

In the Name of Allah the Merciful the Compassionate

THE ISLAMIC CHARITABLE TRUST

The Best Legal Structure for Muslim Charities

Preliminary Points:

1. Muslims have duties, not rights. Muslims are under a duty to establish the *deen* of Islam. Allah describes the Muslims in the Qur'an as those who say: "We hear and we obey."
2. However we live in a land whose law is not always in harmony with the Shari'ah. The challenge we face, therefore, is to find the ways and means of doing what we have been commanded by Allah to do, while also complying with the requirements of UK law and not coming into conflict with it. Of course, once there is a majority of Muslims in the UK, insh'Allah, then in accordance with the law's democratic principles, it will be time to hold a referendum to decide whether or not all UK laws should become Shari'ah compliant!
3. Until that point arrives, we are subject to the laws of this land as they stand, some of which are in our favour – and all of which are subject to change. For example, under the present law, Muslims have the legal right to do what Allah has commanded them to do: we have a legal right to the freedom of belief, and a legal right to the freedom to put that belief into practice, and a legal right to the freedom to bring up our children in accordance with our beliefs.
4. In exercising these legal rights by enjoying these freedoms, however, there are often legal requirements and duties with which it is necessary to comply. As regards establishing Mosques and Islamic Centres, for example, certain documentation is needed in order to gain a certain legally recognised status, while certain planning and safety regulations must be satisfied before a Mosque can be built and opened for general use.
5. In fulfilling these legal requirements, the danger is that we can go about it in the wrong way, for example by adopting a legal structure which is not in harmony with the *sunnah* – when we could easily have adopted one which is. During the last thirty years I have repeatedly witnessed the troubles which have afflicted Islamic organisations and beset Muslim communities whenever they have, whether wittingly or unwittingly, adopted or tried to adapt legal structures which are entirely alien to the way of Islam and which have little affinity to the *sunnah*. It is in fact relatively easy to avoid these pitfalls, while at the same time enjoying recognition from and satisfying the legal requirements of the law of the land, provided that the appropriate approach is taken.
6. In making an informed decision, there are three main factors which have to be considered:
 - (i) the practice of the *sunnah*;
 - (ii) the requirements of the *shari'ah*;
 - (iii) the requirements of UK law.

Clearly the best UK legal possibility is the one which enables a Mosque and Islamic Centre to be administered in accordance with the *sunnah* and *shari'ah*, while at the same time satisfying the technical requirements of UK law and enabling the Trustees to function efficiently and effectively in today's high-tec world.

- 7.** As regards what is meant by the term “UK law”, although Scottish law is sometimes different to English law (whereas English and Welsh Trusts are governed chiefly by the *Charities Act 2011*, Scottish Trusts are governed chiefly by the *Charities and Trustee Investment (Scotland) Act 2005*) and although the regulatory bodies which supervise charities are different – the Charity Commission for England and Wales and the Office of the Scottish Charity Regulator (OSCR) for Scotland, with the registration process in Scotland being less complicated than in England and Wales – the law relating to charities in the United Kingdom is broadly the same. The following advice therefore applies equally to Islamic organisations in England, Wales and Scotland, unless stated otherwise, but not to the island of Ireland.
- 8.** As regards possible legal structures for Charities, there are four main structures, three of which – the Charitable Unincorporated Association, the Charitable Company limited by guarantee and not having a share capital and the Charitable Incorporated Organisation – have been devised principally by non-Muslims, and so in many respects their form is different to the *sunnah* of Islam. The Prophet Muhammad, may Allah bless him and grant him peace, warned against abandoning his *sunnah* and following the example of others instead – including our predecessors, meaning the Jews and the Christians.
- 9.** The other possible legal structure on the other hand, the Charitable Trust, is very close to that of the Islamic Waqf. Indeed some historians have concluded that the concept was learned from the Muslims during the Crusades. If we utilise a Charitable Trust structure, therefore, it should be easier to follow the *sunnah* in accordance with the *shari’ah* of Islam, while also complying with the requirements of English law. This is important.
- 10.** For this reason, it used to be my advice that the best course of action, for both Trustees and beneficiaries, was to register any charitable Islamic organisation as a Charitable Trust. In the light of experience, however, I have learned that if you **understand** how an Islamic Waqf and a Charitable Trust work, then you can make appropriate provision in the Articles of a Charitable Company limited by guarantee and not having a share capital, or in the Constitution of a Charitable Incorporated Organisation, as the case may be, to be administered in the same way as an Islamic Waqf and a Charitable Trust.
- 11.** I have found that the Unincorporated Association structure is, for Muslims, usually a recipe for disaster and should be avoided!
- 12.** In other words, the governance of a Charitable Company limited by guarantee and not having a share capital and of a Charitable Incorporated Organisation can be structured in such a way that while enjoying the benefits of their particular legally defined characteristics, they can be administered **as if** they were a Charitable Trust.
- 13.** So in fact the choice of which legal structure is best for a Muslim Charity depends more on having a Muslim friendly governing document than on the choice of which of the three viable legal structures is to be utilised.
- 14.** In order to outline the differences between these possible legal structures in greater detail, and in order to **understand** better how an Islamic Waqf and a Charitable

Trust work, we will *insh'Allah* first consider the main **administrative** characteristics – together with their social effects – of the following models:

- (i) the Islamic Waqf;
- (ii) the Charitable Trust;
- (iii) the Charitable Unincorporated Association;
- (iv) the Charitable Company limited by guarantee and not having a share capital;
- (v) the Charitable Incorporated Organisation.

15. The Islamic Waqf:

15.1 The main administrative characteristic of an Islamic Waqf is that once it has been established, its ownership cannot be sold, donated or inherited because it 'belongs' to Allah. Whenever a Waqf is created, Trustees are chosen to run it, and they in turn choose further Trustees to take their place as they grow old and retire or die. Thus the Trustees fulfil a trust which is placed in their hands. The role of the Trustee in *shari'ah* is therefore very similar to that of a Trustee under UK law. However, under UK law as it now stands, ownership is never regarded as 'belonging to God' – ownership must always be vested either in the Trustees for the time being, or in what are known as holding Trustees, or in a legally recognised entity which is regarded as having a legal identity of its own. As we shall see, *insh'Allah*, this can sometimes lead to legal complications when property is bought and sold and Trustees change.

16. The Charitable Trust:

16.1 The Charitable Trust is capable of being structured in such a way that it is virtually identical to an Islamic Waqf as regards the way in which it is administered, while at the same time fulfilling the technical requirements of UK law and enjoying charitable status. There is little point in instructing a non-Muslim lawyer to draft the Trust Deed, however, unless he or she is fully aware of the nature of the *sunnah* and the *shari'ah* and of the normal needs and requirements of Muslims. Given the requisite knowledge of the *sunna*, the *shari'ah* and UK law, there is great scope for legally ensuring flexibility and proximity to the *sunnah* and *shari'ah*.

16.2 The main advantage of the Charitable Trust is that it is administered by a limited number of Trustees, who choose their Chairperson (i.e. their Amir or Amira) from among themselves and who are free to follow the *sunnah* as regards the way things are done and decisions are made. Provided these Trustees are the best of their community and have *taqwa*, the Mosque and Islamic Centre will always remain in safe hands, especially if they and they alone are given the power under the Trust Deed to choose new Trustees and discharge existing Trustees. This means that Trustees cannot be removed or replaced by means of rigged elections (but only by misconduct, sickness, old age, retirement, or death) and that they can administer the Mosque and Islamic Centre with flexibility and a minimum of bureaucracy. Unlike the traditional model of the Charitable Unincorporated Association, there is no obligatory membership fee, which leaves people free to give voluntary *sadaqa – fi sabilillah*,

and not in order to secure the right to vote! There are no elections and therefore no factions, no fighting and no (successful) take-over bids.

- 16.3** The general effect of this scenario is to unify the Muslim community, especially, when they regard the Chairman as their Amir. Provided he follows the *sunnah* and keeps within the *shari'ah* and serves his community, Allah's hand is over his hand – and as a result people love him, fear him, respect him and obey him.
- 16.4** Since administration is simple, the services and expense of professional lawyers and accountants are not required so much – although of course it is a requirement of UK law that annual accounts are kept and, if a Charitable Trust's income is over £25,000 *per annum* then the accounts must be independently examined, if over £250,000 then the accounts must be prepared on the accruals basis and independently examined, and if over £500,000 then they must be audited annually. Once a Charity's income is over £25,000, an annual report must also be prepared by the Trustees. Thus in this respect the requirements for a large Charitable Trust are almost exactly the same as for a large Charitable Company limited by guarantee and not having a share capital – although a Charitable Company is answerable to *two* supervisory bodies, Companies House *and* the Charity Commission, which again means extra work and more technical know-how.
- 16.5** Clearly with any large Islamic Organisation – such as any large Central Mosque and Islamic Centre which will naturally also be involved in assisting with marriages and burials, running a *madrassah* for Muslim children, publishing and distributing books and literature and audio-visual products about Islam, helping and instructing new converts to Islam, organising seminars and conferences for both Muslims and non-Muslims as part of its *dawah* activities, collecting and distributing *zakat*, feeding fasting Muslims in Ramadan and providing facilities for *tarawih* and *itikaf*, helping poor people to go on *hajj* to Makka and visit Madina, interfacing with governmental institutions and the media, working together with other Islamic organisations and charities, and so on – it may become necessary to employ a large number of staff.
- 16.6** This is why large Islamic Organisations are sometimes advised to become Charitable Companies limited by guarantee and not having a share capital. In fact, however, a Charitable Trust is just as able to employ staff as a Charitable Company, and in both cases it is the representatives of the organisation who do this, whatever the Charity's legal status in the eyes of the law.
- 16.7** The main disadvantage of the Charitable Trust, however, is that under UK law it does not have a legally, recognised identity of its own. This means usually that property has to be vested in at least two of the current Trustees. It cannot enter into contracts or sue or be sued, although again this is not a problem, because the Trustees simply act in person or through an appointed agent. As with an Islamic Waqf, the Trustees are responsible and accountable for their actions, but in fact in practice will only be found personally accountable under UK law for intentional fraud or wilful neglect – which would be the position in accordance with the *shari'ah* in any event. Under UK law a Trustee will not be personally liable if he has acted reasonably and there has been no breach of duty on his part. Similarly, if loss is

caused to the Trust through the default of an agent employed by a Trustee in good faith, then the Trustee will not himself be liable unless in employing the agent or continuing to employ him the Trustee failed to take the care which an ordinary prudent business man would in managing his own affairs.

16.8 In practice, therefore, there is no difficulty as regards employing staff which arises from the fact that the Charitable Trust is not regarded as having its own legal identity. In practice the contract of employment is simply between the employee and a person acting on behalf of the Charitable Trust, who can either be a Trustee or someone to whom that power has been delegated.

16.9 As regards the problems which may arise when property is transferred or when Trustees change, under English law there are three main ways of lessening the disadvantage of a Charitable Trust not being a legal entity in its own right:

- (i) Land Holding Service by the Charity Commission: This service is only available for Charitable Trusts registered with the Charity Commission in England. What this means is that the Charity Commission holds on trust the property of the Charitable Trust for it, so that the property does not have to be re-conveyed each time there is a change in Trustees. This is useful, but in fact I would prefer and advise one of the two following options when dealing with this technical legal difficulty.
- (ii) Memorandum executed as a Deed: Whenever there is a change in Trustees, if this is recorded as a Memorandum which is executed as a Deed then under UK law it operates to automatically vest the Trust property in the continuing and new Trustees – thereby avoiding the requirement to have the trust property re-conveyed each time. This operation will require the services of a lawyer, but it is relatively straightforward and should not be too costly. This certainly applies in England and Wales, but I am not certain whether it also applies in Scotland.
- (iii) Incorporation of Trustees: This service is only available for Charitable Trusts registered with the Charity Commission in England. The Trustees can apply for a certificate of incorporation whereby they (not the Charity itself) are regarded as a corporate body, that is a legally recognised entity. They can then have their own corporate Seal (or logo) and whenever Trustees change or property is bought or sold, title is always vested automatically in this corporate entity. This in effect gives the Trustees of a Charitable Trust the main advantage enjoyed by a Charitable Company – i.e. its having its own legal identity, – but without making the Trust subject to the complexities of Company law. This is because incorporation does not confer limited liability on the Trustees, since the certificate of incorporation incorporates the Trustees, not the Charity itself.

As regards a Charitable Trust registered in Scotland, options (i) and (iii) above are not available. However, option (ii) which is relatively straight forward, may be available. I have tried to ascertain if there is any equivalent to the three options under Scottish law, but without success. I believe there may well be, but I would advise the Trustees of any Charitable Trust based in Scotland to enquire about this point directly, from a Scottish firm of solicitors.

In my opinion, any Charitable Trust which is going to hold property – especially one which intends to acquire property in order to produce revenue as envisaged in *paragraph 18.8 below* – should either utilise one of these three options, or else change its structure to that of either a Charitable Company or a Charitable Incorporated Organisation.

16.10 In my experience, a Charitable Trust operates best with a relatively small number of Trustees – between 2 and 9 – although there can be more, (but not less than 2). The more Trustees there are, the more difficult it is for Trustees to attend the same meeting. I usually advise that a quorum for a Trustees meeting should consist of **at least two** or else a **simple majority** of Trustees, including the Chairman or a Trustee appointed by him to act as chairman in his absence, whichever is the greater (but with some important decisions requiring at least a **two thirds** majority support).

16.11 There are two main possible disadvantages with having a relatively limited number of Trustees:

- (i) A large Islamic Organisation such as a Central Mosque and Islamic Centre in a large city will inevitably have worldwide links, and may want to draw attention to this. Clearly it would be impractical and counter-productive to make everyone involved a Trustee, and yet in some way it is often appropriate to pay respect and demonstrate gratitude where these are due. In my opinion this can best be achieved by making provision in the Trust Deed for having honorary members (e.g. diplomats, scholars), associate members (e.g. other Islamic organisations and charitable bodies with similar aims), and patrons (e.g. world leaders, financial donors) of the Charitable Trust – who have no direct role in the administration of the Charitable Trust, but who nevertheless can act in an advisory and promotional capacity, in a supportive and cultural capacity, or in a political and financial capacity.
- (ii) The demands of administering a large Charitable Trust may be too great for such a relatively small number of Trustees, especially if they have other commitments. This potential difficulty is easy to rectify. The Trust Deed can give the Trustees power to employ any staff needed in the day-to-day running of the organisation. They can also be given the power to appoint a Management Committee to oversee the general administration of the organisation – with the proviso that at least one of the Management Committee is a Trustee and that the Management Committee reports regularly to the Trustees.

This gives the Trustees flexibility and leaves them free to keep an eye on the overall picture without becoming too involved in small details.

16.12 I have found, in the light of experience, that it is better if the Management Committee is comprised of **all** the trustees **plus** non-trustee members, with the Trust Deed making it clear that all decisions of the Management Committee are subject to the approval of the Board of Trustees – approval which is deemed to have been given unless specifically withdrawn. This arrangement ensures that the Trustees remain in overall control of the Charity (which is their legal responsibility) – and that the Management Committee does not begin to assume that its members are independent of the Trustees and in charge of the Charity!

- 16.13** There is one other matter which requires consideration. This is the remuneration of Trustees. Traditionally, under UK law, Trustees were not allowed to be paid for their work as Trustees, unless they provided a professional service (usually legal or financial) and the Trust Deed authorised payment for such services. They could however be reimbursed for any expenses incurred by them in carrying out their duties as Trustees. **However**, with our present modern society in which the administration of a Trust can take up a Trustee's whole working week, or a considerable part of it, UK law has gradually been changing: It is now permissible for a Trustee to receive remuneration for his or her services, provided this is both necessary and reasonable – for example, if the organisation cannot do without his or her services, and if these can only be provided in return for payment, and if the amount paid is not more, or is less, than the amount a person employed to do the same job would receive – and provided that the Trust Deed makes provision for such remuneration.
- 16.14** It should be noted in this context that at present the Charity Commission will only accept a remuneration clause as valid if it was included in the original governing document of a Charity (and accordingly approved by the Charity Commission prior to registration of the organisation as a charity). The Charity Commission will not accept a remuneration clause that has been introduced at a later stage by way of amendment.
- 16.15** Similarly, an employee can now be made a Trustee if this will assist in the administration of the Charity, provided that there is not a majority of Trustees who are also employees. This relaxation in the law gives the Charitable Trust an additional flexibility which it did not enjoy in the past, and encourages the involvement of skilled Trustees who would not otherwise be able to accept their trusteeship if they did not receive at least some remuneration for their work, especially if it is full time. It is important to inform the Charity Commission if and when any Trustee is utilising such a remuneration clause. At present this is done by completing an online notification via the Charity Commission website.
- 16.16** I used to advise all Islamic organisations who are registered as Charitable Trusts to keep that status. However, I now advise larger Charitable Trusts to convert either to a Charitable Company limited by guarantee and not having a share capital or to a Charitable Incorporated Organisation, **provided that** their Articles or Constitution as the case may be, are drafted in a Muslim friendly way, so that the Charity can be administered **as if** it is a Charitable Trust.
- 16.17** I still also advise any Islamic organisation which has been established for more than ten years to examine the contents of its Trust Deed with a Muslim lawyer who also specialises in Charity Law in order to ascertain whether or not it has been correctly drafted so as to ensure that its purposes are correctly worded, that it has a correct administrative structure which is compatible with the *sunnah*, and that the Trustees have been given the necessary powers to carry out the purposes of the Trust effectively, and within the limits of the *shari'ah*. If this is not the case – and usually there is always room for improvement where the Trust Deed has been drafted by a non-Muslim lawyer who through no fault of his or her own does not

fully understand what is required by his Muslim clients – then they should seriously consider amending their Trust Deed accordingly if this will improve the way in which their organisation is run. Similarly, any group of Muslims wishing to set up a new Charitable Trust should preferably seek the services of a lawyer who is conversant with both the *sunnah* and the *shari'ah* and UK law.

17. The Charitable Unincorporated Association:

- 17.1** A Charitable Unincorporated Association is usually comprised of a group of members and is governed by its Constitution – which sets out its aims and makes provision for the election by and from its membership of its executive committee. It is known as an ‘unincorporated’ association because it has **not** been incorporated as a company and accordingly has no legally recognised identity. Therefore any property it owns either has to be vested in the names of some or all of its Executive Committee, or in the names of what are known as ‘holding Trustees’ (who may charge a fee for this service). Every time the Trustees change, the property has to be re-conveyed to the new Trustees. This can be both costly and time consuming. Since the Charitable Unincorporated Association has no legal identity of its own, it cannot be a party to a contract and it cannot sue or be sued. These functions are carried out by members of the Executive Committee on behalf of the Unincorporated Association. If the members of the Executive make a mistake and money is lost or damage is caused as a result, then they are personally liable for any loss which results from their actions, if they have behaved negligently. Generally speaking, liability falls upon the individual members, upon particular individuals or office holders or upon the members of the Executive Committee (depending on the circumstances) according to the general law of agency.
- 17.2** As regards the administration of a Charitable Unincorporated Association, its governing body is subject to periodic elections. This means almost inevitably that any Muslim Community which holds them splits into different opposing groups whose leaders often seek to gain power and reputation, rather than to serve the community. This is not the *sunnah* of our Prophet Muhammad, may Allah bless him and grant him peace, which is based on unifying the community, not on dividing it.
- 17.3** Unfortunately, many smaller Islamic organisations have adopted this model, along with the traditional format of a compulsory membership fee which entitles paid up members to stand for and vote at annual or biannual elections for the posts of the Executive Committee. In fact it is not the *sunnah* to charge a membership fee – which, for example, the *ahlu'l-suffah* would never have been able to pay anyway. In my experience, this particular structure almost inevitably results in political instability, with the Muslim community splitting up into different factions and literally fighting the election, often in a very physical manner. Thus this model leads to behaviour which is far from the *deen*.
- 17.4** A very familiar pattern is this: A group of sincere Muslims raise money and build or convert a building into a Mosque and Islamic Centre. In the early years the people who use the Mosque and Islamic Centre are united behind a leadership whom they all accept. Once the hard work is over, a second group of less committed Muslims

moves in and tries to take over, often by paying the membership fees of people who hardly ever use the Mosque and Islamic Centre but who are nominal Muslims – in return for their votes. This practice is sometimes accompanied by bribes and threats of intimidation. The results are awful, especially if the mafia element – who are concerned more with power and reputation than with doing what is pleasing to Allah – gain control. Any Muslim community which adopts this structure which in effect enshrines the principle of ‘divide and rule’ has effectively turned its back on the confirmed practice of the Prophet Muhammad, may Allah bless him and grant him peace, and the *khulafa rashidun*, may Allah be pleased with them.

17.5 If we consider how the *khulafa rashidun* were chosen, may Allah be pleased with them, none were chosen by means of election, and none were subject to annual or bi-annual elections thereafter. There are neither Qur’anic *ayat* nor Prophetic *hadith* which refer to democracy (liberal or otherwise), voting, elections or committee meetings! The Prophet, blessings and peace be on him, made it clear before he died, both by his actions and by his words, that *sayyedin*a Abu Bakr would be the first *khalif*. Before his death, *sayyedin*a Abu Bakr chose *sayyedin*a Umar as his successor. Before his death, *sayyedin*a Umar chose six of those whom he considered best suited and told them to choose his successor from amongst themselves – they chose *sayyedin*a Uthman. When *sayyedin*a Uthman was suddenly murdered, without having given any indication as to who should be his successor, people came to *sayyedin*a Ali and said that he should be *khalif*. He replied that it was neither for them nor for him to choose – but for the survivors of those who had fought at Badr – in other words, those with the greatest experience and knowledge in the community. They chose *sayyedin*a Ali – who then accepted their choice. Whenever the Prophet or the *khulafa rashidun* selected a governor or an amir or a qadi, he would act as their representative, governing as best as he could as they did.

17.6 Thus the *sunnah* is that the one or the ones with the most knowledge in the community choose the leader. Once chosen, he remains the leader as long as he remains within the *shari’ah* and in full possession of his faculties. Once chosen, he is the final arbiter and decision maker, but only after he has consulted the people of knowledge on matters which require a decision. This is the true nature of *shura*, which cannot be naively equated with any ancient or modern form of democracy. There is no democratic process in Islam and no appointment or decision by majority vote. Governance is by wisdom, not by numbers. None of the *khulafa rashidun* were chosen by means of a general election. We should follow this *sunnah*, which is based on trusting those who have experience and knowledge, not on a western majority voting system, which favours the lowest common denominator – and by means of which outsiders can take over.

17.7 In contrast to the governance model of the Charitable Unincorporated Association, the administration of a Charitable Trust is primarily the responsibility of a group of Trustees who can choose an Executive Committee to assist them in the administration of the Trust and who must consult their community before any major decisions affecting it are made. This is what *shura is*. With a Charitable Trust, there are no periodic elections: once a group of Trustees has been selected, it is these Trustees

who have the power to discharge existing Trustees and choose new Trustees in the future. This helps to secure continuity and stability. The chairman of the Trustees is in effect the Amir of the Muslim community. It is therefore very important that the initial trustees – and especially their chairman – are trustworthy people who have *taqwa* of Allah and love for His Messenger, *salallahu alayhi wa salam*.

17.8 My advice to the Trustees of all Islamic Organisations which are registered as Charitable Unincorporated Associations is to change their governing document by becoming **either** a Charitable Trust **or** a Charitable Company limited by guarantee and not having a share capital or a Charitable Incorporated Organisation which can be administered **as if it were** a Charitable Trust – with a limited number of Trustees who are the best of the community. They will then be able to follow the *sunnah* and *shari'ah* while also benefiting from the law of the country's legally recognised charitable status.

18. The Charitable Company limited by guarantee and not having a share capital:

18.1 Like the Charitable Unincorporated Association, the traditional Charitable Company limited by guarantee and not having a share capital is characterised by a structure which is alien to the *sunnah*. It is often adopted by the larger Islamic organisations because it does appear to have two main advantages under UK law:

- (i) It is regarded as having its own legally recognised identity and is referred to as a 'corporate body'. It can own property. This means that there is no need to re-convey all the property it owns every time its Directors/Trustees change. Property is registered in the name of the charity. It can enter into contracts and sue and be sued in its own name.
- (ii) In the case of financial loss or damage, the liability of its Executive Body is limited, often only to £1. This often appears an attractive proposition (although in fact any Trustee with *taqwa* will know that he or she is ultimately answerable to Allah for his or her actions and will not be able to rely on cleverly worded escape clauses on the Last Day). Furthermore this limited liability does not cover every situation. A Director of a Charitable Company can still be personally liable, for example, when he is in breach of his fiduciary duty, where he acts beyond his powers and incurs loss as a result of an unauthorised transaction, where there is a failure on behalf of the company to comply with the statutory obligations laid down by the Companies Acts (which **are** complicated for a non-lawyer), and where he acts negligently.

18.2 Moreover, these apparent advantages of a Charitable Company limited by guarantee and not having a share capital are outweighed by the main disadvantages which are:

- (i) Because it is a company, a Charitable Company limited by guarantee and not having a share capital is subject to the requirements of UK Company law as well as to those of UK Charity law. This inevitably makes its administration more complicated and difficult to understand. I should think, for example, that the average Muslim Trustee would find the standard Memorandum and Articles of Association for a Charitable Company limited by guarantee and not having a share capital unintelligible, unless he or she was a qualified UK lawyer.

- (ii) Because the administration is more complicated, it becomes more difficult to act decisively – every decision must first await permission from some committee or other – and so it becomes more expensive, especially when lawyers and auditors are needed.

- 18.3** Much of company law is *dunya*-orientated, because both commercial companies and the lawyers who advise them are usually concerned with making money. This orientation affects the way companies are structured and the social relations and exchanges which take place within them, in which members of top management are highly paid while the rest of the work force receive considerably less. This structure promotes a two way ‘them and us’ attitude – which persists in a Charitable Company limited by guarantee and not having a share capital even though it is no longer ostensibly concerned with financial gain – and which in the context of a large Central Mosque and Islamic Centre environment often results in a separation between the management and the majority of worshippers. This is why many large religious institutions feel like large religious institutions – rather than the dynamic centres of the *deen* which they could and should be. In effect they become centres of bureaucracy and delay by committee procedure. This may seem politically expedient at times, especially in the post-colonial era in which the *Ummah* is still recovering from the battering it has received during the last two centuries, but the structure and way of administration of this model is in fact far removed from the Prophetic model.
- 18.4** If one looks at the structure and procedures outlined in a standard Memorandum and Articles of Association for a Charitable Company limited by guarantee and not having a share capital, then from an Islamic point of view it is a bureaucratic nightmare which is far worse than the structure and procedures contained in the Constitution of the average smaller Charitable Unincorporated Association, and which is far removed from the simplicity and clarity of the *deen* of Islam, relying as it does on paid up membership and majority voting. In my opinion there is absolutely no need to make life this complicated by submitting to a structure and procedure which has been devised by non-Muslims virtually bereft of prophetic guidance.
- 18.5** In contrast, a well-drafted Trust Deed for a Charitable Trust can and should actually be used by lay Trustees as a guide manual.
- 18.6** Furthermore, if you examine the standard clauses regarding financial and commercial activity contained in a standard Memorandum and Articles of Association for a Charitable Company limited by guarantee and not having a share capital, these usually include all sorts of *haram* transactions which are forbidden by Allah. One might be forgiven for thinking that such ‘islamic’ documents are a ‘trojan horse’ designed to paralyse and disable the running of the charitable institution for which they have been drafted. The truth of the matter of course probably is that the lawyers responsible for drafting these documents have probably done their best to do a good job, but without having any real understanding of the *sunnah* and the requirements of the *shari’ah* – especially as regards the prohibition of usury – which can in fact so easily be incorporated by anyone who has that understanding into a document which satisfies the technical requirements of UK law and will therefore be regarded as legally valid in the UK.

- 18.7** It is significant, for example, how often there is no clause in such documents which stipulates that the Directors should be practising Muslims, and no clause which forbids the Trust or its agents to enter into usurious transactions. This means that it would technically be possible for a Mosque and Islamic Centre to be run by non-Muslim directors – or by directors who are not practising Muslims – who might be tempted to raise a loan by way of a *haram* mortgage using the main Mosque and Islamic Centre building as security! This is not a healthy scenario. The Muslims should be re-defining the present society – not the other way around.
- 18.8** The traditional way in which the Islamic Waqf has always raised money is not by indulging in usurious transactions with moneylenders, but by acquiring property which produces revenue which is then used to pay for the running expenses of the Waqf. For example, there is nothing (other than lack of funds) to stop any Mosque and Islamic Centre purchasing surrounding and nearby dwellings and shops which are rented out or sold after refurbishment at a profit principally to Muslims. This helps to establish the Muslim community round the Mosque, it keeps the Muslims' wealth circulating within the community, and the *halal* income derived from the rent and profits from sales is directed towards the running costs and charitable objects of the Trust. This is a healthy scenario.
- 18.9** All of that said – and as already stated – the governance of a Charitable Company limited by guarantee and not having a share capital can be structured in such a way that while enjoying the benefits of its particular legally defined characteristics, it can be administered as **if** it were a Charitable Trust.
- 18.10** Accordingly my advice to any Islamic Organisation which has been formed as a Charitable Company limited by guarantee and not having a share capital is to review and if necessary amend its Articles of Association so that it can be administered as **if** it were a Charitable Trust. How can this be achieved?
- 18.11** The key to this approach is having different levels of membership, whereby:
- (i) only the Directors/Trustees are Full Members;
 - (ii) only the Directors/Trustees have the power to discharge and appoint Directors/Trustees and to make binding decisions concerning the administration of the Mosque and Islamic Centre;
 - (iii) other categories of members (for example **local community users** of the Mosque and Islamic Centre, **friends** of the Mosque and Islamic Centre and **patrons** of the Mosque and Islamic Centre) may have a vote in order to show approval or disapproval of any proposal at any *shura* meeting concerning issues which involve the local community – but **not** to make decisions which are binding on the Directors/Trustees concerning the administration of the Mosque and Islamic Centre.
- 18.12** As with a Charitable Trust, provision can be made for a second level of Management, comprised of some or preferably all of the Directors/Trustees **plus** non-Director/Trustee members to whom the day-to-day administration of the Mosque and Islamic Centre can be delegated. This second level of management can be described as, for example, the Management Committee, or the Executive Committee, or the

Governing Council, or the Shura Council. Whatever it is called, the Management Committee's **function** remains the same. The Articles of Association should make it clear that all decisions of the Management Committee are subject to the approval of the Board of Directors/Trustees – approval which is deemed to have been given unless specifically withdrawn. This arrangement ensures that the Directors/Trustees remain in overall control of the Charity (which is their legal responsibility) – and that the Management Committee does not begin to assume that its members are independent of the Directors/Trustees and in charge of the Charity!

18.13 In my experience, although these provisions are very different to those which are enshrined in the traditional model Articles for a Charitable Company limited by guarantee which are provided by virtue of the various *Companies Acts*, this Muslim friendly structure works!

19. The Charitable Incorporated Organisation:

19.1 The Charitable Incorporated Organisation, usually referred to as the CIO (or in Scotland the SCIO), is a relatively new legal structure which is intended to benefit from the legal attributes of a Charitable Company limited by guarantee and not having a share capital – but without its having to be registered with Companies House.

19.2 A new charity can be set up as a CIO from the start. Charitable Trusts and Charitable Unincorporated Associations can convert to a CIO. Legislation enabling a Charitable Company limited by guarantee and not having a share capital to convert to a CIO is due to be enacted during 2014.

19.3 In the case of conversion, the procedure is this: a new CIO is first registered as a charity, which has its own new registered number. Once registered all the assets and liabilities of the 'old' charity are transferred to the 'new' CIO. Once this process has been completed, the 'old' charity is removed from the register of charities.

19.4 There are two main model CIO Constitutions provided by the Charity Commission. The Muslim friendly model CIO Constitution is described as "A Charitable Incorporated Organisation whose only voting members are its Charity Trustees". As with a Charitable Company limited by guarantee and not having a share capital, this model needs to be adapted so that it can be administered **as if** it is a Charitable Trust, by having different levels of membership which distinguish between:

- (i) voting members (the Charity Trustees); and
- (ii) non-voting members, such as, for example, **local community users** of the Mosque and Islamic Centre, **friends** of the Mosque and Islamic Centre and **patrons** of the Mosque and Islamic Centre) who may have a "vote" in order to show approval or disapproval of any proposal at any *shura* meeting concerning issues which involve the local community – but not to make decisions which are binding on the Charity Trustees concerning the administration of the Mosque and Islamic Centre; and
- (iii) by having a second level of management; and
- (iv) by having a decision making process which is in harmony with the *sunnah* and the *shari'ah*.

- 19.5** The CIO Constitution can make provision for a second level of management comprised of some or preferably all of the Charity Trustees **plus** non-Charity Trustee members to whom the day-to-day administration of the Mosque and Islamic Centre can be delegated. This second level of management can be described as, for example, the Management Committee, or the Executive Committee, or the Governing Council, or the Shura Council. Whatever it is called, its **function** remains the same. The CIO Constitution should make it clear that all decisions of the Management Committee are subject to the approval of the Charity Trustees – approval which is deemed to have been given unless specifically withdrawn. This arrangement ensures that the Charity Trustees remain in overall control of the Charity (which is their legal responsibility) – and that the Management Committee does not begin to assume that its members are independent of the Charity Trustees and in charge of the Charity!
- 19.6** It is important to appreciate that all CIOs are subject to statutory General Regulations and Dissolution Regulations which specifically govern how decisions must be made with regard to:
- (i) making amendments to a CIO Constitution;
 - (ii) amalgamating two or more CIOs, or transferring assets and liabilities from one CIO to another CIO; and
 - (iii) winding up or dissolving a CIO.
- 19.7** It is not possible to opt out of or amend these Regulations – and these decisions must be made by the Charity Trustees acting specifically in their capacity as “Members” of the CIO and not as “Charity Trustees” of the CIO.
- 19.8** To facilitate this, a Charity Trustees Meeting can be changed into a Members Meeting simply by deciding this in real time during any meeting of the Charity Trustees. The Charity Trustees may not detect any significant changes in their being when this change takes place – but this is a technical legal hoop through which the law requires them to jump and the minutes of the two meetings in one should make a record this.
- 19.9** These exceptions apart, the Charity Trustees are free to utilise a decision making process which is in harmony with the *sunna* and the *shari’a*.
- 20. Decision Making:**
- 20.1** Whichever legal structure is chosen for an Islamic Charity, there are two main ways for its Trustees to make a decision when they are not unanimous about what should be done – **either:**
- (i) after due consultation, the chairperson (Amir or Amira) makes the decision; – **or:**
 - (ii) decisions are made by majority vote, with the chairperson having a second casting vote if there is an equality of votes.
- 20.2** The first way is in harmony with the *sunnah* and the *shari’a*, but only works among Trustees who trust each other. The second way is in accordance with the western democratic method and is usually preferred by Trustees who do not fully trust each other.

Conclusions:

- 21.** It should be clear from the preceding examination of the different possibilities, that in my opinion, both as a lawyer and as a Muslim, the best option for all concerned, both the Trustees and the members of the Muslim community whom they serve, is **either** the Charitable Trust **or** a Charitable Company or Charitable Incorporated Organisation **if** structured like a Charitable Trust – and *provided that* the Trustees are the best of their community and have *taqwa*, and *provided that* the Trust Deed, or Articles, or Constitution as the case may be have been drafted carefully, and correctly. In my experience, a badly drafted Trust Deed can result in almost as much trouble as the Constitution of a traditionally structured Charitable Unincorporated Association or the Articles of a traditionally structured Charitable Company limited by guarantee and not having a share capital.
- 22.** In my opinion a small charity can best function as a Charitable Trust. A larger charity – and especially a charity which has the use or ownership of property is probably better advised to be a CIO. A charity which is already a Charitable Trust can change its structure to that of a CIO. A charity which is already a Charitable Company cannot convert to a CIO at present, but this should become possible before the end of 2014. A charity which is at present a Charitable Unincorporated Association should seriously consider becoming either a Charitable Trust or a CIO. In either case, if the charity is based in Scotland, its Trustees should enquire from a Scottish lawyer as to whether or not there is a Scottish equivalent of the three options to which I have referred in *paragraph 16.9 above*. In my opinion, *option (iii)* is the best, and *option (ii)* the next best.
- 23.** As already stated in *paragraph 16.16 above*, if a charity has been a Charitable Trust or Charitable Company for more than 10 years, its Trustees should have the Trust Deed or Articles of Association as the case may be reviewed and amended if necessary by a lawyer who is conversant with the *sunnah* and the *shari'ah* and UK law.

Hajj Ahmad Thomson
Barrister
28th Shaban 1435
26th June 2014

