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The Evolution of the Trust System in the Mutual Fund Business in Indonesia (A Study Based on Islamic Law Perspective)

Gemala Dewi¹

The progressive development of International law can be seen also in the concept of trust in business transaction based on its evolution from time to time. This is because the trust institution, which is considered as an achievement of the Anglo-Saxon legal system that has tremendous benefit, actually started from the concept of separation between ownership and mastery in the form of charitable trust of waqf, known in Islamic law. Research proves that in the history of "Trust", waqf is forerunner of the establishment of "Trust". How the concept of waqf develops a business type of Mutual Fund that is in compliance with Sharia Law, is the problem that is discussed in this paper. By using a normative and comparative law method, this paper found that by implementing only Nazhir functions that reflect the concept of trust by means of Islamic Trust Fund (ITF), the benefit of the object of cash waqf can be multiplied. For this purpose, the Islamic Trust Fund concept is defined in the real meaning of cash waqf mandate which today can be used in business activities, other than worship sector. With ITF concept like this does not preclude the general public to participate in purchasing units in the form of a business Sharia Mutual Funds (SMF), so thus also can create investment opportunities that also drives the wheels of development.

Keywords: *trust, waqf, mutual fund*

I. Introduction

In these days, the concept of "Trust" in business transactions and other activities becomes a phenomenon of an invention which is incredibly useful for the society. The Trust system is known in the international world nowadays as a solution when a business contract is no longer able to accommodate the development of an agreement which has more than one party involved. In the development of capital markets throughout the world, for example, the importance of collective custody is inevitable. Therefore the existence of the concept

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of "trust" becomes the solution to accommodate the interests of the collective custody in the capital market. As the examples of the use of trust system in capital markets activities are the forms of "Trust" in each bonds issues or in formulation of Collective Investment Contracts (CIC) of Mutual Funds. How did the role of the trust in the Islamic concept of business activities, especially in the Islamic capital market, will be discussed in this paper, particularly its function on the issuance of unit trust of Sharia Mutual Fund (SMF) and the development of the functions of charity on the concept of *waqf*.

II. The Concept of Trust and Its Evolution in the Common Law Legal System

In Anglo-Saxon legal tradition (Common Law) Trust concept is known as a transfer of legal ownership over an object to be managed for the benefit of third parties. This is apparent from the following explanation.

Trust is created where the absolute owner of property (the settler) passes the legal title in that property to a person (the trustee) to hold that property on trust for the benefit of another person (the beneficiary) in accordance with terms set out by the settler".²

From the information given above it appears that devolution of power occurred over the legal ownership of a party called the Trustee, by the original owner (settler) for management (use of) a property for the benefit of another party (beneficiary), according to a desired destination by the settler. Trust can be described as a relationship of trust (fiduciary) in which one party (the trustee) is as holders of rights to property under the law (legal title) is subject to the obligations under the equity to maintain or to use that property for the benefit of others.³

In Black's Law Dictionary defined as understanding the Trust:

"A legal entity created by a grantor for the benefit of designated beneficiaries under the laws of the state and the valid trust instrument. The trustee holds a fiduciary responsibility to manage the trust's corpus assets and income for the economic benefit of all of the beneficiaries"⁴

² Alastair Hudson, *Equity & Trust*

2nd ed., (London: Cavendish Publishing Ltd., 2002), p. 30.

³ Emmy Pangaribuan Simanjuntak, *Mengenai Trust, Upgrading Lecturer Civil Law / Commerce*, (Yogyakarta: 16-18 November, 1992), p. 1.

⁴ Henry Campbell Black, *Black's Law Dictionary*, (St Paul, Minn.: West Publishing Co., 1991), p. 1047.

From these definitions we can see the concept of trust institution as a legal entity created by the grantor (the party who gave the treasure) in the interest of beneficiaries (recipient's property) through the appointment, status and are legally valid trust instrument. In this case, the party appointed as trustee (guardian/caretaker mandate) has a responsibility (fiduciary responsibility) to organize/manage the trust assets and income for the economic benefit of all property recipients (beneficiaries).

In principle, the concept of *trust* in the system of *Common Law* gives legal sense that the party that controls an asset or an object is not always the owner of the object. In this case, as the Trustee of money or property entrusted to manage the power to do anything for money or property to audience interests (*beneficiaries*). Mastery of management to the trustee allows the asset management more competent than handed directly to the party entitled to enjoy it (beneficiary). Assets will also be more accessible to more established managed and its use in the event of his generational transfer beneficiary which generally takes a long time in the transition process (Probation) property as if delivered by hand on the beneficiary.

Trust institution then evolved. Through this trust system, a lot in material law (property law) can be overcome. For example in *Convention on the Law Applicable to trusts and on Their Recognition* received in the Hague Convention on July 1, 1985, given the understanding trust in the broader field, that is not only intended to give meaning to *personal* and *family trusts*, but also trusts that were created for the purpose of conducting business (*Un Incorporated Business Trust Organization / UBTO*), *trusts* for social purposes (*charitable trusts*), trusts created especially for the benefit of a loan (*Indenture trusts*), or trusts that are created as holders of collateral (*collateral trusts*).⁵ All of the trusts that exist and thrive, which was created by the settlor (express trusts) is included within the meaning of trusts in the convention, by taking the characteristics or the same characteristics of all these trusts, with the exception of constructive trusts (created by court order).⁶

In simple terms it can be said that the understanding of the Trust in the legal system *Common Law* is "*legal relationship created under the laws of eq-*

⁵ Gunawan Widjaja, *Transplantasi Trusts dalam KUH Perdata, KUHD, dan Undang-Undang Pasar Modal Indonesia*, (Jakarta: PT RajaGrafindo Persada, 2008), p. 290-291.

⁶ *Ibid.*, p. 291.

uity whereby property (the corpus) is held by one party (the trustee) for other (cestui que trust or beneficiaries.)”⁷ The statement shows that the trust in the countries with the Common Law tradition is the product of Equity⁸ outside the Court of Common Law. Common Law itself does not recognize the existence of trusts. In the view of Common Law, as well as the Civil Law legal tradition, only recognizes a single ownership. Relevant parties in a legal trusts relationship can not solve the problems of existing law through Common Law Court, they are only going to get a resolution through the Court of Equity.⁹ Long ago in England there is a dualism of court, that is if someone complained about his case to a general court (Common Law Court), in the case decided by the system, and if he had complained to the court that use Equity system, namely the Chancery Court, it was decided also to other systems sometimes altogether different. The 1873M-year parliament passed legislation regarding the improvement of court system known as the Judicature Act to resolve these differences and ordered all courts to adopt a unified law. Court of Equity is the use of the principles of justice for the supplementing of the law, which under Islamic law can be equated with the use *Istihsan* method.¹⁰

III. Trust Institution and Its Application to Mutual Fund

The concept of mutual funds in the common law legal system appears in the definition of mutual funds that put forward by Charles P Jones as follows:

“Mutual funds are either corporations or business trusts typically formed by an investment advisory firm that selects the board of trustees (directors) for the company. The trustees, in

⁷ AR Fullarton, “The Common Law and Taxation of Trusts in Australia in the Twenty-First Century”, p.3, <http://www.alfullartonassociates.com.au/trusts%20paper.htm>”<http://www.alfullartonassociates.com.au/trusts20%20paper.htm>.2007

⁸ In etymology, the meaning of the word “equity” is the ideal of justice that do not governed by law even those that may conflict with the law. Equity is part of English law which is not derived from customs and the decisions of parliament, but it comes from the rulings of Court of Chancery antiquity. In the past (14th century) is a minister who completed the Chancellor case filed by the society to obtain justice which subsequently developed into a court called the “Court of Chancery”. In its development (17th century), Court of Chancery held by jurists and in the early 19th century binding with the same understanding of equity as Comon law precedent. More information see Abdulkadir Mohammad “Hukum Perjanjian”, (Bandung: Alumnus, 1986), p. 6-7.

⁹ Gunawan Wijaya, “The Hague Convention on The Law Applicable to Trusts and on Their Recognition dan Shapeless Trusts; Suatu Perkembangan Trusts di Dunia Menuju ke Arah Konsepsi Trusts Yang Netral”, Newsletter No. 65/Juni/2006,.

¹⁰ M. Hamidullah dkk, *Fikih Islam dan Hukum Romawi* (Yogyakarta, Gama Media, 2003), p. 145-146.

turn, hire a separate management company, normally the investment advisory firm, to manage the fund. The management company is contracted by the investment company to perform necessary research and to manage the portfolio, as well as to handle the administrative chores, for which it receives a fee".¹¹

From the definition, it appears to use the concept of *trust* in the activities of the Fund. As is well known that the concept of the so-called "*trust*" in the Anglo-Saxon legal tradition (*Common Law*) is:

"trust is created where the absolute owner of property (the settlor) passes the legal title in that property to a person (the trustee) to hold that property on trust for the benefit of another person (the beneficiary) in accordance with terms set out by the settler".¹²

Trust can be described as a relationship of trust (*fiduciary*) in which one person is a holder of property rights under the law (*legal title*) is subject to liability based on the equity to maintain property or use it to benefit others.¹³ Kimbrough in the *Summary of the American Law* says that *trust* is the ownership of property held by one party to use or interest to others who have rights under the *equity*.¹⁴ *Trust* can also be interpreted as a legal relationship between two or more persons in which a bound to rule on the basis of property rights under the law for the benefit of others who have an interest based on *equity*.¹⁵ Trust is a trust given to a person (called a *trustee*) and performs the obligation for the benefit of another person (called the *beneficiary*).

In conjunction with Mutual Fund, the introduction of the concept of unit trust is one of the oldest types of collective investment in British legal history.¹⁶ *Unit trusts* is: *collective investment scheme*" which is, "*pool of investment capital provided by participants so that each participant receives a share of the profits generated by these mutual investment in proportion to the size of her contribution*".¹⁷ In this concept of unit trust investors to acquire investment units whose amount is proportional to their participation in the overall investment *pool*. Unit trust is incorporated through the declaration of trusts,

¹¹ Charles P Jones, *Investments*, op.cit., p. 56.

¹² Alastair Hudson, op.cit., p. 30

¹³ Emmy Pangaribuan Simanjuntak, *Mengenal Trust*, upgrading civil law lecturer/trade (Yogyakarta: 16-18 November, 1992), p. 1.

¹⁴ Ibid, p. 1.

¹⁵ Ibid, p. 2.

¹⁶ Gunawan Widjaja, op. cit, p. 314.

¹⁷ Alastair Hudson, *Equity Interest*, (London: Cavendish Publishing, 2002), p. 665. as cited by ibid .

based on the deed, trusts or agreements made between the trustee with the manager¹⁸ or between *custodian* and *management company*.¹⁹

According to the legal tradition of *common law* (*Anglo Saxon*), *trustee* in the practice of Mutual Funds other than as an owner, is also an administrator in the law of the *trust corpus* (investment pools). The position of trustee as owner of the *trust corpus* is in order to make the management of the *trust corpus*. In the Development Trusts in the United States, at implementation in the capital markets, trustee conducted by Management company that serves as an administrator or manager who founded the *Mutual Fund*.²⁰

From the standpoint of contract law in the legal system of the Civil Law, Mutual Fund is formed resulting from the existence of a collective agreement granting the power of indirect fund management among the investors as providers of funds, with Investment Manager (IM) and Custodian Bank (CB) as fund manager. Attachment to investors in the contract, granting the power of the IM and CB occurs, legally on the basis of laws and regulations that govern them.

In Indonesia, the attachment of investors with Collective Investment Contract (CIC) made by IM and CB has a legal basis in the Civil Code (KUH Perdata). In Section 1317 contained provisions regarding the promises made for the benefit of third parties. Article 1317 reads:

"Recall also allowed to request the establishment of a promise to the interests of a third party, if a determination is made by a promise to himself, or a gift made to another person, includes a promise like that. Anyone who has promised something like that should not be pulled back, if the third party has been declared wanted to use it."²¹

The promise to the interests of third parties which are recognized in article 1317 Civil Code (KUH Perdata) is written in the CIC made by MI and BK. The rights and obligations set forth in CIC by IM and CB for managing the fund for the benefit of investors. Other Articles in the Civil Code which is used as the basis of CIC under the Civil Law legal system in Indonesia is Article 1618 which regulates investor engagement in CIC as a silent partner in a civil partnership.²² In general, as is appropriate to apply the agreement must meet the legal

¹⁸ Philip H. Petit, *Equity and the Law of Trusts*, (London: Butterworths, 1989), p. 13 as cited by *Ibid.*, p. 313.

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 367.

²¹ R. Subekti dan R. Tjitrosudibio, *op. cit.*, p. 304.

terms of the agreement under the provisions of Article 1320 and of course based on the provisions of Article 1337 and Article 1338 Indonesian Civil Code as of the principle of freedom of contract.

Practically, On the institutional side, there is basically no difference of principle between Conventional Mutual Funds and Sharia Mutual Funds in Indonesia. Both Conventional Mutual Funds and Sharia Mutual Funds can take the form of the Company (PT) or the shape of CIC according to statutory provisions in force.²³ However, today both Conventional Mutual Funds and Mutual Funds Sharia in practice only use the second form, the Collective Investment Contract (CIC), because of the nature and concepts that are considered less practical, both in its formation and dissolution of the less flexible it is not desirable Securities Company to the mutual fund business today.²⁴ That is because the concept of CIC has a special concept that is different from contracts in general. In the form of Collective Investment Contracts (CIC), the Fund is not a legal entity or corporation but a legal form which is termed as the Un-Incorporated Business Trusts Organization (UBTO) that can be distinguished from a corporation. Differences UBTO of corporate legal form can be seen from the following explanation:²⁵

*"The Incorporator of a corporation is comparable to the Creator of a UBTO. Both act for and on behalf of the entity being created in order to bring it into existence. Likewise the Investor of the corporation and the Exchanger of the UBTO provide the assets (property and/or money) that form the corpus (body) of the entity being created. The investor of the corporation purchases the stock and is called the Stockholder. The Exchanger of the UBTO exchanges his assets for the trusts Certificate of Capital Units and is called the Certificate Holder."*²⁶

In a Mutual Fund in the form CIC has a management company which acts as Investment Manager (IM) responsible for investment activities, which in-

²² Article 1618 Civil Code reads: "The alliance is an agreement by which two or more persons bind themselves to put something in communion, with the intent to share the profits going for it" Look: Gunawan Wijaya, *op. cit.*

²³ Article 18, Law No. 8 of 1995 on Capital Market, states that:... [a] Mutual Fund can be in the forms of: a. Corporate, or b. Collective Investment Contract.

²⁴ The result of interview with Mr MuhammadTouriq, Head of Sub. Sharia Policy Development Section, the Issuer and the Public Company, Capital Market Supervisory Agency and Financial Institution RI, September 27, 2008 in the Office of Bapepam-LK.

²⁵ Gunawan Widjaja dan Almira P. Ramaniya, *Reksa Dana dan Peran Serta Tanggung Jawab Manajer Investasi dalam Pasar Modal*, (Jakarta: Kencana, 2006), P. 50-51.

²⁶ *Ibid.*

clude the analysis and selection of the type of investment, taking investment decisions, monitor the investment market and take measures necessary for the interests of investors. The Investment Manager is a company whose main business is managing the customer-owned securities portfolio investors.

In this form of CIC, the Fund is managed by the two parties, in addition there is also an Investment Manager Custodian Bank. Custodian Bank to act as a store of wealth (safe keeper) and the administrator of the Fund. Funds collected from many investors through mutual fund is owned by investors and stored on behalf of the Fund at the Custodian Bank.²⁷ A Mutual Fund (Mutual Fund) is a collection of separate certain assets, which is derived from investments of investors.²⁸ CIC Fund gave birth to a form of collection of property together, which took the legal form of a fellowship, which is managing and storing their wealth transferred to third parties (together Investment Manager with the Bank's Custodian).²⁹

Some characteristics of CIC Investment Fund are as follows:

1. Sell investment units continuously along some investors who buy.
2. Participating units are not listed on the stock.
3. Investors can sell back to the participating units owned investment manager who manages.
4. Proceeds from sale or redemption payment of investment units will be charged to the Fund's assets.
5. The selling price / purchase of investment units is based on Net Asset Value (NAV) per unit, calculated by the Custodian Bank on a daily basis.

CIC-shaped Fund is a mutual fund that is open, the mutual fund offering and buy back shares from investors up to the amount of capital that has been issued.³⁰ Both Conventional Mutual Funds and Sharia Mutual Funds share the same characteristics. The difference in form between the two concept is in the institutional side, is visible on the institution of Sharia Supervisory Board (SSB) on each company's investment manager (*fund manager*) that this is certainly

²⁷ Eko Priyo Pratomo dan Ubaidillah Nugraha, *Reksa Dana; Solusi Perencanaan Investasi di Era Modern*. (Jakarta: PT. Gramedia Pustaka Utama, 2001), P. 42.

²⁸ Gunawan Widjaya, *Transplantasi Trusts dalam KUH Perdata, KUHD, dan Undang-Undang Pasar Modal Indonesia*, (Jakarta: PT. RajaGrafindo Persada, 2008), P. 309.

²⁹ Widjaya dan Ramaniya, *op.cit.*, p. 75.

³⁰ Munir Fuady, *Pasar Modal Modern*, (Bandung: PT Citra Aditya Bakti, 1996), P. 107.

not located in a Conventional Mutual Funds. In Mutual Funds in Sharia operations, DPS serves as a representative of the National Islamic Council (DSN) that is placed on Islamic financial institutions (in this case the Sharia Fund).

In principle, the legal basis of operations for Mutual Funds and Mutual Funds Conventional Syariah they refer to the same legal basis of the Capital Market Law No. 8, 1995 Article 18 and Bapepam-LK. Bapepam-LK Regulation governing the general operations of the Fund Regulation. IV.B.1 Guidelines for the Management of CIC Investment Fund, No. IV. B.2 Guidelines CIC Investment Fund Contract, No. IV.B.3 About CIC Investment Fund of Participation Units Traded on the Stock Exchange and No. IX.C.5 About Participation Registration for Public Offerings CIC Investment Fund.

However, for Syariah Fund there are special rules governing the operations further, the Bapepam-LK. IX.A.13 About Publishing Islamic Securities, Regulation No. IX. A. 14 About Akad used in issuance of Islamic Securities in Capital Market. In addition to Bapepam-LK, the Sharia should refer to the Fund became operational on MUI Fatwa Sharia About Mutual Funds On July 30, 1997 and Fatwa DSN-MUI No.20/DSN-MUI/IV/2001 About Guidelines For Mutual Fund Investment Sharia.

The main difference lies in the enactment of Islamic principle which requires that the operation was held two processes, namely:

1. The process of "screening" or filtering of investment instruments based on Islamic guidelines. Filtering according to the sharia is issued stocks that have illicit activities such as usury, *gharar*, liquor, gambling, pork, cigarettes and so forth. Thus, in Islamic securities portfolio avoided the use of investment funds on the business activities mentioned above.
2. The process of "cleansing" to clean up the income derived from activities that are considered unlawful according to syariah guidelines.³¹ Use of this cleansing of funds allocated to financing benefits for orphans and underprivileged people, the construction of public facilities, as well as humanitarian disaster.

In the mutual fund based on Islamic principle is related to the operational

³¹ Anshori, Abdul Ghofur, *Pokok-Pokok Hukum Perjanjian Islam di Indonesia*, (Yogyakarta: Citra Media, 2006), p. 3.

mechanism consists of two kinds of legal actions in the form of treaties, namely:

1. Between investors and the Investment Manager by *wakalah* system; and
2. Between the Investment Manager and the investment made by the system user *mudarabah*.

Akad *wakalah* used in the contract between the investor and the Investment Manager is essentially an agreement granting the right to the Investment Manager to carry out fund management has been entrusted by him, in the hope that investors will benefit from the funds invested. Investors acted as *Shahibul Maal*, while the Investment Manager acts as his deputy.

The contract is created between the Investment Manager and investment with the system users *mudarabah* have the following characteristics:³²

1. Profit sharing between investors (*Shahibul maal*), who represented the proportion that has been agreed upon by both parties through the Investment Manager as a representative and there is no guarantee of results of certain investments to investors.
2. Investors bear the risk only for funds that have been granted.
3. Investment Manager, as representatives do not bear the risk of losses on the investment was doing all it were not for negligence (gross negligence / *tafrith*).

Mutual Funds in Sharia, investments may only be made on financial instruments in accordance with Islamic sharia through shares that are held through a public offering and the distribution of dividends is based on operating profit level, the placement of deposits in Islamic banks, and marketable long-term debt in accordance with Islamic principles. In addition, investment should also be done on the business activities that do not conflict with Islamic law (not the gambling, usury, forbidden foods and drinks, and that damage morale / cause harm). Similarly, the selection and execution of investment transactions should be conducted according to the precautionary principle (prudential management / *ihtiyath*), and not allowed to gamble in it an element of *gharar*.

From the description above, globally as an economic institution, Syariah Fund is an institution other than carry out investments to benefit also pay attention to social values and *akhlakul karimah*. Can be classified as a Social Responsible Investment (SRI), or the Ethical Investment, Social Aware Value-Based Investment and Investment.³³ So give more legal protection for inves-

³² Ibid, p. 73.

tors, especially for the implementation of (ethical investment, socially aware investment and value-based investment) is an investment that has universal values that are not only useful for Muslims also have a positive impact for society in general

IV. The Institution of Trust According to Islamic Law

From the point of Islamic law, the legal concept of "trust" which has the principle of separation of ownership is actually not a new thing that is difficult to understand. This is because in Islamic law there are legal concepts that are similar to institutions "trust" is, namely the *Waqf* institutions or practices in the Indonesian language is called *waqf*. According to Imam Abu Hanifah understanding *waqf* is holding an object whose ownership are retained by the donor *waqf*, but the wherewithal to benefit the public interest.³⁴ In Article 1 of Law No.41 Year 2004 on Endowments, Endowments understanding translated as: "the legal act wakif (giver *waqf*) to separate and / or give up some of his property to be used forever or for a certain period in accordance with their interests for purposes of worship and / or the general welfare according to sharia"³⁵ From the definition of *waqf* appears to the separation of ownership of property to be used by third parties. About objects in his *waqf*, religious Maliki opened the vast opportunities to provide endowments in any asset type, including the most liquid assets are cash (cash *Waqf*).³⁶

Waqf in Islamic law, which was formed since medieval Islamic world from 7 to 9 Th centuries AD, has many similarities with the concept of Trusts in British law.³⁷ This is apparent from the construction that each *waqf* must have *Waqif* (founder) similar to the settler of the Trust, *mutawilli* or in Indonesia called *Nazir* (trustee), *qadi* (judge) and beneficiaries (*mauquf alaih*)³⁸ In the second concept of it, both *waqf* (endowments) and trusts, the object submitted for use beneficial to the interests of the users (beneficiaries or *mauquf alaih*) that had been predetermined well of the recipient as well as its usefulness, for

³³ Look: Firdaus NH, op. cit., P. 16.

³⁴ Uswatun Hasanah, "Peran Wakaf Dalam Mewujudkan Kesejahteraan Sosial (Studi Kasus Pengelolaan Wakaf di Jakarta Selatan)", Dissertation, Graduate Program State Islamic Institute (IAIN) Syarif Hidayatullah, Jakarta, 1997, p. 30.

³⁵ Indonesia, Law No.. 41 of 2004, of *waqf*, Article 1, with an explanation from the author.

³⁶ Ahmad Djunaidi dan Thobieb Al-Asyhar, *Menuju Era Wakaf Produktif*, (Depok: Muntaz Publishing, 2008), p. iv

³⁷ Goudiosi, loc.cit., p.1237-1240.

the individual and the public interest and social. Significant differences are only from the point of expiry of the time that in *waqf*, usually until the benefits or belongings have been destroyed.³⁹ However, it is only valid for the *waqf* to social objectives in this regard including the *Waqf ahli* (Islamic family trust) and not in *waqf khairiy* (devoted to a charitable purpose from its inception).⁴⁰ Another difference is in the British legal system "legal estate" (ownership) is directed to the trustee, is what distinguishes the (*muttawali / Nazir*) where *Nazhir / muttawali* not the owner of the *waqf* property but as a property manager only.

The concept of *Waqf* institutions in Islamic law have similarities in terms of delegation of trust (*trust*), known as the concept of trusteeship, namely the belief that accompanied responsibilities (*fiduciary duty*) for the party entrusted with the mandate. A "*Nazir*" *waqf* was in charge of the management of *waqf* property under the law with the Pledge of *waqf*. In this case *Nazir* holds "*legal title*" to the *waqf* property (*maukuf bih*), which has the authority to manage the *waqf* property (*mauquf*) that was not hers (not the *legal owner* of the property endowments), while "*wakif*" is the "*settlor*" (*original owner*) of *waqf* property. In this case the *waqf* property should be managed by the "*Nazir*" of his people and society as *beneficiary* (*mauquf alaih*).

The similarity between the legal concept of *waqf* in Islamic law with the trust in the British legal system, as described earlier is not a mere coincidence. The influence of Islamic law in the formation of Anglo-Saxon legal tradition that shape English law and the countries of colonies evidenced by some scholars, like Professor John Makdisi, Jamila Hussain and Lawrence Rossen.⁴¹ John Makdisi in his writings titled "The Islamic Origins of The Common Law" in the

³⁸ Ibid. In the law of *waqf* in addition to construction, there are the so-called pillars of *waqf*. According to Abdul Wahhab Khallaf, endowments, there are four pillars: 1. People who berwakaf (*wakif*), ie, the property owner and take legal action *waqf*, 2. Diwakafkan property, or *mauquf BiH* as the object of legal acts, 3. The purpose of *waqf* or are eligible to receive endowments called *mauquf alaih*, 4. The statement called the *waqf* of *wakif shighat* or pledge *waqf*. (Abdul Wahhab Khallaf, *Ahkam al-Wakof* (Mesir: Matba'ah al-Misr, 1951), p. 14. ³⁹ Ibid, p. 1246-1247, However, today's developing discourse and operational even Endowment Money (Cash *waqaf*) which allows the application of a specific term endowments. Operasional validity of the *waqf* of money is based on understanding of Maliki fiqh scholars. (Look: Religion Departemen RI: Paradigma Baru Wakaf di Indonesia, (Jakarta: General Directorate of Waqf Islamic Guidance Society, Religion Departemen RI, 2008), p. 5-6, Restricted Endowments term called *waqf muaqqat*, (Look: Farida Prihatini, *Uswatun Hasanah dan Wirdyaningsih*, *Hukum Islam Zakat dan Wakaf Teori dan Prakteknya di Indonesia*, (Jakarta: Papas Sinar Sinanti, 2005), p. 136. Simak Baca secara fonetik

⁴⁰ Ibid.

journal North Carolina Law Review in 1999, argued that in addition to the Trust institutions, many other examples of institutional common law derived from Islamic law, one of which is the jury system is taken from the system *Lafif* in the form of Islamic judicial body consisting of 12 persons drawn from ordinary people who lived in the neighborhood of the judiciary is to be sworn to tell the truth and make a decision (verdict) binding for the judge to the case according to the facts of the case.⁴² Some of the English Common Law legal institutions are fundamentally expected adapted from similar institutions in Islamic law or of legal jurisprudence in the Islamic Caliphate and introduced into England after the Normans who inherited colonial legal institutions of the Islamic legal administration system Sicilia Emirates (Arab-Norman Culture), and the close relationship between King Roger II of Sicily with King Henry II of England.⁴³

Pertaining to the concept of Mutual Funds, the use of trust institution that has similarities with the concept of jurisprudence of *Waqf* (Endowments) can be seen from the function of Fund management (the Investment Manager and Custodian Bank) acting as trustee is entrusted with the mandate (*trust*) to manage investment funds (*waqf property or trust corpus*) for the interests of investors as a beneficiary unit holders (*mauquf alaih*). As a "*Nadzir*" or *waqf muttawali*, Mutual Fund manages objects in accordance with endowments goal that have been professed (as a "*declaration of title*") for the interests of Muslims including the *wakif* itself as the beneficiary (*mauquf alaih*). In the book "*Feminist Perspectives on Equity and Trusts*" written by Susan Scott-Hunt, Hilary Lim on Endowments in relation to the trust, the *waqf* was put in a separate chapter is entitled: "*The Waqf in trust*".⁴⁴ In the book stated:

⁴¹ Look: Mukul Devichan, "Is English Law Related to Muslim Law?", BBC News, 24 September 2008, <http://news.bbc.co.uk/1/hi/magazine/7631388.stm>. Retrieved on 2008-20-05. And see also: Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice*, (No place: Cambridge University Press, 2006), p. 15-16.

⁴² John A Makdisi, "The Islamic Origins of The Common Law," North Carolina Law Review 77 (5) Tahun 1999, p. 1635-1739.

⁴³ Jamila Hussain, "Book Review: The Justice of Islam by Lawrence Rosen", Melbourne University Law Review 2001, p. 30. Regarding a similar case can also be seen from Nicholas Heer Sherman Jackson, "Review: Islamic Law and Jurisprudence: Studies in Honor of Farhat J. Ziadeh, Journal of Near Eastern Studies 54 (1) Januari 1995, p. 68-69 dan Gamal Moursi Badr, "Islamic Criminal Justice", the American Journal of Comparative Law 32 (1), Winter 1984, p. 167-168.

⁴⁴ Susan Scott-Hunt dan Hilary Lim, *Feminist Perspectives on Equity and Trusts* in written, (London: Cavendish Publishing, 2001), p. 47.

"However, Avini does conclude that, if there was an external model for the English trust, he concurs with the Islamic theory that the waqf was the greatest influence upon the trust, having been 'imported to England by Franciscan friars...in the 13th century'. The similarities in 'purpose, theory and structure' are such, he argues, that the waqf and the trust are almost identical institutions'. For Cattani, looking through the lens of Islamic law, 'there is no doubt that the waqf is the earlier of the two institutions' leading 'naturally... to an inquiry as to whether the English trust was derived from the Islamic waqf'.⁴⁵

From that statement seems a close relationship between *trusts* and *waqaf*. Similarly Afzalur Rahman in his book titled "*Muhammad Encyclopedia of Search*," gave the title "*Trust*" to *waqf*.⁴⁶ This is the relevance of the permissibility of the business Fund derived from the concept of Trust's Common Law legal system; to be practiced in the economic activities of Muslims according to Sharia. So in principle, the Fund institutions according to Common Law legal concept does not conflict with Shari'a, for in practice as a trustee or investment manager *Nazir / muttawali* not commit fraud, fraud or purchase securities which contain usury or issued by issuers of securities that produce unlawful goods or other restrictions set forth in the National Sharia Board's consensus. In Indonesia the Sharia Board consensus derived from "Dewan Syariah Nasional-Majelis Ulama Indonesia (DSN-MUI) fatwas. Furthermore the practice of the Mutual Fund should follow the rules and implement the regulations of the stock exchange authorities (Badan Pengawas Pasar Modal dan Lembaga Keuangan / Bapepam-LK) as the competent institution.

The concept of conventional mutual fund, generally has a detailed setting and close supervision of stock exchange authorities (Bapepam-LK). This relates to the risks faced by investors in investing in the stock market. Because most institutional investors by the Fund are not people who understand the investment, then their inability to analyze investments require legal protection from the signs and mechanisms issued by the authority of the stock transactions to the managers of investment funds, in this case the Investment Manager. For Sharia Fund activities, ideally of Bapepam-LK as exchange authority has issued many regulations that ensure adequate legal protection for mutual fund

⁴⁵ Ibid., p. 55.

⁴⁶ Afzalur Rahman, "*Muhammad Encyclopedia of Search, Book Three, The Trader*", (London: The Muslim Schools Trust, tanpa tahun), p. 707-708.

⁴⁷ See the discussion on the last section of Chapter 2 of the author's dissertation on the Faculty of Law Graduate Program, the University of Indonesia, with the title: "Islamic Investment Fund Contract in Indonesia (Study on Contract According to Islamic Law)", year 2010, p. 142 - 147.

investors, are also applicable to investors of Sharia Mutual Funds (SMF).⁴⁷ However, for legal certainty for implementation of Islamic system of Sharia Fund activity was Bapepam-LK should make special rules that also can give the signs in the form of rules that will provide guidance where *gharar* (obscure /unclear) transactions and where the transaction is not *gharar* with the provisions of a clear legal sanction for the offense.

This becomes important because although on each investment manager of mutual fund companies have a Sharia Supervisory Board, in the practice of their transactions in the stock *gharar* risk is that which can not be avoided. As a logical consequence is the requirement for the mastery of risk management in buying and selling, particularly in capital markets transactions. Therefore, efforts to manage risk in investment management through diversification and utilization of capital market instruments, such as securities (stocks), *sukuk* (bonds), and derivatives, should be strived for as much as possible to prevent the practice of *riba* (usury), *maysir* (gambling) and *gharar* (risk uncertainty) itself in practice in the capital market. Thus, in practice later, the risk that can be faced is the risk that involves the knowledge and clarity of information, the object is clear and can be controlled, as well as games of skill, not games of chance.

Trust is used the concept as a system to protect the interests of investors in mutual fund activity will need to *Sharia* is implemented in accordance with the concept of trust in Islamic law as the concept of *Nazhir* tasks that must be sought for the management of *waqf* objects to be more productive and sustainable according to the original purpose of *waqf*. In operational terms the Sharia Fund, *Nazhir* functions in running the trust can be analogized to collective custody functions held by the Custodian Bank (CB) and management functions are the responsibility of the Investment Manager (IM) of the Sharia Fund. For these purposes, the provisions of the fatwas (legal opinions) of the National Sharia Board (DSN-MUI), and the regulations of Capital Market Supervisory Board (Bapepam-LK) governing the general mechanism of mutual fund and the special provisions of the contract of *sharia* should be run properly.

In Indonesia on *waqf* in the concept of trust is accommodated within the provisions of regulation on the management of cash *waqf* as stipulated in Government Regulation no. 42 of 2006, on the Implementation of Law No. 41 of 2004 on Endowments. Legislation, among other things regulates the forms of endowments, such as rigid object and movable objects and money. This can be seen in the provisions contained in Articles 28 to 31 of Law No. 41 of 2004

and Articles 22 to 27 President Rules (PP) No. 42 of 2006.

The *Waqf* of movable object, such as money, done by *waqif* through Islamic Financial Institutions (IFI) designated by the minister (Article 28 of Law No. 41 of 2004). *Waqf* of the movable objects in the form of money held by *waqif* in writing to the Islamic Financial Institutions (IFI), then by the IFI issued a cash *waqf* certificate, then cash *waqf* certificate issued by the IFI had conveyed to *waqif* and *Nazhir* as evidence of transfer of property *waqf* objects (Article 29 of Law no. 41/2004). Later, Islamic Financial Institutions (IFI) on behalf of *Nazhir* register *waqf* property in the form of money to the Minister no later than 7 (seven) working days after the issuance of cash *waqf* certificate. (Article 30 of Law no. 41/2004).

Furthermore, the Government Regulation no. 42 of 2006 affirmed that the cash *waqf* currency to be in the rupiah, if the money is going in endowments are still in foreign currencies such as the Rial, Dollar, Euro, Ringgit Malaysia and so on, converted first into the rupiah currency. (Article 22 of Regulation No. 42/2006)

For a *waqif* cash *waqf* that would be required to:

1. Present at the financial institution of Sharia Receiving Cash *Waqf* (Lembaga Keuangan Syariah – Penerima Wakaf Uang/LKS-PWU) to express the will of the cash *waqf*;
2. Describe the ownership and origin of money that will be in *waqf*;
3. *Wakif* will fill out the form statement that serves as a *waqf* deed of pledge (AIW). (Article 22 paragraph 3 of Regulation No. 42/2006).

In the of case *waqif* unable to attend to the LKS-PWU then *waqif* may appoint representatives or their attorneys, and representatives from *waqif* can claim moving objects in the form of *waqf* pledge money to the *Nazir* in front of the *Waqf* Deed of Pledge Officers (Pejabat Pembuat Akta Ikrar Wakaf / PPAIW) and so delivered the *Waqf* Deed of Pledge (Akta Ikrar Wakaf / AIW) to the LKS-PWU. (Article 22 paragraph 4 and 5 PP. 42/2006)

Some provisions of Legislation above show clearly that cash *waqf* recognized in positive law in Indonesia. In addition, the Act also ordered the establishment of *Waqf* Agency of Indonesia (BWI), which served to promote and develop national endowment; this agency is an independent institution. According to the *Waqf* Act BWI membership is appointed and dismissed by the Presi-

dent. While accountability for implementation of the tasks performed by an independent audit institution and submitted to the Minister and in general to the general public. Agency that has been established since 2007 now has stewardship in a period of four years. For the first period since its founding management today is the BWI period of 2007-2010, which has established its membership through a Presidential Decree No. 75 / M Year 2007, and the determination of its staff by the Decree of the Minister of Religion No. 96 of 2007. When viewed from the side of the law of trusts, BWI in Indonesia can be categorized as sort of the Trust or institution called the "Trustee" in charge of managing the *waqf* funds, especially cash *waqf*.

V. Sharia Mutual Fund (SMF) as an Alternative of Waqf Fund Management

The problems encountered in the practice of RDS in question here is that arising from a violation of applicable law. Since its emergence and during the development of Shariah Fund, there are no legal cases that occurred in the activities of Mutual Funds Sharia.⁴⁸ The existence of Sharia Fund which has been dissolved by the Bapepam-LK is not because of violations committed by the Investment Manager, Custodian Banks and perpetrator of other Shariah Fund against the rules. But most Islamic Fund is being dismissed because the net asset value obtained does not meet the minimum limit of Net Asset Value (NAV) is determined by the capital market regulator. In addition, the dissolution of Islamic Mutual Funds Mutual Fund performed because age is already more than 5 (five) years. Dissolution of Sharia Fund to be done to protect the interests of investors and the Sharia Fund would be developed healthier.

Not meeting the minimum net asset value (NAV) of a Sharia Fund associated with the number of instruments (securities) of Islamic investment, like sharia shares, Islamic bonds (*sukuk*), Collective Investment Contract Islamic Asset Backed Securities and other securities in accordance with the sharia principles is not widely available. This limitation has led to difficulties in constructing an investment portfolio of funds that have accumulated in the Fund Sharia. The lack of Net Asset Value (NAV) obtained by a Sharia Fund because investors

⁴⁸ The result of interview with Bp. Sujanto, Head of the Bureau of Justice Review of Investment Management, Capital Market Supervisory Agency and Financial Institution Supervisory Agency (Bapepam-LK), Ministry of Finance of Indonesia, on 22 September 2008.

who invest their funds at least on the Sharia Fund or in other words that the Syariah Fund is not sold on the market.

As an alternative in overcoming the problems of Islamic Mutual Funds NAV, is to open the possibility of placing the funds into the cash waqf investment units RDS while also opening opportunities for the general public who want to invest in it. For the mechanism can cooperate with Indonesian Endowments Board (BWI) to channel the cash waqf fund for Mutual Funds in Sharia played. This idea is based on the thought of progressive to (beneficiary) but can be beneficial to development.⁴⁹ Cash Waqf very precise models provide a promising answer to the social welfare and help overcome the economic crisis of contemporary Indonesia.⁵⁰

Investment is encouraged in Islam, even for each person who has the advantage of consumption that is used for daily needs. In the research report⁵¹ of Indonesian Muslim Expert Asosiation (Ikatan Cendekiawan Muslim Indonesia / ICMi) research team has proven that how big the influence of investment to national income is determined by the multiplier effect which in turn depends on the size of the trend of consumption expenditure which is called the *marginal propensity to consume* (MPC) and the modern state in general on the so-called *marginal propensity to save propensity to save* (MPS). Whereas in most people propensity to save is the excess of consumption. While in the formulation of a Muslim formulation economy arising not a revenue equal to consumption plus savings ($E = C + S$), but $E = C + I$ (income (E) equals consumption (C) plus *Infaq* (I)), where *Infaq* directly channeled to investment (I).

In terms of Islamic economy, raising infaq implementation can be considered as an investment opportunity. In Al-Qur'an Surah Al-Baqarah 2:219 - 220, Allah teaches people about wealth management in life as follows: "... And they ask you (about) what (should) they *infaq* (spend). Say, "The advantage (of what is needed)." This is what explains the verses of Allah unto you that ye should think, about the world and the hereafter ... "

⁴⁹ Endowments are very relevant cash provides a model of a mutual fund through a trust fund mobilization which worked through the challenges of professionalism that mandate in his Management fund in the midst of doubt in the management of waqf funds and anxiety syndrome crisis, domestic investment and capital flight. Waqf cash very quickly stimulate the return of an investment climate conducive to the dramatic rise of theological emotional motivation of charitable intentions jariah wisdom rational economic considerations in addition to social welfare. (Ministry of Religious Affairs, waqf Cash Management Guidelines, (Jakarta: Directorate of Waqf, the Islamic Society Directorate-General Guidance: 2008), p. 72-73. SinaBaca secara fonetik

⁵⁰ Ibid, p.72

Based on the statement of Al-Quran, Chapter 2 (Al-Baqarah), verses 219 and 220 above can be seen that *infaq* by a muslim is the excess of consumption. So that in the Muslim economic growth, *Infaq* taken from the investment fund, because it is not possible from the consumption fund. Similarly, funds for *waqf*, any more than it needs to be channeled to investment. So the formula is: *waqf* = *infaq* = Investment.

So from the formula above if sourced investment of *waqf* funds can be done by everyone, it will collect large amounts of funds that can be used for development. Therefore, the custom to hand over the treasure to be shared through the *waqf* is an invaluable capital. Whatever owned assets can be used for endowments and investments. This Commemoration of the hadiths which has been used as the legal basis of *waqf*, if observed from *hadith* can be used as a basis for investing. Examples of *Hadith* are:

"From Umar who said that Umar came to the Prophet Muhammad to ask for instructions on obtaining land in Khaibar, should be used for what, by the Prophet Muhammad, advised: "if you want to, resist and charity principally the profit". Umar followed the advice of the Prophet Muhammad, then wherewithal (being a waqf), provided the principal may not be sold, should not be granted and should not be inherited. "(Narrated by Bukhari-Muslim from Ibn Umar. Ra).

In another hadith it is stated:

"That Umar r.a. have said to the prophet Muhammad, "Indeed, I have one hundred shares at Khaibar, I have never had my love wealth more than that, I mean really want to put it as charity," replied the Prophet SAW, "You hold the essence (of land) and give the fruit as charity. "(Reported by An-Nasa'i and Ibn Majjah).

Investing in the *waqf* is a recommendation to the afterlife, however can also affect the good life in the world with productive way that assets being held for the common good. For that existing assets should be developed, by means of doing productive things. Especially in this day *waqf* property has evolved in a form that was originally only real property, now may take the form of moving goods. With advances in Muslim thinking today that allows endowments in the form of money, called "Cash *Waqf*" or endowments of money, the funds of the *waqf* institution can rotate in Islamic economic institutions.

Maybe in the future can be developed the idea that the concept of *waqf* (charitable trust) in the form of funds to be submitted for social purposes can be used also by *wakif*, as the development of trust institutions in the western world

as we discussed above, in its history took over from the concept of *waqf* in Islam. Trust institution which was originally used for the Charitable Trust has now evolved into various forms of goal trustee agencies, including for investment purposes, such as mutual funds in unit trusts. If so, then it's possible to institute Sharia Fund, which will be formed from these endowments funds will not only social nature for the construction of race and nation in terms of macro, but also to prosper the individual Muslim in the country. So it also can inspire people who have the awareness to *waqf* was, as well as benefit from the *waqf* funds that are not only stored in the afterlife also has appeared in part a result of the world.

It is possible happens on *waqf* institution, and therefore classified in accordance Malikiyyah, endowments do not cause the termination of ownership rights to the 'ain (object diwakafkan). What is lost is only right to spend it. They provide arguments (legal basis) of permanent objects used as *waqf* items with hadith of Ibn Umar.⁵²

"From Ibn 'Umar that 'Umar actually get the land in Khaibar, then Umar said: " Yes Rasullullah, I have obtained land in Khaibar, and I have not pernah get a treasure more valuable than the land, then what You commanded me (Yes Rasullullah) ? Rasullullah then said: If you want to resist the origin and charity (the good), then Umar put it as charity, under on that land should not be sold, not granted, and not for the indigent, not emancipate slaves, to entertain guests and for those who master (his nazir) eat some of them well and serve as property and in a history of saying: Do not mastered basic terms. (Hadith narrated by Jama'ah).

From the above hadith to do *waqf* seems that the only benefit, while still owned the property subject wakif. Similarly, Abu Hanafi opinion that the property may be withdrawn by wakif expense, but on the other hand he also argued that if there is a dispute between wakif the Nazarite, the judges have the authority to decide that wakaf should continue and should not be drawn again by wakif.⁵³

Original concept contained in the *Waqf* Trust, traditionally only used for

⁵¹ Ahmad Malkan Lubis, et.al., Paper Deepening the Implementation of the Economy Based on the Qur'an and Hadith, Research Report of the research team ICMI Orsat Washington DC, American Orwil Work Programme October 1995-March 1996, seminar in ICMI Meeting in May 1996 in Embassy, Washington, DC., the United States., p. 68-70. In this study, the author is a member of the team of researchers.

⁵² Muhammad bin Ali bin Muhammad asy-Syaukani, Nail al-Autar, (Mesir: Mustafa a-Babi al-Halabi, t.t.), Vol.VI, P. 127. See also: Wahbah az-Zuhaili, op.cit., P.155.

⁵³ Ibid.

social needs (Charitable Trusts). However, there is no prohibition in *mu'amalah* jurisprudence to develop "Nadzir" waqf institutions for economic needs and was developed in draft form collective custody Sharia Fund. This is because the waqf institutions in *ijtihadi* level.⁵⁴ So that its shape can be applied in accordance with the times. This can allow Endowments held for a limited period and held for the benefit of the wakif addition to social interests.⁵⁵ Similarly, it is possible if the *waqf* object is sold.⁵⁶

Trust in the light of the institution, the concept of collective custody of Sharia Mutual Fund (SMF), Investment Manager (IM) and the Custodian Bank (CB) to act as Trustee (*Nadzir waqf*) for investment purposes of *waqf* property. Implementation of cash *waqf* enables institutions active in the field originally expanded in the direction of worship-minded Jurisprudence solely to the actions for public minded or *muamalah* jurisprudence. This is based on the opinion of Maliki scholars. In this case, as Trustee of SMF Nadzir tasks outlined their rights and obligations in a Collective Investment Contract (CIC) made by the MI and BK. In this Trust concept IM acts as *Mudharib* in bond of *mudharabah* contract to manage the *waqf* funds from the investors, develop it by arranging fund investment in the market. As *mudharib* in the implementation of *Mudharabah*, IM act on the basis of trust (trust) under the terms of the contract law of Islam. By involving *waqf* fund that is eternal, then the SMF will be more strongly defend the Net Asset Value (NAV) it. NAV strength is more possible in the Fund is due to Islamic *waqf* money based on Fatwa Indonesian Ulema Council (MUI) is a prerequisite application of money as an object of *waqf* is essentially the value should be fixed / intact. With these provisions, it must be considered by the manager of *waqf* of money is to strive for the principal amount of the *waqf* did not experience a reduction or shrinkage.

In connection with the protection of *waqf* funds in Shariah Fund is true there is no provision regulating. However, such protection remains to be done, because basically Syariah Fund is subject to and guided by the provisions of capital market. Therefore, the provision of capital markets can provide a solid

⁵⁴ Departement of Religious Affairs of the Republic of Indonesia, *Paradigma Baru Wakaf di Indonesia*, (Jakarta: Directorate of Waqf, Director General Guidance Islam, 2008), p. 27.

⁵⁵ This shows that the *wherewithal* was only the result, thereby *waqf* property in his will remain the property wakif. It's just that he was forbidden to download *tasaruf* it in the form of business ownership to other parties. This understanding comes from the argument of 'Umar, too.

⁵⁶ Uswatun Hasanah, *op.cit.* p. 31-32.

legal foundation in securing legal certainty for those who invest in the stock market.⁵⁷

Waqf fund managed by the Investment Manager in Shariah Fund will always be protected to the maximum so secure management of its investment, due to the Investment Manager is required by law to carry out their duties properly and correctly, full of good faith and professionalism. As mentioned in the Capital Market Law No. 8, 1995, Article 27, namely: "Investment Manager shall in good faith and responsibly carry out his duties may be solely for the benefit of mutual funds." From this requirement, hence the need for maximum security, given all the funds managed by the Investment Manager is the status of public funds *waqf* fund. Therefore, as we have said, the Investment Manager is obliged to carry out their duties in the best possible for the benefit of Islamic mutual funds.

Where is known that the Investment Manager does not carry out their duties properly in accordance with the provisions stipulated in Article 27 paragraph (1) Capital Market Law, the Investment Manager shall be responsible for any losses incurred due to the negligent actions such.⁵⁸ Based on this, in other words, the Investment Manager bears responsibility for any loss arising sharia mutual funds since management is not conducted in good faith and not with full responsibility. In addition, with supervisory discipline of Bapepam-LK and Sharia Supervisory Board at the institution of Sharia Fund Investment Managers, the future can be expected that the preservation of the existence of Sharia Fund institutions in Indonesia.

For example, on a mix of cooperation between institutions with endowments Nazarite Sharia Fund can be seen from the application of cooperation between Republika Dhuafa Wallet or "Dompot Dhuafa" Republika with Batasa (BTS) Capital.

Forms of cooperation between the two institutions are using planting system investments, as well submit *wakaf* with servings.⁵⁹

⁵⁷ Indra Safitri, *Transparansi Independen Pengawasan Kejahatan Pasar Modal*, (Jakarta : Go Global Book Safitri & Co. Publication Book Division, 1998), p. 15.

⁵⁸ Indonesia, Indonesian Capital Market Law, Act. No. 8 Year 1995. Article. 27 verse (2).

⁵⁹ Look: Achmad Djunaidi and Thobieb Al-Asyhar, *Menuju Era Wakaf Produktif*, (Depok: Mumtaz Publishing, 2008), p. 107.

CHOICE	TOTAL OF INVESTMENT FUND	TOTAL ENDOWMENTS CASH MONEY
I	10%	90%
II	30%	70%
III	50%	50%
IV	70%	30%
V	90%	10%

The total investment that cut the number of *waqf* (at your option provided), will be back to 100% within a period of about 1 to 5 years. After the return of investment amount, the wakif pure business will benefit in accordance with a designated portion. That is, by investment (investment) through the agency, *wakif* will get two benefits: get business benefits, as well as can be charitable (*waqf* was).

In such cooperation schemes, endowments funds obtained from the investment model through *BTS Capital* and *Shariah Batasa- "Dompet Dhuafa" Republika* will be distributed to the public virtues, such as improving health services, improving facilities and means of pre-education facilities, improvement of economic empowerment society.

Thus, the *waqf* in Islamic Sharia is similar to economic capital corporation where there are profits to be developed which are used for the benefit of the people. Better ensure that it is the presence of eternity *waqf* provisions may not sell or modify the asset into consumer goods, but still kept it as a productive asset. In other words, at least theoretically, endowments should always evolving and even increased to a new *waqfs* and on the other hand will preserve the institution of Sharia Fund through a stable Net Asset Value (NAV).

In the current conditions maybe the establishment of an alternative Islamic Fund has not yet been able to run considering that *Waqf Institute* that manages cash *waqf* is still relatively new. So do not have enough funds for the establishment of a Shariah Fund. The total cash *waqf* funds that enter the Indonesian Agency (Badan Wakaf Indonesia / BWT) for the Period 2007-2010 Endowments new range of 1.6 Billion.⁶⁰ So still need time separately forming an ideal

⁶⁰ Interview by Phone With Bapak Mustafa Edwin Nasution, Ph.D, Monday, 12 July 2010,

Islamic Fund in order to handle problems Aktifa Net Value (NAV) of Mutual Funds Sharia (MFS).

VI. Conclusion

The evolution of "Trust" started from the concept of separation between ownership and mastery in the form of charitable trust of *waqf*, known in Islamic law. Research proves that in the history of "Trust", *waqf* is forerunner of the establishment of "Trust" which became the operational basis of collective care institutions in Mutual Funds today. However, goals of *waqf* that are social endowments do not allow the institutions to be developed as the basis for contract transactions in mutual fund devoted solely to business activities. So that in this case can be implemented only *Nazhir* functions that reflect the Islamic trust. For this purpose, the Islamic Trust Fund concept is defined in the real meaning of al-contract mandate which today can be used in business activities using *mudharabah* system. But with the release of discourse *waqf* of money, which allows institutions to develop a productive *waqf*. *Muamalah* jurisprudence based on the opinion of Maliki scholars, *waqf* property can be placed into the operational of Sharia Mutual fund (SMF). SMF would strengthen the continuity of objects while maintaining continuity of *waqf*. Trustee duties (*Nadzir*) in SMF which is held by the Custodian Bank (CB) and management task by the Investment Manager (IM) are translated all the rights and obligations of each in a Collective Investment Contract (CIC) made by the IM and CB. In this Trust concept MI acts as *mudharib* in bond *mudharabah*. With RDS concept like this does not preclude the general public to participate in purchasing units in the RDS, so also can create investment opportunities that also drives the wheels of development.