CHAPTER 4

Trust and Waqf Ownership Structures

The issues of perpetuity and ownership are the main two areas of conflict between Waqfs and trusts as traditionally understood. The previous chapter has discussed the areas of conflict and potential avenues for reconciliation with regard to perpetuity in Waqfs and trusts. This chapter will deal with the issue of their respective ownership structures, again, pointing out areas of conflict and highlighting reconciliation possibilities. While this issue is pertinent for Waqfs and trusts in general (public and private), the focus here is on private family Waqfs and trusts.

To set the scene for discussing reconciliation, the groundwork must be cleared first. This chapter will explain ownership theories in Islamic law and common law generally, before delving into the specifics of Waqf and trust law ownership theories. After which, the chapter will show that there is scope for reconciliation, especially when theoretical perspectives are neither seen as sacrosanct nor conclusive; theory is seen as a means not an end; a means to achieve more reconciliatory possibilities in the practical realm.

1 Ownership (Almilkiyah) in Islamic Law

1.1 Theological Considerations

In Islamic law, the discussion of ownership starts in theology.1 The idea is that Allah is the true owner of everything, while man is only in actual possession (Milk Ḥaqiqī).2 Bambale explains, ‘Islam regards the owner of property as one who holds the property on behalf of the community in the capacity of a trustee: or a representative and not by his having absolute right of ownership’.3 He adds, ‘absolute or permanent ownership of all things (property included)
belongs to none but Allah’. Jurists have quoted many Quranic verses to illustrate this; examples include but are not limited to:

Believe in Allah and His Apostle and spend out of what He has made you to be [custodians] of...5

And when your Lord said to the angels, I am going to place in the earth a khalif [custodian], they said: What! Wilt Thou place in it such as shall make mischief in it and shed blood, and we celebrate Thy praise and extol Thy holiness? He said: I know what you do not know.6

And He it is Who has made you [custodians] in the land and raised some of you above others by (various) grades, that He might try you by what He has given you; surely your Lord is quick to requite (evil), and He is most surely the Forgiving, the Merciful.7

Then We made you [custodians] in the land after them so that We may see how you act.8

In interpreting the first verse above, Alqurṭubī affirms, ‘this proves that the true owner of things is Allah, and it is not for his servant but to use property in what pleases Allah so that he may attain paradise’.9 Outside Islamic law, Honoré has expounded similar ideas with regard to the state and ownership. He holds that,

... ownership has never been absolute... in a loose sense, the state may be said to have an ‘eminent domain' over at least the land comprising its territory, this does not carry with it rights to possess, enjoy or alienate it, so that the sense in which the state is owner is very loose indeed. The interest of the state, according to this conception, is confined to powers of expropriation and a minimum of restrictive regulation, together with

4 Ibid.
5 M.H. Shakir, The Qur’an Translation (10th edn, Tahirke Tarsile Qur’an 1999), 57: 7. I have underlined the relevant parts of each quoted verse. In all the verses above, Shakir uses the term successors as a translation for Khalīfah or Khalāʾif. The correct translation in my view is 'custodian'. That is what I have adopted.
6 Ibid. 2: 30.
7 Ibid. 6: 15.
8 Ibid. 10: 14.