

An Analysis of the Trust Property System in Bangladesh

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Abstract: Nowadays, the concept of trust has gained more popularity compared to an earlier period in Bangladesh. However, there are some pressing concerns about managing this jurisdiction's trust and charity organizations. The settlor typically uses the idea of trust to transfer property. Additionally, there must be a clear intention to establish trust. It cannot be made for unknown or undefinable causes. Above all, the trust's aim must be lawful and specific. As an illustration, a trust could be created for a single person's benefit or a particular group of individuals, for example, the education of underprivileged children in a community, hospital purposes, charity endeavours, or even the founding of a scholarship or school, or university. Regarding a charitable trust in Bangladesh, the trust can be made public. Recipients need not be visible here, which could be faith in religion or charity. In this context, this paper analyses the governance and regulatory systems of trust and charitable property in Bangladesh. It also suggests a few recommendations for the modernization of the management of the organizations.

Keywords: Trust, Property, Management, Waqf, Debottar, Bangladesh.

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I. Introduction

The concept of trust has gained more popularity compared to earlier. The settlor typically uses the idea of trust to transfer property. However, the central concept of trust was derived from Roman law at first, and gradually it developed in England through the use of Chancery (Equity). A trust can be created for different purposes, including private and public. It has been particularly challenging to define trust because the term 'trust' is used in different ways by different legal scholars.¹ According to Professor Keeton, 'Trust is a relationship which arises whenever a person called the trustee is compelled in equity to hold the property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons or for some objects permitted by law, in such a way that the real benefit of the property accrues, not to trustees, but to the beneficiaries or other objects of the trust.'² According to Keeton's description given earlier, there must be a trustee with the legal title and a beneficiary with the equitable title to demonstrate the existence of a trust. As a result, wherever there is a trust, the trustee has the nominal title to the property, and the beneficiaries have the equitable title or right to use or enjoy the property. This is the distinct character of a trust that developed after the emergence of equity. At common law, the legal title owner was the person entitled to its use; thus, the legal owner and the beneficial owner were inseparable.³

However, Keeton is criticized for his definition that no one can be obliged to undertake a trust. Also, his definition needs to answer the question of who is the accurate or actual owner.⁴ Trust has been defined and further discussed by many legal scholars. Nevertheless, Snell's Equity states in the introduction to its commentary on trusts that no one has yet succeeded in providing a satisfactory definition of trust.⁵ According to Underhill, trust is 'an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (called the trust property) for the benefit of the persons (called the beneficiaries) of whom he may himself be one, and any one of whom may enforce the obligation.'⁶

¹ Hirsch, A. J. (1998). Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws. Fla. St. UL Rev., 26, 913.

² George Gleason Bogert, Dallin H. Oaks & Other., The Law of Trusts, 9th Edition

³ Da Rocha, B. J., & Lodoh, C. H. K. (1999). Ghana land law and conveyancing. Dr & L Print. and Pub. Services.

⁴ Snell's Principles of Equity. (1973) By Sir ROBERT MCGARRY AND P. V. BARER. London Sweet & Maxwell Ltd.

⁵ ibid

⁶ Underhill, A. (1970). Underhill's law relating to trusts & trustees, Butterworths; 12th ed edition.

However, Underhill's definition is not exhaustive in that sense; it excludes charitable trusts and some unenforceable trusts that are legal though they have yet to identify human beneficiaries. Maitland has criticized even using Lewin's definition of trust as a justification for confidence.⁷ According to Hanbury, it is preferred to explain a trust rather than define it and distinguish it from comparable but distinct notions rather than dissecting and criticizing past definitions, which could be more rewarding.⁸

In Bangladesh, the interpretation-clause of the Trust Act 1882 also elaborates, 'A trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner: the person who declares the confidence is called the author of the trust: the person who accepts the confidence is called the trustee: the person for whose benefit the confidence is accepted is called the beneficiary: the subject-matter of the trust is called trust-property or trust-money.' Charitable or public religious trusts are not included in the definition because the Act only applies to private secular trusts.

Furthermore, a comprehensive definition of trust in Bangladeshi law must be considered. Trusts with a specific purpose are established rather than those that distribute assets to specified human beneficiaries. Even though they may benefit particular individuals, charitable trusts are purpose trusts since they are created to advance a larger shared goal, such as alleviating poverty or promoting religion or education.⁹

Literally, "trust" signifies confidence. However, as a means of transferring property legally, it may entail transferring property to someone with confidence that the person will hold it for the use or benefit of others as selected by the transferor. For example, X transfers property to Y for the use or benefit of D. Here, X builds trust. The trust's creator is X. The trustee is Y, and the beneficiary is D. It has become challenging to provide a single, widely accepted definition of trust because of the use and development of trust systems for several purposes and various ways. Many eminent jurists have attempted to define trust; however, no definition appears comprehensive. In this context, this paper analyses the governance and regulatory systems of trust property in Bangladesh. It also suggests a few recommendations that need to be adopted for trust property and organizations.

II. Classification of trust

There are different types of trusts, such as private and public trusts. Also, trusts may be classified in the manner of their creation, and therefore, there is express, implied, and constructive trusts.

2.1 Private trust

A private trust is created for an individual, a group, or a private purpose. Also, private trust can be subdivided into express and implied trust. Sometimes, its benefit can be conferred to the general public, but mainly it is a benefit for the individual.¹⁰

2.2 Public trust

The purpose of public trust is to advance public welfare. However, it might be advantageous to a particular person or a class. It is also known as a charitable trust. In the case of *Pemsel (1891)*, Lord McNaughton defined the classification of charitable trusts as follows: trust for the relief of property, trust for the development of education, trust for the promotion of religion, and trust for other purposes advantageous to the community.¹¹ As an illustration, a trust could create for the benefit of a single person or a specific group of individuals, the education of underprivileged children in a locality, hospital purposes, charity endeavours, or even the founding of a scholarship or school, or university.

III. The system of trust in Bangladesh

Both private and public trusts are in use in Bangladesh. Notably, there must be a clear "intention" to establish trust. It cannot be made for unknown or undefinable causes. Above all, the trust's aim must be lawful. According to Section 4 of the trusts Act 1882, 'A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) forbidden by law, (b) is of such a nature that, if permitted, it would defeat the

⁷Carr, D. J. (2016). John McGhee (ed), Snell's Equity, Lynton Tucker, Nicholas Le Poidevin, James Brightwell, Lewin on Trusts.

Kin, K. L. F. (2004). Lewin on Trusts /Lewin on Trusts: First Supplement to the Seventeenth Edition/Underhill and Hayton: Law Relating to Trusts and Trustees. Singapore Journal of Legal Studies, 260.

⁸ Hudson, A. (2021). Understanding equity & trusts. Routledge.

⁹ Bove Jr, A. A. (2004). The Purpose of Purpose Trusts. Prob. & Prop., pp. 18, 34.

¹⁰Goffe, W. S. (2011). Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals. Real Prop. Tr. & Est. L.J., pp. 46, 543.

¹¹ Commissioners of Income Tax v. Pemsel [1891] A.C. 531,583.

provisions of any law, (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy. Every trust of which the purpose is unlawful is void.

Moreover, the whole trust is void when a trust is created for two purposes, one lawful and the other unlawful, and the two purposes cannot be separated. Explanation - In this section, the expression "law" includes, where the trust property is immovable and situated in a foreign country, the law of the such country.¹²In order to comply with Section 4 of the Act, a private trust in Bangladesh must not violate the rules of proper property disposition, for example, the rule against perpetuities under Section 14 of the Transfer of Property Act, 1882, Section 114 of the Succession Act, 1925, Section 13 of the Transfer of Property Act, 1882, Section 113 of the Succession Act relating to the gift in favour of unborn persons, the rule against accumulation under Section 17 of the Transfer of Property Act, 1882 and section 117 of the Succession Act.¹³

Regarding a charitable trust in Bangladesh, the trust can be made for the public. Recipients need not be visible here, which could be faith in religion or charity. A charitable trust is a collection of assets donated to create a charitable fund, typically with liquid investment. The charity manages and owns the assets for a predetermined amount of time, and all or part of the value the assets generate is donated to charity. It can take the method of a permanently fixed sum per year or based on a percentage of the trust's value in a given year and is, therefore, subject to adjustment. A charitable trust can last forever.¹⁴

In Bangladesh, some laws have been enacted to control and regulate the actions of charitable trusts regardless of their legal status. These laws directly impact how non-profit organizations interact with the government and how their operations are planned and managed. These are the Trusts Act of 1882, Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961, Society Registration Act 1860, Compliance Rules on Foreign Donations (Voluntary Activities), 1978, Foreign Contributions (Compliance) Ordinance 1982, Microfinance Regulatory Policy 2006, and Company Act 1994 and others.

Most of the charitable trust property in Bangladesh are the waqf estates. It contributes to a significant amount of public religious trust. Waqf means the permanent dedication of any property by a Muslim for any reason recognized by Muslim law as a religious or charitable purpose. Waqf property benefits confer to the public at large.¹⁵The primary legislation on the waqf is the Waqf Ordinance 1962. It is related to the management and administration of waqf property in Bangladesh.

The law regarding waqfs in Bangladesh is partly governed and controlled by statutes, in part by judicial rulings, and in part by Muslim personal laws. According to Section 2 (10) of the Waqfs ordinance 1962, 'waqf means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognized Muslim Law as pious, religious or charitable, and includes any other endowment or grant for the purposes described above, a waqf by the user, and a waqf created by a non-Muslim. (11) waqf deed means any deed or instrument by which a waqf has been created and includes any valid subsequent deed or instrument by which any of the terms of the original dedication has been varied. (11a) waqf estates mean the totality of immovable properties, as well as movable properties, in respect of which a deed makes the waqf, and no waqf property shall be designated as waqf estate if it consists of only movable properties. (12) waqf property includes property of any kind acquired with the sale proceeds of, or in exchange of, or from the income arising out of, waqf property, and all offerings made, or charities consecrated or contributed, on or to waqf property. (13) waqif means any person is creating a waqf.¹⁶

However, there are few religious and charitable endowments under Hindu Law in Bangladesh. Religious endowments such as *debottar* property, which are dedicated to the deity's ownership, and Mutts, known as religious and educational institutions, can be created in writing or orally. Also, it may take the form of a will and a gift. Endowments may be made to feed the Brahmans or the needy and others. In a public *debottar*, anybody can perform their right to worship. However, in a private *debottar*, only members of a particular family or group are allowed to do so, and the general public is not permitted.¹⁷Apart from the Hindu laws, In Bangladesh, Hindu public or private religious and charitable endowments are subject to the following restrictions and regulations: Religious Endowments Act 1863, Transfer of Property Act 1882, Charitable and Religious Trusts Act 1920, Succession Act 1925, Section 92 of Civil Procedure Code 1908, and Registration Act 1908.

¹²Section 4 of the Trusts Act, 1882.

¹³ Liaquat Ali S, An evaluation of the trust system in Bangladesh

¹⁴Ahmad, M., & Jahan, R. (2002). Investing in ourselves: Giving and fundraising in Bangladesh. Asian Development Bank.

¹⁵Ahmad, M. (2015). Role of waqf in sustainable economic development and poverty alleviation: Bangladesh perspective. *JL Poly & Globalization*, pp. 42, 118.

¹⁶ Section 2 (10-13) of the Waqfs ordinance, 1962.

¹⁷Routh S. K, Elements of Hindu Law.

In Bangladesh, private universities are run as non-profit higher education institutions within the Trusts Act 1882. According to the Private University Act 2010, a private university's general funds cannot be spent for any purpose other than the university's necessary expenses. However, there needs to be more about the potential education tax for a student. Private university students can face a problem if the government imposes an education tax. In this case, government cooperation is essential for the country's private universities to set an example in higher education.

In Bangladesh, some organizations are providing their services with the aim of public trust. Sometimes, these institutions change their legal status to become other organizations operating as public trusts. Because the alteration is voluntary and they believe it will benefit the organizations more. For example, previously, the *Bishwo Shahitto Kendro* is registered within the Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961 but is currently under the NGO Affairs Bureau, Department of Social Welfare. However, the actual issues institutions face are more complex. As a company, it conducts its operations as a public trust to benefit society; it must continue for a while using the same legal framework.

Therefore, it is impossible to develop a comprehensive strategy for carrying out a specific public trust, which ultimately leads to the stoppage of their ongoing operations. There may be a reason for tax exemption representing the same as an NGO. Public trust organizations must also adhere to specific bureaucratic rules, such as submitting audit reports to the appropriate government authorities for any significant funds from various sources. These issues may deter interested parties from establishing new public or charitable trusts.¹⁸

IV. Conclusion and recommendations

Generally, public trusts are created to alleviate poverty, education development, religious advancement, or any other community-beneficial goals. In Bangladesh, the Trusts Act of 1882 only governs personal trust issues. Regarding public trusts, one of the simple guidelines followed by the judiciary is to give effect to the intention of a donor to create trust. However, if there is no special legislation in Bangladesh to control and monitor trust-related problems, a question may arise as to the goals of public trusts.

There are some specific recommendations to improve the sector for the country's trust property and organization:

- Since the existing laws regarding trusts and charity are primitive, these need to be updated and changed immediately.
- It would be wise if the government could create a special law for public or charitable trusts to define and control organizations' plans. The updated law of trust and charity can perform perfectly for the legal situation in Bangladesh as new properties and businesses are rising more than past.
- A trust and charity management commission should be established where all types of trust organizations, charity organizations, small or in large, must be registered under the supervision of a particular ministry of the government. Moreover, the public must also be informed about the advantages of establishing the organization.
- Developed countries' models can be followed regarding general trust issues and meet their available international fund-issue standards.
- The proper audit report of all types of trust or charity organizations must be disclosed by newspapers or other effective ways to the public every fiscal year to gain public confidence in the trust or charity organizations.

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¹⁸ Enact law to regulate public trust, *The Daily Star* (May 10, 2016).
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