Chapter Four

Locating the Religious and the Charitable in Western Cultural and Legal Thought

4.1 The Legal Category of the Place of Worship: Colonial Inheritances

At first sight it appears that British colonial debates and contemporary questions on the disputes and conflicts around places of worship in India seem far apart. This seems apparent by the self evident nature of the definition of “place of worship” in the Places of Worship Act, 1991. Section 2 (c) of this Act states that “place of worship” means a temple, mosque, gurudwara, church, monastery or any other place of public religious worship of any religious denomination or any section thereof, by whatever name called.”

Such a definition on application fails to find coherent referents in many cases. To begin with it presupposes what religion is and thus has a description of the entity that can come under it such as Hinduism, Islam etc. However it fails to adequately describe certain entities that are brought under it. This is most visible in the case of the disputed shrine at Bababudangiri, Chikmagalur wherein legal discourse has perceived the shrine as being both Hindu and Islamic. An argument to bring the disputed shrine under the provisions of the enactment would cause problems. Does the shrine belong to a religious denomination and of which religion? How does one understand it as a place of public religious worship?

It would seem from the Places of Worship enactment and the legal discourse that has been generated around the place of worship that such an entity is a contemporary one. However in the well known case of Ismail Farooqui v Union of India (popularly known as the

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1 This has been demonstrated in Chapter One.

2 AIR 1995 SC 605.
Ayodhya case) it was acknowledged that the basis for the right to worship and its resolution in the present case had its foundations in British India, wherein the right to worship of Muslims in a mosque and Hindus in a temple had always been recognised as a civil right and that Indian courts in British India had maintained the balance between the different communities or sects in respect of their right of worship.

The acceptance of this framework of the exercise of the right to worship for separate religious communities thus has its origins in the colonial legal enterprise. Therefore like most aspects of religion in India, separate frameworks govern places of religious worship for Hindus and Muslims. The wakf administration which is the Wakf board governs all places of worship related to Muslims such as mosques, masjids and other places related to the Muslim community (which includes dargahs as well). There is a central enactment that is known as the Wakf Act, 1995 which governs all matters relating to wakfs. A wakf which is defined in Section 2(r) of the Act is the permanent dedication of a property recognised by the Muslim law as pious, religious or charitable. However each State has its own Wakf Board with separate rules framed for its functioning. A framework of religious and charitable endowments enactments that are separate for each state govern Hindu places of worship (that are similarly defined as being dedicated for purposes that are religious or charitable)

These present day legal categories of the wakf and the Hindu endowment did not exist till the early decades of the twentieth century. A glance at government revenue records in the Muzrai Department of the Mysore State in the years 1881-1886 reveals a categorisation into chattrams, mutts, langarkhanas, Hindu and Jain temples, masjids and dargahs. A perusal of

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3 For an account of the same please see Khan (2005) and Varadachari (2006).
the Mysore Muzrai Manual\(^5\) in the nineteenth century reveals a similar categorisation of religious places into categories including but not limited to chattrams/musafirkhanas, mathas, temples, and mohammadan institutions (once again divided into masjids, ashurkhanas and dargahs. Chattrams (which were subsequently abolished) and Musafirkhanas were feeding houses that provided free food to travelers. Despite being described differently (they were seen as being set up by Hindus and Muhammadans respectively), they were subject to the same set of regulations. Temples and mathas had a different set of regulations based on the perceptions of the British administrators (the wealth of temples was subject to a high degree of regulation whereas there was an entirely different concern with mathas—that of successorship. Mohammedan institutions were classified into four kinds 1) masjid or daily place of worship 2) Dargahs which are tombs or places where the remains of the members of a royal family, saints and religious men are buried 3) Ashurkhanas or the place where mourning services are held during Muharram 4) Takhia or the residence of fakirs and saints which is generally placed in a secluded corner of the kabarstan. There is also a description of the kinds of services that can be followed and elaborate narrations of what were the duties of the inhabitants of the spaces in the context of these services. The regulation of religious and caste processions,\(^6\) and the care of ancient monuments\(^7\) also fell under the ambit of the Muzrai Department.

Mohammedan institutions in this framework are characterized by their function and activity, and not their purpose as in the present framework of wakf law that characterizes any institution as being a wakf on the grounds of it having been dedicated by a Muslim for a

\(^5\) The set of orders and regulations deemed important by the Muzrai Department (the department of religious regulation in the princely state of Mysore.

\(^6\) Section X of the Mysore Muzrai Manual.

\(^7\) Section VI of the Mysore Muzrai Manual.
religious or charitable purpose. Services that are to be carried out are described as religious (recitation of namaz), subsidiary (service of food and water), official (management), burial, educational, establishment and communal (the kazi performing dispute resolution services) with descriptions of what these activities were. One can also see that certain forms of activity could be characterized as religious. This is however different from modern wakf law wherein the institution of the wakf itself has a religious purpose and all the activities need to be justified as religious or charitable.

The Mysore Muzrai regulation of 1913, was however the first statutory attempt to regulate these spaces. This regulation for the first time defined the kind of religious spaces that would be subject to such regulation as “every temple, mosque, or other place of worship or religious service, any chatra or house of feeding or rest for travelers without charge, or other institution of a religious or charitable nature, which is now actually in the sole charge of Government, or for the support of which any annual grant in perpetuity is made from the public revenues, or an inam has been granted and is recognized and registered at the inam settlement as a “devadaya or dharmadaya grant”, and every institution of a religious or charitable nature which has been taken under the sole management of the government. There are important terms in this definition. It seems that in order for an institution to be subject to legal regulation, there had to be the following characteristics of being “religious” or “charitable” with the additional characteristic of having a grant or allowance from the government.

Such a notion of the religious and charitable is reflected not in just in the legal history of the Mysore state but concerns that preoccupied legislators and administrators all over British

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8 Section 2 (r) of the Wakf Act, 1995.

9 Section 1 (2) (i) of the Mysore Muzrai Regulation, 1913.

10 I would like to clarify that devadaya means religious and dharmadaya means charitable.
India. As pointed out these terms have been inherited in our contemporary times and still form the basis for our understanding of these legal categories.

I suggest that unraveling the roots of this colonial inheritance is crucial to understanding why the legal regulation of religion and the religious place has been so unsuccessful (as pointed out in Chapter One). In order to do this one needs to ask the question- what is the experience of the British in respect to religion and the place of worship and why is it that they saw the religious and the charitable as related entities in the creation of the legal category of the place of worship?

As explained and pointed out in the second chapter, the process of secularization in the West gave rise to a number of conceptual frameworks and categories. These frameworks were the result of Christianity’s interaction with what it perceived as a pagan social order and its attempt to draw boundaries on the basis of idolatry. The deeming of a practice as idolatrous was done on the criteria of theological principles. Such principles percolated various spheres of life including legal discourse. I propose that one such theological principle was charity. I show here the basis of the emergence of charity as a thematic framework in the western tradition, the role of the church in such a thematic framework, and its secularization leading to the legal structure of the trust. In this context I shall examine the arguments made by others on the theological origins of the trust. I will also examine the doctrine of equity.

4.2 Charity as a Thematic Framework in the Western Tradition

*When you did it for one of these, the least of my brethren you did it for me (Matt:19:21)*

In normal understanding charity refers to generosity in helping people who are poor, sick or helpless and being benevolent and kind. In our day to day living it often goes without saying that charity and being charitable are desirable. However such a mundane understanding of
charity as simply some form of sharing does not help us arrive at any kind of theoretical insight on what charity could be. For instance why is it that colonial powers found collective forms of property in North America as inferior and not worthy of recognition? Why is it that these were seen as embodiments of savages lacking reason and not as being generous, benevolent and kind as they shared their property with everybody and thus embodied deserving human virtues that everybody possessed? Therefore charity needs be studied in a broader context as a theme that figures prominently in Western culture itself.

Why is charity such an important theme within western culture? In order to answer this question of how present day conceptions of charity have come into being one needs to understand the cultural conditions for its emergence. Charity as agape or love is peculiar to Christianity and considered one of its key tenets. It is exemplified by the doctrine of almsgiving which did not exist prior to the advent of Christianity and was absent in the Greco-Roman traditions. The way we understand charity today is peculiar to its conceptualisation within Christianity. Roman Garrison (1994, 39-45) points out in his analysis of charity in the Greco-Roman traditions that classical Greek did not have a specific term which meant “alms” or a gift to the poor. He further suggests that the lack of terminology in the Greek tradition (and the Roman as well) for the concept of almsgiving proves to be symptomatic of a certain indifference in the plight of the impoverished.

Garrison's analysis further shows that Greek attitudes with respect to charity and wealth are characterised by an ethic of moderation. Property and money were taken for granted as being appropriate to the status of a good man and poverty was a condition to be avoided. Greed and unlawful gain were unworthy of a wise man. This can be seen in Plato’s writings where he holds that if a man is superlatively good, it is impossible that he should also be superlatively rich. The good man will not find it easy to be extremely rich or extremely poor as he would divert his wealth towards honourable objects. The hoarding of money was looked down upon
by the Greeks and the management of wealth was characterised by liberality. The exercise of liberality was not however motivated by compassion for an individual in need but to develop good character. According to Aristotle acts of virtue are noble and the reason that the noble man will give is the nobility of giving. A man must give rightly, to the right people, the right amount at the right time. Therefore one had to be discriminating and selective about whom one gives to. Plato lays down conditions such as the person who is not hungry but who has sobriety of soul. The worthy recipients of such liberality were one’s social peers, fellow citizens, family members and friends. Such liberality demanded that the claim on the giver consisted not in need but in some pre-existing relationship. There are thus no specific exhortations to the rich that they should give to the poor. Although pity could be a motive for giving, poverty by itself could not be a condition meriting liberality. The ideal republic of Plato had no room for the destitute, beggars being a symptom of crime and evidence of the wrong constitution of the state. Compassion had to be shown not to every man who may be hungry or needy, but only to the virtuous who have experienced misfortune.

Such values of moderation in Greek philosophy were challenged by the Cynics who exalted poverty and repudiated wealth and comfort. Although the Cynic believed that people ought to sustain him he did not ask people for sympathy towards his condition. As Garrison elucidates:

> For Diogenes, almsgiving was not an act of mercy; indeed where he was the recipient it was an obligation........................................Poverty is the ideal; it requires the wise men to lead a self–sufficient life .Too generous almsgiving would only burden ,even choke, the beneficiary (44).

A marked change in this approach arose in the first century A.D through the teachings of Stoicism. Musonius Rufus a Stoic- Cynic teacher preached the virtues and joys of poverty and advocated the distribution of charity to those in need although he demonstrated the
traditional concern for friends, family members and peers. However he made no reference to any theological principle that charity earned merit before God.

Such was the background in which Christianity began to spread. Christianity transformed the discourse on charity in a radical manner by introducing the doctrine of redemptive almsgiving. Although Garrison perceives the inception of this doctrine as having to do with sociological factors such as the social hierarchies of that day he clearly views this as a theological principle. Almsgiving in Christianity was not just seen as an essential act towards being a good Christian but also had a redemptive function being atonement for one’s sins.

Christian teachings about wealth are generally negative. However throughout the Bible there is an emphasis on the responsible management of money, the prudent use of property and the practice of charity that would require wealth. Although Jesus expected his followers to have no property, no possessions and possibly no income, there are instructions to give indiscriminately and provide generously without expecting any return. Luke’s gospel promises that people will be judged, condemned or forgiven by God in the same way they treat others and that giving earns one a spiritual reward. The letters of Saint Paul also convey similar concerns i.e. that generosity to the needy is a demonstration of genuine love. The letters of James also exhibit hostility towards wealth. For James concern for the poor is the priority of all those who claim wealth.

Such almsgiving also carried with a particular work ethic. Passages in the New Testament encourage the view that labour should be seen as a means to earn wages which may be used

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11 The doctrine of almsgiving was prevalent in Judaism but did not have the redemptive significance that it had in Christianity. However the theme of helping the poor was important and Jewish texts mention that good works demonstrate the individual’s personal righteousness, determining whether he is acceptable to the Lord. (Garrison 1994).

12 An account of these Christian teachings on almsgiving are provided in Garrison (1994).

13 Garrison quotes 1 Tim.6.17-19.
or ought to be used to help the needy. Giving to the poor justified the possession of wealth and the benevolence of the rich would be advantageous for them in the future afterlife. Thus giving assumed an eschatological importance in the early days of Christianity as the day of Judgment was imminent and compensation for sin needed to be sought.

Its importance as a key tenet of Christianity is demonstrated by the sermons of St Augustine (1951) a central figure in Christian theology. He preaches:

But the Builder of the world tells you that the world will crumble………..These are His words of admonition ‘Do not lay up for yourselves treasure on earth’. Therefore if you believe His forewarning and do not disregard His admonition, let that be done which He advises, for He who gives this advice does not deceive you. You will not lose what you have given away, but you will follow what you have sent ahead. Then I give this advice: ‘Give to the poor, and thou shalt have treasure in heaven’. You will not remain without treasure, but what you possess on earth with anxiety you shall have with security in heaven. (1951,266)

According to St Augustine a true Christian does not store wealth but gives it away to the poor. Such an action allows one to be wealthy not in the sense of worldly goods but a prosperous afterlife. He advises “Give away your treasure…..He will bear to heaven what you give him on earth (268)” He then uses the illustration of Christ himself receiving these alms and allowing one entry to heaven. On the Day of Judgment believers who have not given alms will not gain entry to the Kingdom of heaven, despite having not committed any evil deeds and having fulfilled all moral obligations. Almsgiving thus carried with it the potential to obtain rewards in heaven.

If you had turned away from all those evil deeds of yours and had turned to Me and had redeemed all those sins and transgressions by giving alms, your almsgiving would now deliver you and free you from the punishment due to such great crimes (271).
St Augustine further suggests that one should subsist on what is necessary and that charity is the root of all good. Such a statement is evidence of the importance placed on charity as one of the three key Christian virtues. The expression of this concept is through the Greek word agape which has been translated as love.\textsuperscript{14} In explaining this concept Christian writers have often tried to distinguish between the Greek eros and agape. The Greek eros can be a crude or carnal love or a heavenly love which is a love of desire involving both conquest and possession. The Christian agape is universal love, not just love for God but for our fellow men. The essence of this love is in God and thus God himself is charity. Human charity thus has to reflect divine charity.

Christian charity\textsuperscript{15} thus holds itself apart from pagan humanism by taking Christ as its model, motive and guide. By faith in Christ the Christian is able to love men the way Christ loved them. Such charity is not just in words but in deeds with many instances and incidents from the Bible testifying to Christ curing the sick, the handicapped and the mentally ill. Such cures are aimed at not just the body but also the mind. Man is prey to sickness and death due to the consequences of his sinful condition; and in curing the physical effects of sins Christ sets souls from the dominion of evil.

Charity is revealed in the two most important commandments i.e. the love of God and the love of our neighbour. A man must love God with all his heart and his neighbour as himself. The question as to who is the neighbour is answered in the parable of the Samaritan. The parable of the Samaritan is a narration of a man who is stripped and beaten by robbers and left on the road to die. A priest and a Levite pass by but their concern for ritual purity and

\textsuperscript{14} An explanation of some of the theological questions involved in the understanding of agape is provided in Bars (1961,107-117).

\textsuperscript{15} This discussion is reproduced from a more elaborate account of the nature of the charity of Christ and the two commandments as provided in Riquet (1962).
their business excused them from stopping to care for a complete stranger. A Samaritan halts and takes care of the wounded man. This parable reflects charity in action. The neighbour is thus not just the friend, the relative, the fellow citizen, it is every man, without distinction of race or nation, class or condition, it is the man whoever he may be, who needs our aid and whom we are in a position to help. Our love needs to be extended to not just the foreigner but also our enemies. Such universal charity has its pattern and motive in God and comes from God itself. The love of our neighbour acquires a transcendental value. True charity can however never be satisfied by relieving the neighbour’s bodily needs and needs to be extended to saving his soul. Such a task unites all souls in the love of God.

St Maximus (1955, 92-93) a theologian in the days of early Christianity accords charity the status of supreme virtue and the summary of the commandments. He says that when all are loved equally, that is the one and same love that we extend to God and man. Charity is opposed to self love which destroyed the unity of man. It is charity that restores that unity and imitates God.

How is the unity with God to be conceived? In addition to the theological understanding that has been laid down above I propose a slightly different perspective on charity i.e. analyse how it has emerged as a thematic framework and the reasons for its emergence as a doctrine. I would like to suggest that the doctrine of charity is only possible due to the existence of private property as understood in the Christian context. Property in Christianity is intimately connected with the Fall of man. This leads to a dilemma for the Christian. How does one use it in accordance with the will of God? Such a question raises infinite answers and needs to be understood in the context of the Biblical injunction that there is an implicit work ethic in alms giving. It is the fruits of one’s labour that one needs to give away. Therefore the practice of charity involves the possession of property prior to giving it away.
This brings us to the theological conception of property which lets us understand how charity brings about unity with God. Property is analogous to the human condition (Alexander 2008, 205-217) reflective of its estrangement from God. The use of property, one’s relationship to it and the ways in which one uses it mirrors the theological doctrines of creation, the fall and redemption. Christian theology holds that all property belongs to God being the result of his creation. The human relationship with property comes with the Fall where self awareness is asserted against God. Alexander suggests that this allows for the recognition of property as identity more specifically “property as mine”. This necessarily leads to the corollary “property as yours”, the theological affirmation behind such a corollary dictating recognition of the other person’s identity and claims on the ground that one must love another as one loves oneself. Such an affirmation is ambiguous as it has the capacity to draw boundaries leading to estrangement from the other person.

For a lucid understanding of this question of the relationship between the theological doctrine of the Fall of man and property as a concept, one must turn to Saint Augustine. According to him private property has come into being as a consequence of sin and continues to be an occasion of sin but it also has remedial and disciplinary functions. If the Fall had not occurred the fruits of the earth would have been held as the common possession of mankind. However human selfishness now lays claim to the earth and its fruits. Even since the Fall, man has become conscious of the plurality of wants and needs. Due to the consciousness of one’s own loss (such consciousness extends to unbelievers as well) one strives to bring things outside oneself under control. Ownership as the exclusive possession of things is not natural but manmade and is a manifestation of the self-love that has brought about the fall of man

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16 An account of this is provided in Dyson (2007).
However according to St Augustine, even if the existence of private property is appalling, Christians are still obliged to respect it and cannot subvert or disregard the laws of ownership. Property laws like all human laws are to be honoured as a matter of religious duty. Property laws are not merely for legitimising human greed, they are the means by which God maintains order on earth. They are necessary to human existence and discourage the violence and robbery that would arise if men were free to compete without restraint for resources in the world. Augustine sees property rights as being derived from kings. Kings derive their right from God and are obliged to act in accordance with the divine will. Such rights can however be abrogated if they are not in conformity with divine law.

This brings us to the third aspect of the human condition which is redemption (Alexander 2008, 211-212). In the distinction between “property as mine” and “property as yours”, Christian theology calls us to give to others and to love and serve our neighbours. This ethic allows the theological conception of property to move from the selfish human conception of “property as mine” to a transformative understanding of barriers as a line to be crossed in giving unselfishly to another person. St Augustine makes clearer the nature of such a transformative understanding (Dyson 2007, 105). Property must be valued for the sake of what it enables us to do for others. Therefore what we have in excess of our needs we must distribute to the poor. Sin lies in excessive love of riches and this is a sin that the poor are likely to commit as well as the wealthy. Indeed those who are poor can sin by being proud of their poverty or resentful of it. Material goods should be desired only as preliminaries to the eternal goods that the Christian hopes to receive. If such material goods become an obstacle to the eternal goods the Christian must relinquish the material goods.

In suggesting that property rights are ultimately derived from God, it may appear that Augustine differs considerably from property theorists such as Locke who sees rights to property being derived from the labour invested by the individual in the property. However
both see the exercise of property rights as a form of sovereignty. Augustine perceives God’s sovereignty as allowing rulers to assign property to individuals whereas Locke assumes that human beings acquire sovereignty over property by investing their labour in it. This leads us to the question whether human beings can possess sovereignty. It has been pointed out (Van Duffel 2007) that the reason why Locke’s argument has so much appeal is that the act of labour resembles the act of creation. In such a case sovereignty can only make sense as a secularised religious concept.\textsuperscript{17} Balagangadhar (1985) points out that the relationship between the producer and the goods that he has created is seen as the producer having dominion over his creations. He explains why this question has arisen:

Notice though that this question really becomes intelligible, if one asks: if God does not have dominion over His creations by virtue of being their creator, who else has it? But, secularization of this question results in any number of rebuttals: why should dominion over the creation be the self-evident relation between the product and the producer? Why not social fame, or glory? Why should the product belong to anyone’s domain? Why do we need dominii?, etc. None of these rebuttals are possible with respect to the theological version (37).

This brings us back to the question of charity. If all property ultimately belongs to God, the practice of charity or giving away one’s possessions brings one closer to God thus achieving unity with him. Self awareness which is the reason for estrangement from God is overcome. Self awareness is what allows for the consciousness that property is one’s own and thus distinct from the property of another person. In overcoming such self awareness this distinction becomes no longer relevant. Giving away one’s property to needy others allows one to fulfil God’s commandment that one must love one’s neighbour as one loves God. This is necessary for achieving unity with God.

\textsuperscript{17} A detailed explanation of the implications of sovereignty as a secularised religious concept is provided in Van Duffel (2007).
How is the principle and practice of charity reflected in legal discourse? As we have seen there are certain limits to a conceptual analysis of property that are set by theology. Therefore an understanding of the legal structures that enable a practice of charity necessarily involves engaging with the concepts that help make such structures possible. One such concept that is crucial and has been identified is dominion. It is only through dominion that one can understand the problems of determining ownership which arise in the Western legal system.

In examining the theological underpinnings of property law Alexander (2008) suggests that property law in the West is forced to acknowledge the doctrine of creation. From a theological perspective it however remains restricted to the doctrine of the Fall which causes humans to define themselves as the centre of the earth and not as part of God’s creation. This leads to a homocentric view of human obligations under property law. Alexander further comments that the theological perspective of stewardship of the land is not reflected in property law particularly the meaning of dominion in the creation context. According to Alexander, the human tendency due to the Fall is to experience dominion as control and superiority but a true theological understanding would treat dominion as stewardship. Such a perception treats dominion as responsibility. Human beings are responsible for God’s creation which is a reflection of God itself. Therefore importantly “Dominion as stewardship rests first on the premise that what has been created belongs ultimately to another. It rests second on the duty to protect and affirm the inherent value of that which is controlled (215)”.

Alexander suggests that such a sense of duty is found in two legal concepts i.e. the trust and the usufruct, the usufruct being the right to use the property of another, without disturbing the right of the primary owner. The trust relationship arose with the Franciscans, who in their

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18 Alexander (2008) cites Genesis 1:28 “Be fruitful and multiply, and replenish the earth and subdue it, and have dominion over the fish of the sea, and the fowl of the air, and over every living thing that moves upon the earth.” in this context.
disavowal of private ownership posited a trust relationship in which property was held for the benefit of others but ultimately belonged to God. It is with this background that we need to understand legal structures that govern property. Such legal structures reflect the dual ownership necessitated by the theological origins of sovereignty. In this context it becomes important to trace the evolution of these structures.

4.3 Roman Fides, Utilitas Ecclesiae, the Medieval Use and the Secular Trust

The trust as a legal structure although having originated in England has received widespread acceptance throughout the world. It is used to govern religious places in the West (primarily churches) and a variety of institutions ranging from offshore companies to educational and philanthropic institutions. For both lawyers and laymen the trust poses a baffling paradox as it permits both the giving and withholding of property. A typical trust usually has a settler (the owner of property) transferring his property to the trustee. The trustee pledges to administer the trust and collect and spend revenues according to the wishes of the settler. This administration of the property is to be for the benefit of a third person who is the beneficiary. In a seeming paradox the third person who is the beneficiary also acquires rights in the arrangement. The trustee cannot do what he desires to do with the proceeds although he can fully transfer the asset to a third party. The beneficiary although incapable of powers of sale has the authority to question the trustee sale and the beneficiaries’ creditors could seize the trust estate to satisfy the beneficiary’s debts. This paradoxical arrangement was for many years administered by a dual organisation of England’s judicial machinery which was divided into law and equity, ownership of the asset being divided into legal ownership and equitable ownership.

How does one understand the existence of these legal structures? There has been much work on tracing the origins of the trust through earlier legal structures. Research around the origins
of the trust generally point to the medieval use as being its precursor. The medieval use which is a structure of land ownership originated in the holding of land *ad opus*. These grants were temporary in nature and involved varied cases such as a tenant surrendering his interest to his lord before alienating his land by substitution or a man wishing to settle property on his heirs, granting the property to a friend and making a provision for reconveyance. Although these were temporary instances, more permanent arrangements were entered into such as the case of the Franciscans who enjoyed the benefits of property without being vested with ownership. A person could thus grant land for the benefit of the friars but arrange for it to be held by nominees.

The evolution of the use into the trust is traced by Martin and Hanbury (2001). An attempt was made to control the feudal incidents arising from the use, which allowed the non-payment of dues arising out of the ownership of land. In 1535 Henry VIII enacted the Statute of Uses which held that beneficial owners would also be considered legal owners. After the Statute it became possible to create a use upon a use by imposing passive uses of freehold land. It became possible to argue that if land was limited to A to the use of B to the use of C, B would hold the legal estate for the use of C. It was the second use that became the trust.

Maitland (1894) points out that such a device achieved popularity after the Franciscan friars began to use it. Helmhloz (1979) has suggested that ecclesiastical courts enforced cestui interest prior to the regular exercise of the Chancellor’s jurisdiction over uses, although such jurisdiction was limited and usually confined to carrying out testamentary instructions. Stephen De Vine (1986) suggests that although one may never know the extent of ecclesiastical jurisdiction one must note that jurisdictional transfers to secular courts was

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19 A Latin term which means to the benefit or for the beneficiary.

20 Cestui interests (which was what they were called at that) time are beneficial interests. In a modern context a cestui que use is a beneficiary of a trust which holds property for the beneficiary’s welfare or use.
gradual and not marked by wrangles, thus pointing out to the ecclesiastical antecedents of the medieval use. He further notes that the canon law yielded to the positive law if the positive law provided a just result.

There have been other debates on whether the origins of the medieval use can be traced to the Germanic salman, the Roman fidei commissum, or the Islamic wakf (this will be discussed later in the chapter). Barton (1965) points out that the salman (an individual who manages property in the owner’s absence or holds the property to control its devolution after the owner’s death) was characteristic of continental systems and never reached England. Besides the salman could be used for a variety of functions such as a testamentary executor or an agent. Oliver Wendall Holmes (1885) disagrees on the ground that the functions of the salman and the feoffee to uses21 appear identical.

Whereas these viewpoints are marked by lengthy analysis, they do not specify why we should consider the origins of the use as ecclesiastical. Should we consider the origins of the use as ecclesiastical merely because the church enforced uses? What is it that exactly distinguishes the salman, the fidei commissum or the wakf from the use? If these are all transactions that involve entrustment of property in different contexts- what is it that shapes and limits the boundaries of these institutions besides personal motivations?

The various viewpoints that have been outlined above are the result of understanding these early legal structures as being predecessors of the trust on the basis of structural similarities. There is an attempt made to understand the development of these early legal structures into the trust on the basis of a transition of structures. Therefore it becomes important to point out similarities in order to justify the transition. Whereas this may be a useful exercise to

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21 A feoffee to uses would be the equivalent of the modern day trustee.
understand the legal repercussions of a particular legal structure it does not let us know what allows the evolution of these structures, let alone their claim to be the predecessor of the trust.

I propose a different way of tackling the question. In doing so, I move away from understanding the origins of the trust as a set of legal structures undergoing transition. I also do not make claims on the factual accuracy and authenticity of various legal structures such as the salman, the wakf etc. as the predecessors of the trust. I however propose to understand the **conditions** that allow for such structures to come into being. In this context Shael Herman’s research into the origin of uses and trusts appears to provide us with better explanations. Herman (1996) in his analysis of the conception of utilitas ecclesiae propounded by the church in early Christianity shows that this provided the foundation of the use and the trust. This Latin phrase suggested that no mere mortal owned church property and that its ultimate beneficiary was Christ. This doctrine had material and spiritual dimensions binding the pope and his deputies to a stewardship of assets conferring on them a bare use and possession. Such stewardship of assets bound the pope and his clerics to administer these assets for the eternal beneficiaries namely Christ and his followers. The profit yielded from the custodial assets thus enriched the church treasury and not the individual clerics or their next of kin.

Herman locates the origins of the use and the trust in medieval ecclesiastical jurisdiction like earlier studies but further suggests that the early church’s quest for political and financial autonomy compelled it to spawn trust like structures. The spirit body duality in Christian doctrine was mirrored in Christ’s spiritual dominium over the church and the pope’s role as senior dispensator of the church’s material assets. The spirit-body duality that existed in the universe manifested itself in property and appeared in the trust apparatus which severed an asset’s ownership from its management, and then reunited these features with a fiduciary duty trained upon utilitas ecclesiae. A cleric was required to act in the welfare of the faithful and
thus honour the sacred trust between God and man. This separation of the material and spiritual universe was not unique to the Christian church, as a similar separation was prevalent in Judaism and Islam.

The church elaborated a trust concept in which the mother church occupied the role of a beneficial owner and individual clerics were guardians and administrators of assets. Such a doctrine also insulated these assets from claims from the cleric’s family and heirs (at a time when clerics were allowed to marry). This concept was adopted in church and chantry foundations. The chantry foundation which was typical in the Middle Ages involved an individual donor adapting the trust apparatus to a special purpose. The donor generally endowed clerics with lands and his charter of endowment instructed the clerics to remember him at the daily alter, and this assured the church’s daily intervention on his soul’s behalf. Thus the landowner occupied the role of settler, priests served as trustees and beneficiaries included the settlor’s spiritual welfare and the church community at large. The cleric became the Christian custos (custodian) and assumed administration and dispensation of the chantry assets. The charter of the chantry instructed the cleric to manage the assets and spend the revenues for his necessary expenses. He could not convert the assets for his own use as he would risk ex-communication.

Such trust like structures found their way into the organisation of monasteries. Like a chantry a monastery was a foundation dedicated to pious causes and like a chantry donor, a secular donor acquired symbolic membership in a monastic fraternity. As monastic orders prospered surplus sources were invested in interest bearing loans. These loans became permanent rents because they never matured, an alienation of church property being prohibited doctrinally. As the monks were subject to a poverty vow the rent’s structure allowed them to avoid the question of whether they had ownership i.e dominium. Dominium (ownership and control of
the property) was vested with the church and the monastic payee was the investment’s usufructuary not its dominus.

Herman’s detailed account of the theological basis of early legal structures used to govern property lets us understand the conditions that form the **operative basis** of these structures. In this context it becomes important to **distinguish** between these structures and various other structures that appear to be similar. In this respect Herman errs by drawing analogies with Roman law. He suggests that the Roman law conception of usus reinforced a church doctrine that the value of things in the material universe depended on their spiritual uses and in augmenting utilitas ecclesiae, not the personal enjoyment of temporary trustees. In later work (1997) he lays emphasis on the medieval commendatio an informal Roman arrangement wherein an aging patriarch confided to a loyal friend the protection of both kin and possession as being the vehicle for church property relations. He also suggests that earlier studies on the origin of the uses tend to point favourably to the Roman fidei commisum\(^{22}\) as it was likely that canon lawyers would come into contact with Roman law and therefore would have borrowed from the concept.

This makes connections with Roman law without adequate justification. Herman cites the commendatio as being a precursor to trust devices used by the church and proof of its likeness in its altruistic purposes and divided ownership. He does not specify as to what is ownership in the Roman context, whether the care and custody of objects is placed with a trusted friend, or a request to a friend to take care of a relative or family members constitutes a transfer of ownership of either goods or money. Can altruistic purposes be the basis for drawing similarities between two legal structures?

\(^{22}\) An arrangement similar to that of the commendatio wherein the owner of an item confided it to a friend who was obligated to surrender it to the beneficiary
As elucidated by David Johnston (1988) the fidei commissum was generally used in the context of testaments. The forms of transfer were also completely different, the trustee often obtaining title to the property as the legatee or heir, which enabled him to keep the property in the event it became impossible to perform the trust.²³ He points out that the jurists make a distinction between the acquisition of title by the trustee and the performance of the trust itself.²⁴ This shows that the operative basis of the fidei commissum was different. It did not rely on the concept of ownership and possession being derived from God in the Christian context. There was no ultimate owner and property relations were based on other norms including the nature of social relationships between the parties.

This background is necessary in order for us to understand how the trust as a legal concept has come into being. As we have seen an understanding of its operative basis in the context of the conditions and limits of theology is more useful than an evolutionary perspective that generates no clear answer but multiple questions as to which legal structure i.e. the salman, the wakf etc. is the predecessor of the trust. An understanding of the operative basis helps also identify the directions in which such structures are shaped. This leads us to the mechanisms that help these legal structures sustain themselves. In other words how does this dual ownership sustain itself?

4.4 “The Measure of the Chancellor’s Foot:” Equity, the Common Law and Compulsions in Western Legal Thought

²³ This would not be in the case in most modern legal systems wherein it is likely that the trust would be invalidated or a provision would be made to deal with such exigencies (such as retransfer of the property to the settlor).

²⁴ Johnston uses the term trust as analogous to the fidei commissum.
Equity is a roguish thing. For law we have a measure ....Equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a Foot a Chancellors’s Foot

- John Seldon²⁵

The bifurcated ownership that is so characteristic of a trust can only be enforced by a similar bifurcation of the judicial machinery in England characterised by the division into equity and common law. The system of equity which is a set of principles based on fairness and reasonableness was used to mitigate the rigor of the common law. This was enforced by the Court of Chancery otherwise known as the court of the king’s conscience and arose in the fourteenth century. This was a response to common law courts refusing to enforce the medieval use and gradually grew into a body of law by itself forming a parallel justice system addressing various kinds of wrongs to that of the king’s courts.²⁶ Although initially the decisions were made loosely without any resort to a fixed set of principles (which led John Seldon, a prominent English jurist to allege that it was as long as the Chancellor’s foot) , it soon assumed a level of coherence with certain core maxims.²⁷ This dual system was however abolished with the Judicature Acts of 1873 and 1875 which abolished the old courts and created the Supreme Court of Judicature with a High Court divided into various divisions. The separate jurisdictions were abolished and all the divisions exercise both legal and equitable jurisdiction.

²⁵ Seldon (1689, 43-44).

²⁶ The Court of Chancery exercised its jurisdiction over civil wrongs and not over criminal matters.

²⁷ These are varied such as 1) He who seeks equity must do equity2) one must come to the court with clean hands3) If equities are equal the first in time to prevail.
In order to understand this machinery we need to go back into the rise of the medieval use that owed a great deal to the Franciscans who were among the first to use the device. The Franciscans were subject to a poverty vow that compelled them to live without property of any sort or kind. Such a poverty vow was based on emulating the life of Christ and his Apostles as set forth by St Francis of Assisi. However it was agreed that they had the use of things although there were differences amongst them as to how much and what were the things that they needed use of (Little 1917).

Due to this doctrine they refused to receive title to any property. Due to sympathy for their lifestyle, many noted residents of the places that they resided in provided them with sites that they could occupy and use. Little (1917, 6) describes one such conveyance wherein the master of a hospital for poor priests in Canterbury gave the Franciscans a site and built them a chapel. The property was held by the community of the town. This was typically followed in many other places in England where the town acted as trustee and lent to the friars at the will of the citizens. At that particular time, the popes distinguished between ownership and use, the Franciscans could have the latter but not the former which was vested in the Catholic church (Maitland 1894). However in 1322 Pope John XXII over ruled this directive declaring that the distinction between use and property was fallacious and thus the Franciscans had ownership of the property that they used. Maitland (1894) suggests that in these debates the legal concept of agency and use evolved, particularly over the question as to what was the status of the third person introduced between the donor and the friars as an intermediary. He further mentions that the “usus” which the Franciscans claimed was not enough to constitute ownership, was very different from the manner in which it was used in Roman law and also that the fidei commisum was not the originator of the use.

Although there seems to be considerable debate and differences between historians on the origins of uses and trusts, there is a clear development in this period on which there is
unanimity i.e. the rise of the equitable jurisdiction of the Chancellor, which became a parallel
form of justice and an important branch of the common law which is still studied today.

The standard explanations provided by English legal historians on this rise of equity are the
inadequacy of the common law or the king’s courts. Holdsworth (1923, 345-346) states that
the root idea of equity is that law should be administered fairly. This idea disappeared from
the common law because the common law had hardened too early into a rigid technical
system. The outlook of the judges became narrower and the increasing number and
technicality of the ordinary forms and processes of the common law led them to concentrate
their attention upon the working and management of the judicial machinery itself. They also
ceased to be identified with the person of the king and the prerogative of administering equity
fell on the king’s agents i.e. the Chancellor.

Such an idea of equity seems to carry an inherent contradiction—it seems to suggest confusion
between equity as a principle and equity as a branch of law. If equity in a moral context is
associated with reasonableness, justice and conscience it is surely separate from equity as a
set of rules or standards to be applied legally. This confusion is highlighted in the literature.
In an analysis on the development of equity in Tudor England, Stuart Prall (1964) asks “Is
equity a principle of justice, whether distinct from the law or an integral part of it, or is it
merely that body of law adjudicated in the Court of Chancery commonly called “equity” by
the end of Elizabeth’s reign?” Prall answers the question himself by stating that one needs to
look into two concepts the Greek epieikeia and the Roman aequitas. Aristotle’s views were that
positive law was based on universal rational principles and as no legislation could encompass all
possible cases under it-universal reason must intervene and see that justice is done. The
Roman concept however was not concerned with philosophical principles but was more
concerned with creating efficient legal procedures. Such jurisprudence was reflected in the
edicts of the praetor who established a separate jurisdiction from that of civil law. The praetor
had no right to make law but had the right to establish procedure. This resembled the equitable jurisdiction of the Chancellor.

Prall suggests that this dual definition of equity is responsible for the controversy about the dual jurisdictions. In his own words:

It was this dual definition of equity that lay at the bottom of so much of the controversy over the prerogative jurisdiction in the sixteenth and seventeenth centuries. For on the one hand "equity" in English usage did come to mean that law which was adjudicated in the Chancery, and thus inspired the rivalry between the common law courts and the prerogative courts. While on the other hand "equity" was also a judicial principle itself, modifying, interpreting, and even setting aside the law in the name of "reason" or "justice." In this latter sense equity was not peculiar to the Chancery, but had been a part of the common law practice in the middle ages, and was to be again in the Tudor and Stuart eras (Prall 1964, 3).

Although it is difficult to understand how the Greek and Roman concepts could actually be compared to the equitable jurisdiction of the Chancellor, Prall’s narrative throws up some interesting questions. He quotes St German a medieval jurist who came out with the first juristic work on equity:

Wherefore in some cases it is necessary to leave the words of the law, and to follow that reason and justice requireth, and to that intent equity is ordained; that is to say, to temper and mitigate the rigour of the law. And it is called also by some men epieikeia; the which is no other thing but an exception of the law of God, or the law of reason, from the general rules of the law of men, when they by reason of their generality, would in any particular case judge against the law of God or the law of reason: the which exception is secretly understood in every general rule of every positive law (Prall 1964, 4).

Prall points out that the revival of the Aristotelian epieikeia could now be translated to mean that statutes could not only be interpreted so as to have their general intent include those cases not specifically mentioned, but it could also be interpreted to exclude those cases that
were covered by the statute. This effectively challenged parliamentary supremacy and set off the dispute between the Chancery and the common law courts.

Prall then discusses certain conflicts which arose between the two jurisdictions and the impact of the Statute of Uses. He then moves on to discussing Edmund Plowden a sixteenth century reporter who came up with an extended definition of equity by stating that statutes need to be interpreted beyond their letter by going into the mind of the lawmaker and interpreting it as he would. Plowden thus accepted the sovereignty of the lawmaker much more than St German; although he accepted St German’s definition of equity (which followed from Aristotle). Equity could thus be outside the law but could be applied to the law with the result that the common and statutory law could be seen as equitable.

Prall’s narrative then continues to discuss Edward Hake an Elizabethan poet who came out with a major work on equity known as *A Dialogue on Equity* who drawing on Philip Melancthon the Protestant theologian argues that *epieikeia* is no longer a principle outside the law, but rather a principle contained within the law itself. Hake considered the common law to be full of equity and had trouble comprehending the role of the Chancery as a court of equitable jurisdiction. The implied deficiency of the common law was that the common law courts were courts of law protecting rights whereas the Court of Chancery was essentially an administrative tribunal seeing that justice is done where there was no law. Pratt concludes by saying that the issue was not one of common law versus equity, or of common law versus Roman law but that of the rule of law versus administrative fiat.

Prall’s analysis shows a conceptual fuzziness about equity. Is equity a word or a concept? It does not seem to be either as it can be used to describe a number of phenomena disparate from each other. It can be used to refer to a body of law, a term in ethics and philosophy and it can be used to refer to the common law itself from which it is supposedly separate.
In seeking to formulate a hypothesis on equity, I would like to suggest that equity is a mode of reasoning. In doing so I would like to relocate some of the main assumptions made on the nature of equity in the context of scholarship on this question. To do so I would like to begin by going back to St German and his pronouncements on equity. As Prall has quoted him he views equity as:

> which is no other thing but an exception of the law of God, or the law of reason, from the general rules of the law of men, when they by reason of their generality, would in any particular case judge against the law of God or the law of reason: the which exception is secretly understood in every general rule of every positive law (Christopher St German 1761, 45)  

Therefore for St German equity is merely an exception to the general law. How should such an exception be decided? He has more to say on this when asked about how equity may be helpful:

> First, it is to be understood, there be in many cases divers exceptions from the general grounds of the law of the realm by other reasonable grounds of the same law, whereby a man shall be holpen in the Common law. As it is of this general ground, that it is not lawful for any man to enter upon a descent; yet the reasonableness of the law excepteth from that ground an infant that hath right, and hath suffered such a descent, and him that also maketh continual claim, and suffereth them to enter, notwithstanding the descent. (Christopher St German 1761, 48)  

How may this be done? St Germain has more to say in the context of the role of equity in English law:

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28 Dialogue 1Chapter 16.

29 Dialogue 1Chapter 17.
And the law will in many cases, that there shall be such remedy in the Chancery upon divers things grounded upon such equities, and then the lord chancellor must order his conscience after the rules and grounds of the law of the realm (Christopher St German 1761, 50)  

St German’s idea of equity is mainly a classic reformulation of the scholastic dialectic which places enacted and customary law in the same framework. The interposition of natural law between the concepts of divine law and human law provided for a basis for weeding out custom which did not conform to reason and conscience (other elaborate tests such as universality, its duration etc). Thus in understanding ownership of property certain exceptions need to be made on grounds of time and infancy. In making such a decision the chancellor shall be ordered by his conscience.

Such an understanding also confirms that equity and common law are within the same framework. Maitland (1910) eloquently explains:

Equity was not a self sufficient system, at every point it presupposed the existence of common law. Common law was a self sufficient system. I mean this: that if the legislature had passed a short act, saying “Equity is hereby abolished, we might still have got on fairly well………………… but still the great elementary rights, the right to immunity from violence, the right to one’s good name, the rights of ownership and of possession would have been decently protected and contract would have been enforced. On the other hand had the legislature said, “Common law is hereby abolished”, this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of common law. Take the case of a trust. It’s of no use for Equity to say A is a trustee of Blackacre for B, unless there be some court that can say A is the owner of Blackacre (Maitland 1910, 19)

The relation between equity and common law according to Maitland (1910, 156) is not that between two conflicting systems, but that between “code and supplement” or ‘code and gloss”. If the Chancellor’s equitable jurisdiction was abolished there would still be law. In such a case what is the historical imagination of modern law? To answer this, we need to go

30 Ibid.
back to the roots of modern law which is Roman law. Maine (1931) in a comparision between Roman and English forms of equity suggests that Roman equity or aequitas was the point of contact between the old Jus Gentium and the Law of Nature. The Jus Gentium was the sum of the common ingredients in the customs of the old Italian tribes. He further explains that there was a great system of common institutions of which the Jus Gentium was the reproduction, and that the complicated usages of separate commonwealths were only corruptions and depravations of the simpler ordinances which had once regulated their primitive state. There was the belief that the old Jus Gentium was the lost code of Nature and equity was how one could access this. Aeques carried with it the sense of levelling which was the characteristic of the Jus Gentium.

Maine admits that the Jus Gentium was created for a purpose to deal with foreigners in Rome and that the Romans did not want foreigners to be tried by their own laws. Such a purpose was completely different from the role and purpose of equity in England. He dismissed the fact that the Romans would have a completely different view from modern day lawyers on the ground “What we respect and admire, he [the Romans] disliked or regarded with jealous dread” (Maine 1931, 42). Maine further details the deterioration of both English and Roman equity and states that they are exactly in the same state in which the old common law was when equity interfered with it. This is when a system based on moral principles that have been originally adopted are carried out to its fullest extent. The system founded on them then becomes rigid and liable to fall behind moral progress.

My purpose in pointing Maine’s analysis of equity is to locate equity as a form of reasoning and posit a problem as to why such reasoning is required. If we take Maine’s suggestion that equity was an interface between the law of nature and the old Jus Gentium, it does appear that there has been no fundamental change in western legal thought from the time of Gratian to the nineteenth century as equity is merely a way of accessing natural law which allows for a
certain dynamic of transforming practice. Such a mode of reasoning was not a body of law or a consistent set of principles by itself although it provided consistency to the phenomena that it described. This is visible by Maitland’s observation when he criticises text book writers such as Story which describe equity and the legal matters over which it has jurisdiction in a topical manner i.e. under concurrent jurisdiction the court would decide over account, mistake, constructive fraud etc. He states that Story’s procedure was the only procedure open to him and he had to deal not with a single connected system, but with a number of disconnected doctrines, disconnected appendixes to or glosses on the common law.

To formulate the problem, what is the context in which the dynamic of equity is forced to operate? Such a question takes us back to the history and the time of the Norman conquest. Michel Foucault (2003, 87-114) in his analysis of Hobbes’ s work states that the discourse of struggle produced by the Norman Conquest was what Hobbes was attempting to deal with, when he made all wars and conquests depend on a contract. The Norman Conquest had manifested itself historically and politically within England. The peculiar feature of the Norman Conquest was that William, king of the Normans inherited the rights not of conquest but the rights of the existing kingdom of England. In the process of being crowned king, William had sworn to respect the law as good and ancient laws that were already accepted. Thus William made himself a part of the Saxon monarchy. This also implied many other things, it meant that England had been taken into possession and that the king was the owner of the land of England. Right was the very mark of Norman sovereignty, such a mark of sovereignty manifested itself in the law itself, legal proceedings being in French the language of the Normans. According to Foucault this resulted in certain contestations against the king. He says that when kings such James I proclaimed that they sat on the throne of God they were not affirming not just a theologio-political right but the rights of the Conquest
itself. This gave rise to the cry for a law of one’s own, the common law such as the voice of Edward Coke and others who challenged King James’s authority.

Whereas Foucault’s work provides insights it does not completely answer the questions raised by the nature of the contestations. Berman (2003) enlightens us about the debates around the preservation of the common law when he analysis the conflict between James I, king of England and Edward Coke, the great English jurist. He says that Edward Coke did not challenge the basic theoretical concepts that were behind King James’s proclamation of absolute monarchy. Coke agreed that the king was the supreme law giver and it was his natural duty to safeguard the community. However there was a profound ambiguity in the concepts of law and king. As the supreme law maker, the king was above the law and no one could challenge him if he failed to observe the law. Law necessarily consisted of concepts, principles and procedures that had been laid down in the past. For Coke, “the king’s’ laws included not just the laws of the king but also the laws of his predecessors and the earlier Norman and Anglo Saxon rulers. This created a legal system that had its duration and its meanings in time. Thus for Coke implementing the king’s law meant abiding by the principles of the common law laid down in the past by kings past and present (Berman 2003, 239).

It is in this dilemma of “what is the king’s law” in which equity is also positioned. According to Maitland (1910, 4) the Court of Chancery came into being not just seeking justice from the king but against the king. He further mentions that the seizures of land by the king were frequent and there were a large number of cases coming before the Chancery as there was no action within the common law against these seizures. Therefore the problem posited by equity as a mode of reasoning finds place in a certain relationship between the king and his subjects. Whereas equity may be a way of reconciling the inadequacies in justice and law, and the dilemmas of the struggle posed by the conquest, a descriptive analysis of such
inadequacies will not help us understand the structure of equity as reasoning. Why is it that equity functions as a set of disparate doctrines?

I would like to pose the problem as follows. Equity as a form of reasoning comes into play not just due to the relationship between the king and his subjects but due to the relationship between God and humanity in the Christian context. As we have seen the term charity has a theological context being derived from the need to use property on behalf of God, God having been the Creator and the absolute and total owner of Earth. Therefore the question as to who is the legal owner of property can only have one answer – God. The question of who are the beneficial owners—the answer can only be the rest of humanity. How does such a theological term become secular in content? Whereas God may be the absolute owner it is humanity that requires the use of Earth and its resources. Therefore the question of who is the representative of God on earth arises and the figure of the king emerges. The king as the true representative of God on earth inherits absolute, total control and possession over property. However this conflicts with the principle that possessing and owning property to fulfil certain requirements of being a good Christian is also a theological virtue. Such a conflict needs to be reconciled and thus the king is allowed to grant features of his ownership to others. Equity becomes a means to reconcile such a conflict and thus secularises a theological virtue.

In this reconciliation equity holds together the dual ownership that comes into existence due to theology. In this process the theological basis for charity or the charitable to be a feature of the legal category of the religious place is sustained.

**Conclusion**

The colonial regulation of religious places had led us to a certain question. Why is it that the religious is also the charitable? This had led us to the question of the role of charity in Western culture and the processes that constitute it. We have seen that charity as a concept is
not something that can be characterised as belonging to all societies but is peculiar to the West and to Christianity. How does the principle and practice of charity reflect itself in legal discourse? Such a question compels us to interrogate charity as a thematic framework which obliges us to understand the theological underpinnings of property, particularly the doctrines of creation, fall and redemption. In understanding how charity interfaces with the legal category of the religious place, we learn that this is subject to the limits of a conceptual analysis of property, one such concept being dominion. We see that such a concept entails acknowledging the questions that arise from the creation doctrine. In determining who has dominion, we realise that such an answer has coherence only when it is posed in respect to God. However this question is necessarily addressed to human beings as they are the inhabitants of the earth and require the usage of its resources. This leads to a conception of dual ownership wherein human beings are indebted to use the earth but in accordance with the will of the true owner who is God. The sustenance of such ownership is made possible by equity.

In the next chapter we shall see how secularised legal structures and mechanisms that were brought into being in the context of the thematic framework of charity were transplanted in the Indian legal order.