reach a high level of abstraction by examining differences and similarities of two legal systems in order to identify solutions to the legal issue under study (Paris, 2016). However, it is not easy to determine a comparative method. Kamba (1974) has argued that "comparative law still lacks a clearly formulated and widely accepted theoretical framework within which specific comparative legal studies and research may be undertaken in a meaningful and effective manner." In the same vein, researcher have pointed out that there was

no clear definition of what a comparative law method was (Zweigert & Kötz, 1998; ÖRücü & Nelken, 2007). In an attempt to solve this issue, Samuel (2014) provided a "methodological road map" for the research student in comparative law. He has defined the comparative theory as "a process in which the comparatist takes several objects in order to study them within a 'scientific' framework in which the object being studied is viewed in terms of the 'other' [and] it is the contrast between the domestic and the 'other' that generates knowledge progression" (Samuel, 2014).

Only a well-developed research strategy could help researchers in comparative law explain and discuss the investigated issues systematically (Paris, 2016). In other words, research should be conducted in conformity with the defined criteria provided in the comparative law literature (Paris, 2016).

In light of the foregoing, the present study has opted for the comparative legal methodology to compare and contrast the Moroccan *waqf* legal system with the common law trust system. The aim is to provide a critical analysis that will enhance knowledge about the *waqf* legislation in Morocco in comparison to other institutions, namely the charitable trust. Moreover, the present paper is an attempt to promote *waqf* legislation in Morocco, given that the two systems belong to two distinct schools (common law and civil law). The confrontation of the two different systems can only lead to what Markesinis (2000) has called "intellectual interaction and borrowings."

HISTORICAL FACTS OF THE *WAQF* AND TRUST

The institution of the *waqf* has been attributed to the prophet Muhammad (PBUH). From the earliest part of Islamic history in the seventh century, the prophet supposedly directed a caliph, Farouk Omar Ibn al-Khattab, to make his property inalienable so that the income could forever be distributed for charity (Fyzee, 1979). Gaudiosi (1988) pointed out that "Within the first three centuries of Islam (the seventh, eighth, and ninth centuries A.D), the Muslim jurists developed the legal institution known as the Waqf, an unincorporated charitable trust."

These foundations are called *awqafs* in major Islamic states. The terms *boniyad* and *hobous* are used in Iran and North African countries, respectively (Çizakça, 1998), to refer to the act of dispossessing property for charitable purposes (Schoenblum, 1999). According to Harasani (2015), the *waqf* structure has been adopted for wealth planning in Islamic law.

Zilfi and Yediyildiz (1990) has considered the *waqf* as an institution that had a limited expansion in the eighth century and that played no formal role in the original Islamic economic system in the first Islamic community of Western Arabia. This was mainly because the state could provide public goods, which in other words, meant the community was relatively small and homogeneous enough to make their basic needs apparent and a centralized delivery system efficient. The expansion of the *waqf* came with a larger and more complex society. Zilfi and Yediyildiz (1991) have suggested that the proliferation of *awqafs* accompanied the establishment and development of successive Muslim-ruled states. After the initial three centuries, a complex body of law emerged to oversee the creation and administration of the *waqf* foundations (Gaudiosi, 1988).

The *waqf* foundation was further considered a financial resource to promote and maintain magnificent architectural works, such as mosques, schools, and hospitals, and to support the myriad services that were of crucial importance to Islamic societies. According to Khan (2015), the Islamic *waqf* has played a positive supportive and remedial role in the reduction of poverty throughout history. In other words, the evolution of Islamic civilization remains incomprehensible without taking into account the position of the *waqf*, in its support of the different sectors of the local economy, and how it has featured in the social policies adopted by Islamic states (Suleiman, 2016).

In the same context, the charitable trust has been legally traceable to the Islamic *waqf* (Gaudiosi, 1988; Schoenblum, 1999). According to Berroho (2012), the *waqf* institution has influenced the development of the common law trust. Contrary to this position, Gaudiosi (1988) supported the claim that the theory of the Roman-Germanic law has had great influence on the common law trust.

The charitable trust appeared for the first time in England. According to Spilios (2019), “One of the practical reasons why the Common

law began to form charitable trusts was due to the ongoing strife between the government and the Church regarding land ownership." The development of the use was due to the necessity of payment of feudal dues that were attached to the holders of legal titles of land (Smith, 1966). Thus, the emergence of the use was due to the structure of the feudal ownership system, which prohibited the alienation of properties (Sândor, 2016).

The first text that enacted the use of the charitable trust in England was issued in 1601 (Spilios, 2019). It clarified the status of the users. In 1844, the United States Supreme Court acknowledged the charitable trust for the first time.[4] The court held that the trust case at hand was valid as a charitable trust under the common law of Pennsylvania. Therefore, there was no legal objection to a corporation taking possession of a trust not strictly within the scope of the expressed purposes of its institution, but collateral to them. The court's decision reads as follows: "It has been decided by the Supreme Court of Pennsylvania, that the conservative principles of the statute of Elizabeth have been in force in Pennsylvania by common usage and constitutional recognition." (Vile, 2009).

In the next section, the legal structures of both the Moroccan *waqf* and common law trust ownership will be examined.

EXPLORING *WAQF* AND COMMON-LAW TRUST

Ownership Legal Structures

In this section, the legal framework of the Moroccan *waqf* will be discussed first, and second, the focus will be on the legal structure of the common law trust.

Waqf Ownership Legal Structure

Although the Quran does not refer directly to the institution of the *waqf*, its rules derive specifically from Sharia'a law.[5] Abbasi (2021)

[4] Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127,197 (1844):

[5] Sharia'a refers to the religious law of Islam. For a discussion of the sources of Sharia'a, see William F. Fratcher, Trust, in 6 International Encyclopaedia of Comparative Law ch. 11, § 132 (1973).

was of the view that "the *waqf* is described as the most important institution, which provided the foundation for Islamic civilization, as it was interwoven with the entire religious life and the social economy of Muslims."

As part of Islamic law, *waqf* regulations were developed in the third century Hijra. According to these regulations, "waqf (endowment) is established by a legal deed that names the owner of the endowed property, the substance of the endowment (ayn), and the beneficiary (mawquf ʿalayhi) of its income (manfaa)" (Khan, 2015). Similarly, Abbasi (2012) has emphasized that *waqf* "refers to an institutional arrangement whereby the founder endows his property in favor of some particular persons or objects. Such property is perpetually reserved for-the stated objectives and cannot be alienated by inheritance, sale, gift or otherwise."

The Islamic jurisprudence has been considered an important source where jurists had to interpret and explain primary sources by adopting methods and rules such as *ijtihad*,[6] which referred to the interpretation of a text in such a way that its legal implications became apparent, or *qiyas*,[7] a comparative method concerned with deriving a particular ruling from general statements (Suleiman, 2016).

Roff (2004) has provided the following clear description of Islamic jurisprudence: "Far from being an immutable set of rules, Islamic jurisprudence (*Fiqh*) is best characterized as a human effort to resolve disputes by drawing on scripture, logic, the public interest, local custom, and the consensus of the community." In the same vein,

[6] Literally, the term *ijtihad* means "exertion" or "self-endeavor." In the legal context, *ijtihad* refers to "the striving of the jurist to a point of mental exhaustion to derive principles and rules of law from evidence found in the sacred texts or sources." For further detail, see Codd, R. A. (1999:115). A critical analysis of the role of Ijtihad in legal reforms in the Muslim world. Arab LQ, 14, 112.

[7] The Arabic term *qiyas* (سايق), in its legal sense, can refer, in various contexts, to any of three legal concepts—judicial analogy, general deduction, or syllogism. For further details, see Joseph Schacht, The Origins of Muhammadan Jurisprudence (Oxford: Clarendon Press, 1950), pp. 99-100./ Legal *qiyas* is, at times, considered the archetype of all forms of legal argumentation. See Wael B. Hallaq (1997: 83), A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl Al-Fiqh (Cambridge, New York: Cambridge University Press.

the Moroccan *waqf* law code is the result of many years of legal thought and experience and has been created and developed by legal specialists. It represents a foundational understanding of the Maliki school and its implications with respect to the *waqf*.

In Islamic law, the protection of property is sacred, and thus, the law has placed great emphasis on protecting private ownership (Harasani, 2015). The Maliki doctrine was concerned with the validity of ownership through legal possession of all types of properties, including the *waqf* (al Qattan, 1985). According to a decision of the Moroccan Supreme Court, the possession supported by documents (*hawala habsiya*)[8] held by the administration constituted strong evidence of the validity of the *waqf*.[9]

The Moudawana was inspired by the Maliki legal school.[10] Hence, it contained various rules, which interpreted and explained the Maliki approach pertaining to the foundation of the *waqf*. As Gaudiosi (1988) has emphatically pointed out "these rules were developed through analogical reasoning by Muslim jurists, specialists in Islamic jurisprudence- the preeminent Islamic science." Three types of *waqf* exist: the public, the familial, and the shared endowments.

The Moroccan law of *waqf* was compiled from the diaspora of the legislative texts applicable to the endowment (*waqf*). The actual law has provided solutions to legal issues. The text uses, as was mentioned earlier, some legal terms, such as *qiyas* and *ijtihad*, that have been considered important sources for the determination of specific problems (Abbasi, 2012).
According to Article 1 of the Moudawana, the declaration of a *waqf* must be done in writing. The law (Article 3) lists the four elements of a valid *waqf*. First, the settlor (*waqif*) must be mature and of sound mind. They also must be a free person and qualified to donate their properties and willingly give away their belongings. In this regard, the

[8] A document held by the Moroccan administration of *awqaf* (*Nidharat al awaqaf*) in which *waqf* endowments are registered and cited.

[9] Court Decision n° 3519, in 07/10/2009; case n 3556/1/1/2008; Ministry of *waqf* and Islamic Affairs against Ministry of interior.

[10] It is important to note that in Moroccan law, no normative distinction is made between law and the Malikite rite, which is applicable in many issues related to private real property, family status, *waqfs*, and other issues; both are of equal normative weight.

Moudawana requires that the *waqif* have full legal capacity (Article 5). The donator must have unrestricted ownership of the property declared a *waqf*. This claim was supported by the Moroccan Supreme Court in 2006, which affirmed that the deed constituting the *waqf* must be tangible and immobile and yield income (Sbihi, 2009). Second, the beneficiary (*mawquf alaihi*) can be specified by the *waqif*, be it for individual or general charity to the Muslim community. Third, the endowment must be an object that can be donated. Lastly, the declaration or recitation of the *waqf* must consist of words easily understood and writing that specifies whether it is a general *waqf*, specific *waqf*, or family *waqf* (Ibrahim, 2013).

The *waqf* instrument or contract, *akad tahbis*,[11] is a *sine qua non* for the validity of the endowment. Articles 24 and 25 of the Moroccan law states that the endowment is governed by two conditions: first, the act or declaration must be done in the presence of two notaries (*adls*).[12] Second, possession, which refers to the full control or occupancy of a thing, often land, by the beneficiary.

Concerning the first condition, the documents must contain all the information related to the property, including its land deed or certificate, designation, name, characteristics, area, value, location, and limits. The second condition, possession, is of two types: effective and legal. In the case of effective possession, the beneficiary must take possession (*al hawz*)[13] of the property. In the same vein, the Moroccan Supreme Court pronounced in 2007 a decision stating that "the manner by which the *waqf* is created requires that the founder be the owner of the property, and the beneficiary becomes effectively possessor upon acceptance. Legal possession, on the other hand, involves the registration of the *waqf* instrument or contract."[14] The Moroccan Supreme Court held in decision No. 555 (2003) that the *waqf* deed registration in land registry might substitute the necessity

[11] The deed establishing endowment.

[12] An officer of the court appointed to the judge in charge of notarial affairs. They are in charge of graft and notary and responsible for recording the statements and judgments.

[13] Possession and effective control of the endowment.

[14] Court Decision No 333, issued in 31/01/2007; case No 1575/1/3/2004; Ministry of *Waqf* and Islamic Affairs against el Ouazzani.

of the *nadhir*'s[15] taking possession.[16] In other words, once the *waqf* deed is created by the *waqif* and entered in the land registry, it is considered valid by the Moroccan *waqf* code. The condition of the recipient taking possession of the property is not a requirement. Hence, the *waqf* is valid.

Similarly, the declaration or recitation (*samaa al fashi*)[17] of the *waqf* can be taken as a unique element for a valid *waqf*. As far as the Moroccan Supreme Court is concerned, the judges consider that "the Maliki school of law did allow the creation of a *waqf* by simple declaration or recite (*samaa al fashi*)."[18] This statement is highly revealing, as it provides a better understanding of how Moroccan judges act in the event of a dispute contesting a *waqf*. Hence, a *waqf* can be valid even if the above-mentioned conditions are not all met.

The Moudawana allows the creation of a *waqf* mentioned in the *waqf* transfer document (*hawala habsiya*).[19] In this context, the Moroccan Supreme Court affirmed in a 2008 judgment that the *hawala habsiya* constituted a binding force of the *waqf*.[20] Article 51 of the Moudawana has determined that three principles governed the *waqf* in Moroccan law. According to this article, the *waqf* was irrevocable, perpetual, and inalienable. However, perpetuity and irrevocability did exist. First, the Maliki school of law did allow the creation of a *waqf* as "limited as to time or as to a life or series of lives," at the expiration of which full ownership of the property reverted to the founder or the founder's heirs. This, however, was the exception to the generally accepted rule of perpetuity (Cattan, 1955). Second, once the property has been declared to be a *waqf*, the *waqif* had no right to reclaim the property.[21] The *waqif* was, therefore, bound by the *waqf* document.

15 A person who is in charge of managing the *waqf* endowment.

16 Court Decision No 555, issued in 28/12/2003; case No 526/2/2/95; published in; Rev justice and law n° 149 (31) p 259.

17 The testimony or hearing.

18 Court decision No 848, issued in 17/3/2004; case No 2275/1/1/2003; Ministry of *waqf* and Islamic Affairs against Al hilali Ahmed.

19 Transfer of endowments.

20 Court Decision No 485, issued in 22/05/2008; case No 36/07/2008; Ministry of Waqf and Islamic Affairs against Abdelkader ben Jilali.

21 Article 37 of the Moroccan *waqf* law stipulates that the *waqf* can be revocable in two cases: first, if the beneficiary is to exist in the future, and second, if the *waqf* bill mentions this possibility.

Moreover, Moroccan courts have held that inalienability was a condition of the validity of the *waqf*. For example, in case No. 11/51 (2011), the Court of First Instance in the city of Ben Slimane decided that the contract of transferring the *waqf* was null and void pursuant to Article 75 of the Moroccan law. However, some exceptions to the rule of inalienability have been permitted. The law allows the *nadhir* (*mutawalli* or trustee)[22] to dispose of the *waqf* property in case it is not valuable.

The Legal Structure and Application of the Common-Law Trust

The development of the common law trust in England can be traced to several periods. Spilios (2019) held the view that "one of the practical reasons why the English began to form charitable trusts was due to the ongoing strife between the government and the Church regarding land ownership." The expansion of the use was due to the necessity of the payment of feudal charges that were imposed on the holders of legal titles to land (Smith, 1966). Thus, the emergence of the use was attributable to the structure of the feudal ownership system, which prohibited the alienation of properties (Sândor, 2016).

Similarly, Hofri-Winogradow (2015) has argued that the traditional approach adopted by the old common law legal system considered the common law trust as,

> An equitable obligation imposed on the owner of an asset to hold it in a fiduciary capacity, using it for the benefit of another or a permitted purpose, the asset being immune from the owner's personal creditors and the beneficiary enjoying both rights in the asset and personal rights against the trustee (p.3).

The legal structure of the use has been based on both fear and fraud.[23]

[22] The person responsible for the *waqf* endowment. They are the head of the administrative entity that is responsible for endowment in a particular region of Morocco.

[23] ". . . two inventors of uses, fear and fraud; fear in times of troubles and civil wars to save their inheritances from being forfeited; and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, etc." Sir Edward Coke in Chudleigh's case (1954) 1 Co Rep 113 b at 121 b. Similarly: "English jurists centuries ago suggested that the parents of the trust were fraud and fear and that the court of conscience was its nurse" (Attorney-General v Sands, Hardres 488, 491 [1669]).

According to Sândor (2016), the use—based on the English feudal estate—was the medieval antecedent to the common law trust. The tenant of the land had the right to possess the land (seisin), and he enjoyed a certain degree of protection from his lord; as consideration, he was obliged to provide services to the lord. Thus, the King was considered legally the owner of the land, while the tenant-in-chief was given rights to enjoy property (Sândor, 2016).

The crucial period for the common law trust was marked by the emergence of the Statute of Uses.[24] According to Spilios (2019), the Statute of Charitable Uses was one of the first texts that enacted the use of the charitable trust in England and clarified the status of the users. In 1844, the United States Supreme Court acknowledged the charitable trust for the first time.

The common law divides the trust into two categories: private trusts and charitable trusts. The Supreme Court defines charitable trust as a fiduciary relation with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.[25]

Charitable purposes include, but are not limited to, "the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, [and] governmental or municipal purposes."[26] Other purposes that are "beneficial to the community" also suffice.[27]

In every trust, three parties are involved. The settlor transfers the property to the trustee. The latter is charged to administer the property for the benefit of the beneficiary. These three roles may be played by more than one person. Also, "the same person can play more than one role" (Hansmann & Mattei, 1998). Accordingly, the settlor and the trustee can be the same person.

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24 "The primary purpose of the Statute of Charitable Uses was to provide a mechanism to make trustees accountable for the appropriate administration of charitable assets." Fishman, James, Encouraging Charity in a Time of Crisis: The Poor Laws and the Statute of Charitable Uses of 1601 (2005). Available at SSRN: https://ssrn.com/abstract=868394 or http://dx.doi.org/10.2139/ssrn.868394

25 Restatement (Second) of Trusts § 348 (Am. Law Inst. 1959).

26 *Id. §* 368.

27 *Id.*

The Anglo-American trust system combines both rights and remedies. In other words, the trustee has legal ownership, while the recipient (beneficiary) has equitable ownership. This is what some doctrines has called the "dual common law/equity system" (Hansmann & Mattei, 1998). According to Smith (2012), the common law trust reflected a hybrid property mechanism. In other words, a trust "is an obligational relationship with respect to property that has been allowed to affect third parties and has, therefore" (Smith, 2012).

The subdivision of property rights in the Anglo-American system however, creates conceptual difficulties. On the one hand, there might be conflictual interests, as the beneficiaries, who were considered property holders, might claim their interest against everybody (Hansmann & Mattei, 1998). On the other hand, since the trustee held a legal title to the trust property, his transfers of property were not reduced by the existence of the trust (Graziadei & Rudden, 1992). In the same vein, (Hansmann & Mattei 1998) it was pointed out that "when the trustee exchanged the trust property for other property, the beneficiary's interest and the trustee's duties attached to the new property received in the exchange." In other words, the trustee was engaged to manage the trust endowment separately from their own (Sândor, 2016). Sândor (2016) has described this legal relationship as "split ownership" because both the trustee and the beneficiary would have some kind of ownership right to the same property at the same time. Thus, the beneficiaries' property interests would continue to exist and remain attached to the property, and the transferee was considered to hold the estate and all its incomes in trusts (Hansmann & Mattei, 1998).

In the civilian legal system, the common law trust structure has not been adopted directly. The civilian legal system has not fully encompassed the trust as a source of obligation (Mattei, 1998). This was due particularly to the notion of property unity rights,[28] which was mostly rejected by trust doctrine (Hansmann & Mattei, 1998). This approach has influenced the Moroccan legal system, and thus, one finds that Section 9 of the Moroccan real rights code has firmly limited the divided interests in property to a small number of well-defined types. As a result, the trust legal structure cannot be considered a viable arrangement, as it fails to fit within the forms of divided property recognized by the Moroccan real rights code.

[28] Hansmann & Mattei (1998) pointed out that "during the French revolution, the division of the right property was considered as a characteristic of feudalism".

However, civil law provides examples that can serve as substitutes to the trust, such as the *waqf* in Islamic countries and the *fiducie* in the French legal system. The latter is a contract between the transferor and the manager by which the settlor transfers the property to the trustee, "who holds it not as his or her ordinary property, but rather in order to fulfil a particular purpose, for the benefit of the settlor, the trustee or a third party" (Barrière, 2011). Since civil law does not permit the division of property rights, the beneficiary does not have classical property rights. According to Hansmann and Mattei (1998), "the enforcement of the transfer's contract with the manager is the only means to exert control over the Managed Property that is available to either the Transferor or the Recipient."

Another way to apply trust structure in civil law that can help to not subdivide the property is to personify the trust. Emerich (2013) has stressed the point that the implementation of the trust in the civil law system would be possible by distinguishing the trustee's interests from those of the beneficiaries. The latter's interests would not be ignored, but the beneficiaries would remain as relegated third parties in the complicated relationship between the trust and the trustee, equal to shareholders in societies (Smith, 2012).

The *fiducie* as a system should not be neglected in the civilian context. According to Emrich (2013), the French *fiducie* is "a purposive ownership, or to be more precise, a modality of ownership". Marini (2007) points out that the trustee is not free to act without restrictions since he must carry out acts in line with the purpose of the *fiducie*; that is to say, the purpose set by the settlor (p: 1346). As a result, the *fiducie* is not a source of wealth for the trustee, who must adhere to the terms of the trust deed and act in the interest of a third person rather than serve their own interests (Grimaldi, 1991).

EXPLORING TENSIONS BETWEEN THE MOROCCAN *WAQF* AND TRUST LEGISLATION

The comparison drawn between the *waqf* and the trust system has shown a number of similarities and differences, and these are as analyzed below.

The *Waqf* and Trust Duration

One of the key points to take into consideration while examining the similarities and differences between the *waqf* and the common law trust is endowment duration. In Moroccan law, Article 23 states that the *waqf* endowment can either be perpetual or provisional. The common law trust, on its part, is not perpetual. It is worth noting that the possibility of *waqf* perpetuity or temporariness is a peculiarity of the Moroccan *waqf* code. The tendency in the majority of Islamic countries is for the *waqf* to be created in perpetuity (Luqman, 2005). In that sense, even the differences between the *waqf* and common law trust, according to Avini (1996), highlight the similarity between them: the common law trust was made in perpetuity until the rule against perpetuities came into effect.

Preventive Justice

For both, the declaration of creating the foundation can be made in writing or orally. Indeed, if an oral trust or *waqf* agreement is not converted into writing, it is governed by the common law or the Moroccan *waqf* code, respectively.

However, the difference between the Moroccan *waqf* law and the common law trust raises what Matthews (2013) calls "preventive justice". According to him, it is less likely that there will be litigation about transactions made in front of a notary or a public official (Matthews, 2013). Article 25 of the Moroccan *waqf* code states that the ascertainment of the *waqf* endowment must be made in front of two notaries. The *waqf* deed is, therefore, entered into the land registry. However, there is no registry for the common law trust in the United Kingdom, for example. Matthews states that the common law system does not use notaries as the civil law system does (Matthews, 2013).

The Moroccan *Waqf*'s Juristic Personality Versus the Trust's Fiduciary Relationship

Another difference between the two institutions lies in juristic personality. It has been argued among Islamic scholars (al fazia, 1999; el Wishi, 2000; Essbihi, 2009) that juristic personality is equivalent to *Dhimma maliya*, meaning an independent legal entity. According to Zahraa (1995), *Dhimma maliya* is an aspect of legal personality,

which is supposed to encompass all of the rights and obligations of a person. It is generally defined as an imaginary repository that consists of all the rights and duties relating to persons. The concept has been attributed to certain entities, one being the *waqf* (Albertus, 2014).

Moreover, the *waqf* institution has a separate set of financial rights and obligations (Albertus, 2014). According to Zahraa (1995), juristic personality reflects both religious and financial duties that the *nadhir* must fulfill during the exercise of his powers or functions (Zahraa, 1995). It is also argued that the *waqf* properties in Morocco have become larger, which impedes the management of the *waqf* without conferring it juristic personality (Sbihi, 2009). According to Article 53 of the Moroccan law, the endowment has juristic personality. Therefore, the *waqf* may engage in selling and borrowing, may sue and be sued, and own land, unlike the common law trust, which is more akin to a legal arrangement between the settlor of the trust and the trustee and is made for the benefit of the beneficiary.

Trust use, on its part, does not enjoy juristic personality. The South African court, for example, has confirmed this fact in many cases.[29] The Canadian courts have held that the common law trust is "an equitable obligation that binds the trustee to manage property within the trustee's control for the benefit of beneficiaries."[30] The common law trust cannot hold property—trust property is held by trustees.[31] Under Canadian tax law, the common law trust is an individual taxpayer (Hansen, 2017). Consequently, neither Canadian nor South African common law trust legislation creates a legal personality for

[29] See, for example, Land and Agricultural Bank of SA v Parker (n 5); Thorpe NNO and Another v Trittenwein and Another 2007 (2). See also Fundy Settlement v Canada, 2012 SCC 14 [10] ("[A] trust is not a person at common law . . .")

[30] Decisions that cite Underhill, Law of Trusts and Trustees (various editions) include: Semchyshen v Semchyshen, 2016 SKCA 108 [41]; Lubberts Estate (Re), 2014 ABCA 216 [49 fn 9]; General Motors of Canada Limited v The Queen, 2008 TCC 117 [39–40]; Zeidler v Campbell, (1988) 59 Alta LR (2d) 268; 88 AR 321 (AB QB) [10–12]; R v Guerin, [1983] 2 FCR 656; 143 DLR (3d) 416 (FCA) [73]; Buschau v Rogers Communications Inc, 2002 BCSC 624 [18]; McIntosh v Canada Trust Company, (1984) 56 AR 231 (AB QB) [15–16]; Tobin Tractor (1957) Ltd v Western Surety Company, (1963) 40 DLR (2d) 231 (SK QB) [39]; and Attorney-General of Canada v CC Fields & Company, [1943] OR 560 (ON CA). 14.

[31] Taylor Ventures Ltd (The Vincent Taylor Family Trust) (n 12) [55] ("The Trust is not a legal entity capable of holding title to the Land Interest or capable of acting as a trustee").

trusts (Albertus, 2014; Hansen, 2017). A common law trust is qualified as sui generis. In other words, it is a unique entity in a separate class.[32] In fact, the common law trust is not considered a juristic person. The trustee is, therefore, bound by the terms of the trust deed, predefined by the settlor.

Waqf and Trust Liquidation

The Moroccan *waqf* code presents potential provisions that deal with the familial *waqf*. Article 122 of the Moroccan *waqf* code provides that the familial *waqf* may be liquidated in four cases: first, if family *waqf* revenues are diminished considerably, or if the *waqf* has no value; second, if the endowment does not provide any benefits; third, if the family *waqf* expenditures exceed its incomes; and fourth, if each beneficiary ends up with a fractional share due to an excessive number of beneficiaries.

In these cases, Article 123 states that liquidation is possible if it is applied either by the Council of *Waqf*, or the majority of the beneficiaries. Compared to common law trusts, liquidation is possible only if the beneficiaries jointly apply for this measure (Harasani, 2015).

Litigation

The Moroccan *waqf* code has brought new aspects related to litigation. First is what we may call the principle of freedom of evidence. That is, the endowment can be proved by any legal document in accordance with Article 48 of the Moroccan *waqf* code. In this context, the Moroccan Supreme Court affirmed, in judgment No. 848 in 2004, that the witness of 12 men in the presence of two officials is evidence of the endowment.

However, this principle is not respected in some cases. As a matter of illustration, the lower court of Taza (a city in the northwest region of Morocco) confirmed that the witness of 12 men in the presence of two officials was not enough for the plaintiff (*Nidharat*: the administrative entity that is responsible for the endowment in a region) to recover the real estate endowment. Thus, the plaintiff had to prove that the real estate endowment was legally created.

[32] Braun v Blann & Botha NNO and Another (1984).

Ownership Structure

Before comparing the Moroccan *waqf* and trust ownership structures, it should be mentioned that the former belongs to the civilian school, which is more rigorous and conceptual than the common law system to which the trust belongs (Matthews, 2013). Accordingly, the anti-conceptual approach to the idea of ownership in the common law, has strengthened and facilitated the evolution of the English trust (Matthews, 2013). Similarly, Article 9 of the Moroccan real rights code classifies the *waqf* among real rights, called *numerus clausus*; the latter are less than ownership yet confer "a right in a thing belonging to someone else" (Matthews, 2013).

The Moroccan *waqf* code provides an important insight. Article 1 states that the *waqf* is the capitalization of asset bar ownership for perpetuity or provisionally, and allocation of its enjoyment for a public or private charitable foundation. Article 40 of the Moroccan *waqf* code states that the *waqf* is an exceptional form of fund that does not give the beneficiary the capital. Once the *waqf* is declared, the ownership is transferred to public *waqf* endowment *Al awqf al Aama*. In fact, the *Nidharat* owns bare ownership, and the beneficiaries only have rights with regards to usufruct. Harasani (2015) holds that "the term 'deemed' ownership is used because in law, the beneficiaries' ownership is not documented and the full bundle of rights that comes with ownership is not available to beneficiaries. So, for example, they may not sell or gift the Waqf property." This claim is confirmed by the Moroccan law of *waqf* in Articles 40 and 41, which state that beneficiaries' rights are limited to usufructs.

So far, the main similarities and differences between the *waqf* endowment and the use have presented. Next, the *nadhir* and trustee as managers will be compared.

Comparing *Nadhir* and Trustee Duties

Nadhir and Trustee as Owners

Undeniably, the *nadhir* and trustee share many things in common. One of the most important questions civilian jurists may ask is whether the trustee is a real owner of the endowment or not. From the Moroccan

waqf law perspective, the *nadhir* is strictly a manager to whom the *waqf* is entrusted, and therefore, the *waqf* has no recognized owner. On the opposite side, the trustee holds all the power that ownership confers (Matthews, 2013). Mathews (2006) explains that trusts create property "good against the world except a bona fide purchaser for value of a legal estate without notice".

Nevertheless, the common law trust system is characterized by what Matthews (2013) calls a "Janus-like approach". In other words, the trustee appears to be a full owner, while in reality they are bound by trust terms. Thus, they have limited powers (Lee, 2010). Some scholars like Matthews (2013) and Grey (1991) believe that the conceptual approach of the trustee as a legal owner and the beneficiaries as equitable owners is not reasonable.

Scholars like Lawson and Rudden (2002) criticize the idea that trustees are legal owners. They highlight the argument that:

> to call the trustees "legal owners" is both inaccurate and misleading. The adjective is wrong since any property (however "equitable") can be held on trust. The word "owners" indicates that very often they will have the powers of sale and management that go with ownership. But they are not really owners because they cannot treat the property as their own. They cannot even neglect, let alone destroy, it their own creditors cannot reach the trust property. So it is probably best to think of trusteeship as an office, created by private law. (p. 86-87)

The above quote reiterates the limitations of trustees' power. The present authors of this paper believe that the trustee's attributes are not similar to those of the owner. This is because the trustee is not what common law jurists call "the remainderman" who has bare ownership (Matthews, 2013).

Trust ownership is flexible and open to different structures. The trust is created only when beneficial and legal interests are transferred to the trustee, who, after splitting them, transfers beneficial titles to the beneficiaries (Worthington, 2000). Honoré (1961) believes that

"splitting" might be convenient for the management of the trust. In other words, by separating management from usufruct; the beneficiary obtains the advantage of expert management of the property, but also runs some risk.

The "Latin" school of civil law, to which the Moroccan law system belongs, does not have this possibility; one is either an owner or not. As a matter of fact, it would be inappropriate to introduce a system of equitable ownership into a system that does not recognize equitable entitlement (Harasani, 2015), which is the case for the Moroccan legal system.

Comparatists aim to look for substance rather than forms. Matthews (2002) points out that "we should not be blinded by the name given by one system when trying to compare it with another: we should look to the substance rather than to the form". The task here, as Matthews claims, is that the legal structure adopted from a different system has to work similarly and not identically (Harasani, 2015).

The concept of God ownership could be an opportunity to reconcile *waqf* legal structure with the trust's concept that the legal owner is meaningless. The common law trust system is one adopted largely in secular law systems, like England. Thus, it would be inappropriate to accept the idea of God as a unique owner in such systems (Harasani, 2015). Moreover, the concept of God deemed owner is meant to maintain the *waqf*'s perpetuity (Harasani, 2015).
Waqf and common law trust reconciliation is possible only if the principle of the legal owner is abolished. Lawson and Rudden's (2002) interpretation of trusts as non-legal owners might be a possible solution. Indeed, two possibilities will be discussed here. First, if there is no legal owner, the common law trust structure is theoretically comparable with the *waqf*. Second, if the legal owners are the beneficiaries in the common law trust structure, it can be reconciled with the Moroccan family *waqf*.

The Nadhir and Trustee as Managers

Both Moroccan *waqf* beneficiaries (especially private *waqfs*) and trusts' beneficiaries who are dissatisfied with the *nadhir* or trustee's administration may seek to take the *nadhir* or trustee account. Indeed,

beneficiaries may "seek to disallow charges, expenses which should not be allowed"[33]: In taking a common account, the accuser may charge the trustee with receipt they have not approved and falsify (Handley, 2014).

Similarly, familial *waqfs'* beneficiaries may sue the trustee who fails to fulfill their duties. In its decision No. 990, dated November 26, 2008, the Moroccan Supreme Court affirmed that the *waqf*'s beneficiaries might sue the trustee on the basis of willful default and neglect if the trustee did not pay taxes. In both cases, the plaintiff must prove at least one instance of willful default (Handley, 2014).

CONCLUSION

Although the origins of its use are not historically known, it is clear that the Islamic *waqf* has impacted the development of the trust over the past decades. From the analysis above, it is evident that there are several similarities between the Moroccan *waqf* and the common law trust. The latter seems to be more flexible than the Moroccan *waqf* in many respects: unlike the *waqf*, it is not a requirement for the trust to be established for charitable purposes only (Albertus, 2014), and the trust can be revocable.[34]

Not surprisingly, reciprocated confusion between civil law doctrines and common law doctrines has led to what Smith calls "a habit of misunderstanding" (Smith, 2012). According to him, the trust structure based on divided ownership is a metaphor that has been accepted as a shorthand for describing the common law trust. Also, it constitutes the main obstacle hindering the full adoption of this system by civilian law property (Smith, 2012).

This article presents different aspects of the current fundamental transformation of *waqf* law in Morocco, evaluating it from a distributive justice perspective and in comparison, with the trust legal system. Countries such as Malaysia and Turkey have modernized and adjusted the *waqf* for legal and socioeconomic paradigms

[33] Re Stephens [1898] 1 Ch 162 CA, 170,172,176; Bartlett v Barclays Bank Trust Co Ltd (No2) [1980] Ch 515, 546 (Bartlett).

[34] However, the Moroccan Modawana in article 37 stipulates that the wakf can be revocable only in two conditions:
If the creation of the *waqf* depends to something will happen in the future.
If only the legal deed mention this possibility.

(Abdulmenem, 2017). Similarly, the Moroccan *waqf* law should not only be implemented and compliance with the legal environment; efficient expertise, management methods, and skills. It is hoped that this comparison paves the way for further comparative research on the charitable trust as a means of fostering the Moroccan *waqf* law code.[35]

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[35] The Moroccan *waqf* Modawana refers to the law regulation in the Moroccan law; it is promulgated on February 23th, 2010.

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