The trust concept was utilised as a device for preserving family wealth. However the mechanism of splitting the legal and beneficial interests in property has enabled it to expand and constitute many of the most significant economic actors of the global economy.[1] Trusts have been employed in a variety of contexts in the commercial sphere (for example pension funds), in the charitable domain and for tax saving schemes. It is estimated that approximately half of the independent wealth in the world is held through one form of trust structure or another.[2]

Due to the wide range of purposes to which the trust is employed and the development and expansion of the trust to meet changing needs, there is no comprehensive and exact definition. I agree with the statement,

> ***" there can be no area of law in which there is more confusion about basic definitions than the law of trusts"[3].***

Various academics[4] have attempted to define the trust concept; Hayton defines the trust as;

> ***"an equitable obligation, binding a person… to deal with property owned by him… for the benefit of persons… of whom he may himself be one, and any one of whom may enforce the obligation."[5]***

A further aspect, which may cause confusion when defining the trust concept is the various ways they have been classified, be it by method of creation (express/implied), according to type of beneficiary (private/ public) or character of the interest (fixed/discretionary). These classifications are central to Moffat's quote; consequently I am going to commence my discussion by analysing the characteristics of public and private trusts as an example of the diverse nature of the trust classification.

One of the most important and far reaching distinctions in the classification of the trust is that of public and private trusts (charities). Charitable trusts (often referred to as public trusts due to their nature) are trusts whose aims are to benefit society, or a section of society. In contrast a private trust benefits an

[1] [1] Hudson, Alastair. - Equity & trusts – 3rd ed. - London: Cavendish, 2003 p85
[2] http://www.trustsand-trustees.com/intro.htm. 4th January 2004
[3] Cambridge Law Journal, 61(3) Nov 2002 p657
[4] Martin, Jill E. - Hanbury & Martin modern equity. 16th ed. London: Sweet & Maxwell, 2001. P.47
[5] Underhill and Hayton Law of Trusts And Trustees, 16th Edition, David J H ayton. Page 3.

individual or individuals. Non-charitable purpose trusts fall outside of either category, they do not get the benefits accorded to charitable trusts but in certain circumstances they may be upheld as valid.

I am going to concentrate on charitable and non-charitable purpose trusts. I anticipate this analysis will demonstrate how the trust concept has been used by equity in more than one way. By outlining areas of possible future development and existing growth in these two areas I aim to show how trusts are at varying stages of development.

The courts often have to determine whether a trust is charitable, as there are many advantages in applying charitable status to a trust. Charitable trusts operate under different rules of creation, enjoy privileges not shared by private trusts and are controlled by different people, thus it is crucial to distinguish between the two.

Under English Law, a trust for non-charitable purposes is void. Before the twentieth Century, non-charitable purpose trusts were permitted, however the law took a turn in *Re Endacott*[6], and the rule against them became so entrenched, it is unlikely to change unless legislation intervenes. [7] One objection to non-charitable purpose trusts is that they have no human beneficiary capable of enforcing them. [8] This is known as the beneficiary principle, and was stated by Lord Parker, in *Morice v Bishop of Durham*[9],

> ***"a trust to be valid must either be for the benefit of individuals or must be in that class of gifts for the benefit of the public which the courts recognise as charitable"***[10]

The beneficiary principle does not operate for charitable trusts, as the Attorney General sues in place of beneficiaries to enforce the trust. There are several exceptions to the beneficiary principle, which were classified by Lord Evershed M.R in *Re Endacott*[11], and comprise of trusts for the erection of monuments and graves, trusts for the saying of masses and trusts for the maintenance of particular animals. The beneficiary principle was re-affirmed in

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[6] (1960) Ch. 232
[7] Martin, Jill E. - Hanbury & Martin modern equity. 16th ed. London: Sweet & Maxwell, 2001 p363
8 Purpose trusts: obligations without beneficiaries? Mark Pawlowski. T. & T. 2002, 9(1), 10-14
[9] Morice v Bishop of Durham (1804) 9 Ves 339
[10] *Ibid, per* lord parker at 441
[11] (1960) Ch 232

Re Astors Settlement Trust[12], where it was made clear that trusts for non-charitable purposes will fail unless they are kept within the confines of these exceptional cases.[13] These exceptions were described in *Re Astors Settlement Trust*[14] as *"properly to be regarded as anomalous and exceptional"*

A further objection to non-charitable purpose trusts is the issue of uncertainty. For a non-charitable purpose trust to be recognised by the law, the purposes must be sufficiently certain to enable the court to control the performance of the trust. The trust in *Morice v Bishop of Durham*[15], failed because the purposes were uncertain. In contrast there is no such requirement for certainty of objects with charitable trusts, as a trust for charitable purposes will be certain, therefore valid.

Another rule that doesn't apply to charitable trusts is the rule of perpetuities, as charitable trusts may continue forever. A valid non-charitable purpose trust must comply with the perpetuity rule. I can distinguish the benefit of such an exception, as charitable purposes are of a value to the community, so to allow ordinary principles of trust law to operate may frustrate the charitable intentions.

Finally charities are free from income tax, capital gains and council tax, which private trusts have to pay.

As I have discussed the contrast in characteristics of non-charitable and charitable purpose trusts, a am going to focus on the development of charitable trusts.

The *Charities Act 1993* provides no statutory definition of purposes that are charitable, so all previous case law is relevant. The law of charities originated in the preamble to the *1601 Statute of Elizabeth*[16]. It developed as a way for the law to control the giving to the poor, and contained a list of purposes that were considered charitable. Despite the Act being repealed by the *Mortmain and Charitable Uses Act 1888*, Lord Macnaghten[17] categorised the purposes contained in the Preamble into four heads; relief of property, advancement of education, advancement of religion and trusts for any other purposes

[12] Re Astor's Settlement Trust (1952) Ch. 534
[13] Martin, Jill E. - Hanbury & Martin modern equity. 16th ed. London: Sweet & Maxwell, 2001.p.363
[14] Re Astor's Settlement Trust (1952) Ch. 534 at 547
[15] Morice v Bishop of Durham (1804) 9 Ves 339
[16] 43 Eliz I, c4, 1601, more commonly known as the Charitable Uses Act 1601
[17] Commissioners for the Purposes of Income Tax v Pemsel (1891) AC 531

beneficial to the community. Further to the four heads laid down by Lord Macnaghten, for a trust to be charitable in the legal sense, it must be for the public benefit.

The fact that the law of charities today is still based on the preamble of the *1601 Statute of Elizabeth*[18]., seems rather peculiar to me. Its development has been a slow process, and it is my opinion, that it is in need of reform. The Lords themselves accept the notion that *"a purpose regarded in one age as charitable may in another be regarded differently"*[19]. I am going to discuss this issue further in relation to examples of charitable trusts under the Lord Macnaghten categories of charitable purposes in the legal sense outlined above. Before I do, I think a brief regard to the normal everyday meaning of the word charity should be discussed. Lord Wright[20] stated that the charity in the legal sense has a *"precise and technical meaning".* And the legal significance is narrower than the popular"[21] The question which interests me is *"how far then, it may be asked does the popular meaning of the word "charity" correspond with its legal meaning?"*[22]A recent survey of 1000 adults carried out by the National Council for Voluntary Organisations found that eight out of ten people did not realise that the royal opera house has charitable status, but two thirds thought amnesty international did.[23]Many people don't realise that the popular definition doesn't coincide with the legal definition. The law deems organisations carrying out religious, educational or poverty work as charitable, but excludes other organisations that much of the general public regard as charities, such as amnesty international.[24]The Charities Bill Coalition, which includes NCVO, Amnesty International UK, Cancer Research UK, British Heart Foundation, British Red Cross, NSPCC, are currently campaigning for the legal definition of charity simplified. I am of the opinion there is a need for the legal definition of a charity, which is currently based on a four hundred year old statute, to be substituted for one

[18] 43 Eliz I, c4, 1601, more commonly known as the Charitable Uses Act 1601
[19] National Anti-Vivisection Society v IRC (1940) AC 31, *per* Lord Simonds *at* 74
[20] *Ibid, per* Lord Wright *at* 41
[21] *Ibid*
[22] Commissioners for the Purposes of Income Tax v Pemsel (1891) AC 531 *per* Lord Macnaughton *at* 583
[23] http://news.bbc.co.uk/i/hi/uk/2750565.stm
[24] *Ibid*

that reflects contemporary view of what is charitable. Some academics have suggested reform ideas within the area of charitable and non -charitable purpose trusts, including the idea that,

> "***all purpose trusts, provided they satisfy the requirement that they confer an appreciable benefit on a sufficient section of the public, would be a valid public purpose trust, with fiscal privileges being conferred on a more restricted class of public purpose trusts"***.[25]

This is an area of possible growth in relation to public/private trusts, which if applied may give a central characteristic to one branch of the trust concept, but still wont give a central characteristic to all trust categories.

My discussion will move on to consider examples of the four heads of charity in detail. Each head involves an element of benefit and also an element of public benefit.[26] An example of this is the benefit of advancement of religion, and the public benefit that the advancement will benefit the whole community, or a substantial part of it. With the exception of trusts for the relief of poverty, to which the public benefit requirement doesn't apply [27], a trust is incapable of being charitable in the legal sense unless it is for the benefit of the public, or some section of it. As the public benefit requirement varies under the four heads, I am going to dissect them separately below.

Lord Macnaghten's charitable purpose category for the advancement of Education originated from the purposes in the 1601 preamble [28], which included "schools of learning, free schools and schools in universities" and "the education of orphans". The modern case law in this area has developed significantly, and the concept of a charitable trust for the advancement of education is no longer limited to teaching activities in schools and universities.[29] Case law has developed to include the publication of law reports[30], sports, when pursued as an educational context [31], museums and many more. Whether the benefits that apply to trusts for the advancement of education are available strongly depends on whether there is a genuine public

[25] Public Purpose Trusts, Gravells, Nigel P. 1977 Modern Law Review. Vol. 40 397
[26] Martin, Jill E. - Hanbury & Martin modern equity. 16th ed. London: Sweet & Maxwell, 2001. p.400
[27] Dingle v Turner (1972) AC 601
[28] 43 Eliz I, c4, 1601, more commonly known as the Charitable Uses Act 1601
[29] Hudson, Alastair. - Equity & trusts – 3rd ed. - London: Cavendish, 2003 p805
[30] Incorporated Council of Law Reporting for England and Wales v Att-Gen (1972) Ch 73
[31] Re Dupree's Deeds Trust (1945) Ch 16,

benefit. The public benefit requirement is very stringently applied to education, as the law doesn't want educational trusts to be used as tax -planning device to provide education to those from affluent families, at the cost of the taxpayer. An example of such is the case of *Oppenheim v Tobacco Securities Trust* [32], in which a trust was set up,

> "**to apply certain income in providing for the education of children of employees or former employees of a British Limited Company or any of its subsidiary or allied companies" [33]**

It was held that despite the companies 110,000 employees, the nexus between them was employment by particular employers, thus the trust didn't satisfy the public benefit test to establish it as charitable.

Hudson[34] makes a valid line of reasoning as to where to draw the line in cases deemed valid under the category of educational. Vaisey J discussed this issue in respect of the charitable status of a trust created for promoting a chess tournament,

> ***"One feels, perhaps, that one is on a rather a slippery slope. If chess, why not draughts?"*** [35]

The statement suggests that this category of charitable purposes may continue to grow unless a form of statutory intervention is put into action limiting the group. In my reading I began to see a possible problem between the legal understandings of what is a public benefit in this area compared to the general publics understanding. In the survey carried out by the Council for Voluntary Organisations[36], only 11% identified Eaton as a charity. I feel it is open to question that Eaton confers a public benefit to enable it to have charitable status; it appears to be - an elite institution where the nexis is having enough money to attend. I agree with the view that,

> ***"tax relief's and other 'privileges' associated with charitable status should not be enjoyed, in the name of charity, by organisations, such as 'public' schools and private hospitals, which ordinary popular understanding of the relevant terms were***

[32] (1951) AC 297
[33] *Ibid*
[34] Hudson, Alastair. - Equity & trusts – 3rd ed. - London: Cavendish, 2003. p 808
[35] Re Dupree's Deeds Trust (1945) Ch 16 *at* 20
[36] ante, page 4

> **neither charitable in orientation nor engaged in welfare provision for persons of lesser or middle range means".** [37]

Next for consideration is religion, the third of Lord Macnaghten's heads of charitable purposes. In the preamble there is reference to "repair of churches", however religion has since developed immeasurably thus the law tends to take a tolerant stance towards religion.

> ***"As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than non"*** [38]

Like the other heads, a trust for the advancement of religion must be for the benefit of the public. In *Gilmour v Coates*[39] a trust for the benefit of an order of Carmelite nuns was held not to be charitable, on the basis that the activities of the nuns were not for the benefit of people outside the convent.

It seems if works are published they confer a public benefit. In *Thornton v Howe*[40], a trust created to secure the publication of the writings of Joanna Southcott was held to be charitable due to its public benefit.

It is my opinion that the area of religion and public benefit may become a controversial one. Religious Groups have followers, which excludes others. The September 11th Attack on the Twin towers has highlighted the segregation issues which religion brings, and how people's opinion towards religious groups change over time. Furthermore individuals hold their own religious beliefs, which may differ from the norm, such as Scientology, but who has the right to tell an individual that their belief isn't good enough to be a religious purpose?

The final Macnaghten category covers matters within the spirit of the 1601 statute. With this head it must be shown that the selected purposes are beneficial as in the way the law regards as charitable. Thus in *Williams' Trustees v IRC*[41], a trust promoting interests of the Welsh community in London failed, as it was held not beneficial in the way in which the law regards as charitable. Other examples of purposes that have been classed as

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[37] Foundations of Charity Law in the New Welfare State. Chesterman, M,- M.L.R. 1999, Vol 62, No3
[38] Neville Estates v Madden (1962) Ch 832, *per* Cross J *at* 853
[39] (1949) AC 426
[40] (1862) 31 Beav 14
[41] (1947) AC 447

charitable include the protection of animals, but not a specific anim al, as this would amount to a private purpose trust.

A trust whose object is to promote (either directly or indirectly) political purposes, even where the end goal is to benefit the community will fail. This is based on the dictum of Lord Parker in *Bowman v Secular Society*[42].

> ***"A trust for the attainment of political objects has always been held invalid, not because it is illegal…. But because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit"***[43]

Lord Parkers reasoning was followed by Lord Simonds in *National Anti-Vivisection Society v IRC*[44], in which the House of Lords had to consider whether or not the societies purposes for the banning of vivisection, could be defined as a charitable purpose. The society was campaigning for a change in the law, namely the banning of vivisection. Lord Simonds stated,

> ***" It is clear that such an association is not of a charitable nature. However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed".***[45]

Thus it was held that the society's aims were too political to qualify as a charity. Hudson[46] suggests that a quandary to this argument is whether or not the court could dec ide which political argument outweighs another. An element of trust law that has become apparent in my analysis is that through the aim of justice, one side always loses out in some way.

A further case, which highlights the non -charitable status of trusts with political aims, is *McGovern v Attorney General*[47], which concerned Amnesty International, the group which campaigns for Human Rights. Slade J followed the reasoning given in *National Anti-Vivisection Society v IRC*[48], and Lord Parker in *Bowman v Secular Society*[49],and held that it was not for the courts

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[42] Bowman v Secular Society (1946) K.B 185.
[43] *Ibid*, p207, *per* Lord Parker
[44] (1940) AC 31,
[45] Lord simonds, national anti vivisection at 62
[46] Hudson, Alastair. - Equity & trusts – 3rd ed. - London: Cavendish, 2003. p.803
[47] (1982) Ch 321
[48] (1940) AC 31,
[49] Bowman v Secular Society (1946) K.B 185.

to decide whether changes in the law would be of public interest or not. Since this ruling, the Human Rights Act 1998 has been enacted in the UK, and as such the charity commission has ruled that the promotio n of Human Rights is a charitable purpose.[50] At the time of the judgement, in 1981, this was not in force.

I am of the opinion that throughout history the law lords have decided whether changes in the law would be of public benefit, through the day to day ca se law, so I don't agree with the reasoning given in the political purposes head, however I understand that allowing all groups with political interests charitable status could be disastrous.

My analysis of the characteristics of non -charitable purpose trusts and charitable purpose trusts brings me to the conclusion that there is no central characteristic to the trust concept. Further, as the various categories of trusts evolve and change with each new case (such as the non charitable purpose trust, which appears to be in full maturity) the characteristics apply to such trusts will also change. A very fitting quote at this point is that of Lord Simonds,

> ***"A bequest in the will of a testator dying in 1700 might be held valid on the evidence then before the cou rt but on different evidence held invalid if he dies in 1900"*** [51]

The very nature of the law of trusts calls for the need of flexibility to deal with the demands of changing times. There is still plenty of room for the growth of charitable trusts, like many o ther branches of the trust concept. Therefore I agree with Moffat's statement, trusts come in all shapes and sizes, as such it may be preferable to talk of the law of trusts in the plural, rather than group them all together.

[50] http://www.guardian.co.uk/guardiansociety/story/o,3605,752065,00.html
[51] National Anti-Vivisection Society v IRC (1940) AC 31, *at* 74