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HARMONIZATION IS THE ONLY "GAME" IN TOWN; ACTUALIZING THE FUNCTIONALITY OF VITAL ISLAMIC FINANCIAL INSTITUTIONS: A CASE OF *WAQFS* IN NIGERIA

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ABSTRACT

While it is true that more often than not, constitutional democracies might enshrine freedom of religion and thus provide for equal treatment of all religions within a given state, the Islamic characterization of the waqf institution transcends the subsisting limits allowed for in the not-for profit legal infrastructure including their taxation exemption provisions in the Nigerian state. According to modest statistics, Nigeria is home to about 100 million Muslims but her governing laws are at best described as secular. The objective of this research is therefore to harmonize the Islamic law of waqf institution and the extant not-for-profit laws in Nigeria such that the institution can function within the Nigerian state without infringing on the Islamic Shariah whilst at the same time complying with the constitutional dictates of the country. The merits of such an exercise are numerous. It could readily be replicated in other non-Muslim jurisdiction across the world. Nigeria being the largest economy in Africa, the dividends

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of such an exercise would cascade across the continent consisting mainly so called developing countries.

Keywords: *waqf law, waqf penumbral existence and institutionalization, legal reasoning, purposive charity, intergenerational charity*

INTRODUCTION

The institution of *waqf*[4] enlists as one of the most important phenomenon in today's voluntaristics discourse. The importance of this institution cannot be over-emphasized. Its cogency cuts across religious, economic, political, and social uses. Religiously, it ensures that a (mortal) human being is able to fulfil the rationale behind his existence on earth even in death.[5] This worship of Allah SWT rationale which is carried out through the noble deeds of man ceases as the reality of the mortality of man creeps in. However, *waqf* ensures the continuity because "when a man dies, his acts come to an end, but three, recurring charity, or knowledge (by which people) benefit, or a pious son, who prays for him" i.e. the deceased.[6]

The economics of *waqf* is quite clear. Being a private sector led initiative, it complements vigorously the over saddled state machinery in the delivery of

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4 *Waqf* originally an Arabic word has found its way into the English dictionary where it is defined as "An endowment made by a Muslim to a religious, educational, or charitable cause" (Oxford Dictionaries, 2015). *Waqf* could succinctly be defined as intergenerational purposive charity. More rigorously, it is an intergenerational purposive religious charitable quest borne out of a non-coercive process whereby a donor earmarks a particular definitive corpus instructing that its fruits or dividends (including its use) be channeled to a specified "Islamically" permissible course wholly for the sake of Allah SWT, the Supreme Being. The beauty of the institution is that because it is a philanthropic institution stuffed with religious ideology and as a result, the incentive to initiate, endow and sustain becomes given and self-interested.

5 The rationale is aptly depicted by the creator in the Quran in Chapter 51 verse 56 and corroborated in Chapter 67 verses 2-3. This means that we were created purposely to worship Allah SWT, the Creator such that, all our deeds or action qualify as worship so long as they are carried out in order to please Allah SWT. They must however be done with the sole intention of pleasing Allah SWT and in the way the Prophet (PBUH) has enjoined or sanctioned to ensure express acceptability by Allah SWT.

6 *Ḥadīth* narrated by Abu Hurayrah, Chapter of Wills, *ḥadīth* number 20. See Muslim, *Ṣaḥīḥ Muslim. English-Arabic*, trans. N. Khattab (Saudi Arabia: Darussalam, 2007).

its mandate which ultimately is to provide the quality of life to which each of the citizenry aspires. This could be readily seen in history where *waqfs* have provided and sustained the best educational institutions, quality healthcare, other infrastructural facilities as well as social amenities which ultimately reduce(s) government expenditure. By extension, *waqf* is able to bring about a reduction in the rate of "interest" by cushioning the crowding out effect, reduction in other forms of taxes thereby enhancing consumer surpluses, boosting employment cum aggregate production, encouraging Shariah receptive quasi-costless wealth distribution, augmenting adaptive capacities in financial engineering and innovations e.g. *ṣukūk* SPV's and thereby fostering growth and development.[7]

Trickling down from the economic merits are socio-political dividends that emanate from *waqfs* which postulate that an economically sound nation is usually free of socio-political unrest. Relatedly, *waqf* might enhance democratic values as well as institutional building being an age-long decentralized civil society institution.[8] This therefore brings to fore the enormous advantages of this Islamic institution.

While it is true that more often than not, constitutional democracies might enshrine freedom of religion and thus provide for equal treatment of all religions within a given state, the Islamic characterization of the *waqf* institution transcends the subsisting limits allowed for in the not-for profit legal infrastructure including their taxation exemption provisions in the Nigerian state. According to modest statistics, Nigeria is home to about 100 million Muslims but her governing laws are at best described as secular. The objective of this research is therefore to harmonize the Islamic law of *waqf* institution and the extant not-for-profit laws in Nigeria such that the institution can function within the Nigerian state without infringing on the Islamic Shariah whilst at the same time complying with the constitutional dictates of the country. The merits of such an exercise are numerous. It could readily be replicated in other non-Muslim jurisdiction across the world. Nigeria being the largest economy in Africa, the dividends of such an exercise would cascade across the continent consisting mainly so called developing countries.

The methodology for this research is expectedly phenomenological as well as qualitative going by the objective of the research. The methods to be

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7 Saidu, O.S., *A Quick Guide to Establishing Waqfs in Nigeria* (United States: Create Space, 2018), 6-170.

8 Saidu, O.S., *Rethinking Philanthropic Foundations: Making Waqfs Work for Nigeria* (United States: Create Space, 2018), 8-349.

adopted is therefore fairly straight forward, relying on the author's knowledge of Islamic law on *waqfs* as well as the historic and modern experiences of *waqf* in selected countries of the (Muslim) world, bearing in mind the normative characteristics for the functionality of the institution, applicable not-for-profit provisions cum legislations relevant for *waqf* functionality in Nigeria gotten by taking a survey of the existing laws will be juxtaposed with such normative characteristics which will then result in the desired harmonization.

In the rendition to follow, the author defines *waqfs*, identifies the differences between trust and *waqfs*, presents the political economy of *waqfs* in Nigeria, describes the legal system of Nigeria including the court system, analyses the problems associated with *waqf* operationalization in Nigeria presenting possible resolutions[9] cum harmonization and finally showcases the salient features in the proposed bill for *waqfs* in Nigeria. The study is concluded with an executive summary and the possible future research directions as well as expectations for *waqf* development in Nigeria.

WAQFS DEFINED

Saidu[10] sees *waqfs* as an "intergenerational purposive religious charitable quest borne out of a non-coercive process whereby a donor earmarks a particular definitive corpus instructing that its fruits or dividends (including its use) be channelled to a specified "Islamically" permissible course wholly for the sake of Allah SWT, the Supreme Being". Running through the *waqf* literature, is a trend and tendency to bifurcate *waqfs* into family and charitable *waqfs*. As the name implies, family *waqfs* connotes *waqfs* for the benefit of the founders direct family members while charitable *waqfs* refers to that *waqf* for other beneficiaries other than the families usually stipulated by the founder. Although, Cizakca[11] has rightly noted that such protruding distinction is a western concept and not tenable in Islamic law which treats both as more or less ideologically the same.

In a pragmatic fashion, *waqfs* works as follows; a Muslim who wishes to set up a *waqf* puts aside an original property and donates its benefits to intended beneficiaries for the sake of Allah SWT. The original property or corpus (now

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9 For details on waqf policies requisite for waqf operation in Nigeria. See Saidu, O.S., *A Quick Guide to Establishing Waqfs in Nigeria,* 6-170.

10 Saidu, O.S., *A Quick Guide to Establishing Waqfs in Nigeria,* 6-170.

11 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future* (UK: Edward Elgar Publishing, 2011), 78-98.

Allah's property), is something from which benefit may be derived whilst its essence remains, such as houses, shops, gardens, etc. Benefits are beneficial outputs or proceeds that emanate from the original property, such as crops produce, rents, usufruct or provision of shelter, etc. So long as the *waqf* remains in existence i.e. the essence or corpus remains, the founder continues to accrue the (spiritual) rewards even in death[12] which ultimately plunges the concerned to paradise.[13] This is the primary motive for setting up the *waqf* in the first place.

From the foregoing it is clear that *waqfs* is of course a charitable institution, but nevertheless, it differs from other forms of charity in that it is ongoing i.e. perpetual, intergenerational or operates in a continuum or continuous fashion. Ongoing charity may include designating a house or a place as *waqf* so that its income is spent on education or health orphans/poor welfare, building mosques or buying Qurans in mosques and so on.

WAQFS DIFFERENTIATED FROM TRUSTS

While there are similarities between the Islamic *waqf* and the (English) Trust, panoramic analyses suggests that there are obvious and far reaching differences between the two institutions which does not make trust laws or the availability of trust laws an effective substitute to run a *waqf* especially in a majority Muslim country like Nigeria. To start with the assets which are the "corpus" of the Trusts are (legally) owned by the trustees with the beneficiaries being equitable owners, as such, the trustees may do whatever they deem permissible with the assets, whereas, for a *waqf*, the *mutawallī* is only the "administrate" of the assets and will not normally be able to take some decisions e.g. Istibdal or sale of the assets without a clearance from an Islamic court. Another difference is that the rule against perpetuities which is a protruding feature of Trust laws has no place in the *waqf* establishment.[14] In other words, by default a *waqf* will normally continue to exist in continuum

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12 *Ḥadīth* 249, Book 1, narrated by Abu Hurayrah in Sunan Ibn Mājah is a testimony to this. See Ibn Mājah, *Sunan Ibn Mājah, English-Arabic*, trans. al-Khattab N. (Saudi Arabia: Darussalam, 2007).

13 If Allah SWT wills. The *ḥadīth* of Jabir bin 'Abd Allāh in Sunan Ibn Mājah, Chapter of the One Who Builds A Mosque for the Sake of Allah, *ḥadīth number* 4, confirms this assertion. See Ibn Mājah, *Sunan Ibn Mājah, English-Arabic*.

14 Cizakca, M. & Alias, A., 'Should Malaysian States Have a Fresh Approach to Waqfs? A Proposal for a Model Waqf Enactment?' *ISRA International Journal of Islamic Finance*, vol. 6/2 (2014): 135-139.

while a trust and its assets are vested for cert ain specified time periods in the deeds.[15] This point is somewhat technically linked with the first point of difference. Expectedly, the administrator of the *waqf* i.e. the *mutawallī* as well as the endower i.e. the *waqif* does not have the imprimatur to revoke a *waqf*. This *waqif/mutawallī* "powerlessness" is however not a feature of the Trust, as under the Trust law, the settlor is permitted to revoke a Trust if he or she so wishes. Furthermore, there are restrictions for/on a *waqf* on the nature of assets that can be endowed to it. For example, usufruct cannot be endowed to *waqfs* according to the orthodox or traditional jurists. Even some debated acceptable corpuses such as stocks and cash have restrictions on investible channels, whereas there are virtually no restrictions on "endowable" Trust assets and it known that usufructs can be bona fide trust assets. Still on differences between a *waqf* and a Trust, the endower i.e. the *waqif* is generally prevented from benefiting or better still having an interest in the assets of the *waqf*, while the settlor could be the beneficiary of a Trust.

A very important difference and in the author's view the most important between a *waqf* and a Trust is the intention of the settlor/*waqif*. A *waqif's* action of establishing a *waqf* should normally by default be governed by a prime religious motive which is the requirement for all Muslims to do acts of worship which invariably includes *waqfs* solely for the sake of Allah SWT, the Creator. This requirement is evident in the *ḥadīth* where the Prophet is reported to have said;

إِنَّ اللَّهَ لاَ يَقْبَلُ مِنَ الْعَمَلِ إِلاَّ مَا كَانَ لَهُ خَالِصًا وَابْتُغِيَ بِهِ وَجْهُهُ ‘‘ .

"...Allah does not accept any deed, except that which is purely for Him, and seeking His Face." [16]

This message is further reinforced in the *ḥadīth* narrated by Abu Hurayrah (may Allah be pleased with him) wherein the Messenger of Allah (PBUH) said:

قَالَ اللَّهُ عَزَّ وَجَلَّ أَنَا أَغْنَى الشُّرَكَاءِ عَنِ الشِّرْكِ فَمَنْ عَمِلَ لِي عَمَلاً أَشْرَكَ فِيهِ غَيْرِي فَأَنَا مِنْهُ بَرِيءٌ وَهُوَ لِلَّذِي أَشْرَكَ

"Allah, may He be blessed and exalted, says: 'I am so self-sufficient that I am in no need of having an associate. Thus, he who does an action for someone else's sake as well as Mine will

[15] Rules on duration might not apply to some (charitable) trust.

[16] *Sunan al-Nasā'ī*, *ḥadīth* narrated by Abu 'Umamah al-Bahili, Chapter of the One Who Fights Seeking Reward and Fame, *ḥadīth* number 56. See al-Nasā'ī, *Sunan al-Nasā'ī. English-Arabic*, trans. al-Khattab N. (Saudi Arabia. Darussalam, 2007).

> *have that action renounced by Me to him whom he associated with Me."* [17]

On the contrary, a settlor is normally primarily driven by other considerations distinct from the sake of Allah SWT motive such as public benefit or altruism, pure private benefit that accrue to him i.e. the settlor or mixed benefits which includes both public and private benefits.[18] Such motives include; the insulation of family wealth from state taxes as well as other perceived diminishers thus "preserving" the wealth for future use cum payments to family members. This obviously relates to family trust; the wholistic preservation of family business by making such a trust and dedicating income from such business to specific family beneficiaries so that wealth fragmentation via sale of inherited family business by the heirs which could culminate into liquidation is forestalled; a "legal" means to effectively side-track or circumvent the law of inheritance and particularly if one wishes that some heirs are left out or get their inheritance piecemeal of one's wealth; to protect one's property from state usurpation; ensure discreteness in appropriation or the bequeathing of properties capitalizing on the fact that the beneficiaries of a Trust in most cases are not registered in overseas trust establishment; to specifically protect some groups of persons who may be physically challenged, minors, unborn children whom the settlor feels the need to provide for; lending helping hands to charities by way of creating a charitable Trust with a charity as joint or sole beneficial owner; used as tax avoidance technique by way of setting up a trust in one country with its beneficial owners in another and by so doing inheritance tax, income tax, capital gains tax, estate tax may be reduced or even eliminated. Similarly exchange controls could be avoided and a multitude of other "benefits" through innovative Trust structures can also be garnered.

It could be argued that some of this motives that motivate Trust establishment also applies to *waqf*,[19] while this might be true, the normative motive for a *waqf*

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[17] This *ḥadīth* is also reported by Imam Muslim. Also resonating the intention requirement is the widely known *ḥadīth* of 'Umar ibn Khaṭṭāb wherein he reported that he *"...heard Allah's Messenger (saws) saying; "The reward of deeds depends upon the intentions and every person will get the reward according to what he has intended. So, whoever emigrated for worldly benefits or for a woman to marry, his emigration was for what he emigrated for." Sunan Ibn Mājah, ḥadīth* narrated by Abu Hurayrah, Chapter of Show-off and reputation, *ḥadīth* number, 103. See Ibn Mājah, *Sunan Ibn Mājah, English-Arabic*.

[18] Saidu, O.S., 'Recent Philanthropy Strides: Lessons for Islamic Philanthropy?' *Research in Islamic Studies*, vol. 2/2 (2015): 59-81.

[19] Professor Murat Cizakca and other economic historians have attested to this.

is to please Allah SWT and for his sake alone.[20] The fact that some persons in the past and present have declared their primary motives to be other than[21] the Islamic normative motive one does not change the Islamic dictates and does not make such persons or endowers correct or necessarily on the right path. In fact, such persons will have to purify their intention(s) if they have to be rewarded for such noble acts by their Creator.

Thus it is therefore worthy of emphasis and further clarification that this intention factor is very deep and needs thorough pondering because a person might say giving out of one's wealth to the public is a noble deed (without taking note of the underlying motive or intention) and conclude that by default that such action or deed is for the sake of Allah SWT, however this is not so, as people can give to public benefit for reasons other than because Allah SWT has enjoined us to be charitable. For example, a person might be asked why he has done a charitable act, he or she might say, well I did because she is a friend, or because he has helped me previously or because he is my benefactor or probably because he might help me next time or for fear of shame or sanctions or for any of the motives described above. These intentions are primarily unacceptable according to the Islamic Shariah and of course by extension such deeds emanating from such intentions are not acceptable from the Islamic viewpoint if intentions remain unpurified i.e. re-intended wholly for the sake of Allah SWT and are deemed futile according to the *ḥadīth*s above.

Therefore, there is a constant need for Muslims to purify their intentions when doing charitable deeds. This is one of the reasons why *waqfs* is a best choice for a Muslim seeking to engage in (perpetual) charity and not trust because at the very thought of a *waqf*, the Muslim should immediately become conscious of its rationale being an Islamic institution and as such intentions might be purified if such potential *waqif* is a sincere Muslim. More so, since intentions are normally not known except if declared, it is safer for Muslims to pursue establishing *waqfs* if he or she intends to do recurring charity and has the means considering its Islamic ideological basis as well as Islamic rules guiding it so that intentions might in this way become purified.

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[20] Other motives might be acceptable as secondary motives but should not and cannot be primary, otherwise the divine reward that should emanate from such charitable gestures will be far-fetched (as the words of the Prophet affirms).

[21] Some might even dedicate waqfs to reap the benefits that accrue from the society by being seen as charitable or religious. Becker (1974) shed light on such type of philanthropy in his "pioneering" work on philanthropy in the (neoclassical) economics discipline.

Pertinently, Cizakca and Alias[22] in arguing their case for a fresh approach for *waqf* in Malaysia identified some shortcomings in the trust laws cum associated laws in the country thus showcasing some differences between trusts and *waqfs*. They argue that under the Trustees Incorporation Act of 1952, it is the board of trustees that are incorporated and not trust body and that the same law does not grant individual trustees the limited liability status thereby making them personally liable entities which in their view is improper. They also advance that the trustees Act of 1949 limits some "lucrative" investment choices such as microfinance and venture capital which might have been available to the trustee for the support of young entrepreneurs for instance, due to its conservative risk posture. Further, they posit that the 1965 companies act hampers the activities (e.g. public fund raising as well as cash waqf) of charitable ventures especially those registered as companies limited by guarantee.

POLITICAL ECONOMY OF *WAQFS* IN NIGERIA

A panoramic search of the *waqf* literature for proper researches that specifically relate to the Nigerian context reveals a stack reality of the dearth of such endeavours. Nevertheless, since the study draws legitimacy from the socio-economic benefits of *waqfs* in the face of the conspicuous "absence" of such an institution in Nigeria, the exposition here will centre on relating the socio-economic rationale for *waqfs* to the Nigeria context.

As hinted earlier, the importance of *waqfs* cannot be sufficiently reiterated. In no uncertain terms, Cizakca[23] clarifies that the institution of *waqfs* does help fulfil greatly, the economic aspirations of modern economists which is; "a massive reduction in government expenditure, which leads to a smaller budget deficit, which in turn lowers the need for government borrowing thus curbing the "crowding-out effect" and leads to a reduction in the rate of interest, consequently reining in a basic impediment to private investment and growth".

The economic aspirations (as stated by Cizakca above) of Nigeria's economists and that of the populace at large is not any different. In fact, the Nigerian people want more, they want; "a) the promotion of a planned and balanced economic development, b) the harnessing and distribution of the material resources of the nation as best as possible to serve the common good,

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22 Cizakca, M. & Alias, A., 'Should Malaysian States Have a Fresh Approach to Waqfs? A Proposal for a Model Waqf Enactment?' 135-139.

23 Cizakca, M., *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present* (Istanbul: Boğaziçi University Press, 2000), 2.

c) an economic system that is operated in such a way as not to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or groups and, d) the provision of; suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, old age care and pensions and unemployment, sick benefits and welfare of the disable; for all citizens". [24]

In the face of dwindling oil prices,[25] unrest in the Niger Delta region which has nearly crippled crude oil production as well as exports,[26] exchange rate

[24] Nigeria Const. art. 16, S 2.

[25] Between 2010 and the first half of 2014, world oil prices were reasonably stable and stood at 110 dollars per barrel. See Bowler, T., 'Falling oil prices: Who are the winners and losers?' *BBC News*, http://www.bbc.com/news/business-29643612, accessed on 19th January, 2015. But from the second half of 2014, prices have plummeted reaching its lowest ebb in January 2016 at a price of 27.67 dollars per barrel, the lowest since 2003. See West, M., 'Just how low can oil prices go and who is hardest hit?' *BBC News*, http://www.bbc.com/news/business-35245133, accessed on 18th January, 2016. The current crude oil prices, however stands at 48.26 dollars per barrel as at Monday 27th, June 2016. See Gloystein, H., 'Brent crude oil prices dip on U.S. profit taking,' Reuters Singapore, http://www.businessinsider.com/r-brent-crude-oil-prices-dip-on-us-profit-taking-2016-8?IR=T&r=US&IR=T, accessed on 19th August, 2016. This is still not good news for Nigeria as analyses suggests she needs a price to the tune of 123 dollars per barrel in order to fund a balanced budget.

[26] In a similar vein, according to the Nigeria's current Minister for Petroleum, on the 16th of May, 2016, Nigeria's crude oil production/export now stands at 1.4 million barrels per day, a 40% fall in output from the standard 2.2 million barrels per day owing to attacks on the oil installations and production disruptions in the Niger Delta region which has claimed the 800,000 barrels difference. See Eboh, C., 'Nigerian oil output down 40 pct on Delta pipeline attacks. Reuters, Abuja,' http://af.reuters.com/article/topNews/idAFKCN0Y71UG, accessed on 31st, May, 2016.

instability[27] (naira free fall against the dollar), rising price level[28] coupled with the herdsman insurgency[29] and the "bokoharamic" dilemma[30] further affecting the economic fundamentals, it is thus not difficult to see or fathom that the current realities on ground in the country seem to make the aspirations a far cry. The author however sees economic hope in a functioning *waqf* system for Nigeria. This hope is not only because history informs us of its prowess at providing a multitude of social amenities and infrastructural facilities but also because we have evidence of improvable charitable giving in the country even in the presence of high income inequality as well as relative poverty in the country.[31] As a matter of fact, *waqf* voluntarily provides social and

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27 Over the years, the Naira has been unstable and has largely depreciated continuously against the dollar. To talk of the present situation, in the month of June, 2016 alone, precisely the 13th of June, the Naira exchanged officially at 196 Naira to a Dollar but by 20th of June, it exchanged at 279 Naira to a Dollar (CBN, 2016). At the parallel market, it is even costlier to purchase the dollar as its price ranged from between 300 Naira to 400 Naira, to a dollar. See Abokifx, 'Your Daily Naira Exchange Rate,' http://abokifx.com/, accessed on 20th, June, 2016. In fact, the richest man in Nigeria, Aliko Dangote said on the 24th of June that, he lost 50 billion Naira (176 million dollars) in the past week owing to this exchange rate regime. See Akwagyiram, A., 'Africa's richest man, Aliko Dangote shifts focus from cement to oil and gas,' CNBCAFRICA, http://www.cnbcafrica.com/news/western-africa/2016/06/27/dangote-shifts-focus/, accessed on 24th June, 2016.

28 As regards inflation, it is double digit. As at January, 2016, the inflation rate was 9.6% but presently, as at May, 2016, it stood at 15.6% (NBS, 2016).

29 It was highlighted by the leader of the South East Democratic Coalition, Evangelist Elliot Ukoh on the 27th of April, 2016 that between June 2015 and April 2016, the herdsman of Fulani dissent had killed over 710 Nigerians in 48 cases in the public domain. See Mamah, E. and Ndujihe, C., '710 Nigerians killed by Fulani herdsmen in 10 months,' Igbo Youth Movement. Vanguard Newspaper, Nigeria, http://www.vanguardngr.com/2016/04/710-nigerians-killed-fulani-herdsmen-10-months-igbo-youth-movement/, accessed on 27th April, 2016.

30 Similarly, the insurgency in the North East occurring on over 20% of the nation's land and which has lingered on since 2009 claiming over 42,955 lives as at June, 2016 (CFRST, 2016) has cancerous effects on investment, poverty and crime rate (AFDB, 2016). The number of internally displaced persons in Nigeria and neighbouring border countries of Chad and Cameroon has increased. As at December, 2015, there were over 2,152,000 internally displaced persons (IDPs) in Nigeria out of which; 12.6% were displaced due to communal clashes, 2.4% owing o natural disasters and 85% as a result of the Boko Haram menace (IDMC, 2016).

31 Evidence of improvable charity as well as relative poverty/inequality are provided in Saidu (2018). See Saidu, O.S., *Rethinking Philanthropic Foundations: Making*

economic dividends free of charge to the citizenry. It will ensure adequate wealth distribution and redistribution in a country like Nigeria with visible economic inequality. It will ensure that capital resources from the well to do are voluntarily deployed to cater for social services in the country. Cizakca[32] captures and confirms this assertion when he says; "At this point another extremely important function of the *waqf* becomes apparent; not only does it help to reduce government debt and consequently the rate of interest and pave way for growth, it also achieves another modern economic goal; a better distribution of income in the economy". He further highlighted that since the income distribution will be attained via unforced donations, taxation and negative incentive issues are therefore positively, a second fiddle or are played down in the process.[33]

A functioning *waqf* system will therefore greatly reduce tax burden, enhance consumer and producer surpluses translating into increase in society-wide production capacities, reduce costs, fuelling reduction in price levels and as such provide a recipe for non-inflationary growth[34] in the Nigerian economy. It has also been conceived previously by Cizakca[35] that *waqf* has the potential of addressing the problem of undersupply of public goods prevalent in most modern economies as standard basic economics suggests. It must be known that Nigeria currently has a infrastructural deficit to the tune of about 3 trillion Naira i.e. over 18 billion dollars, a figure which represents about 20% of her GDP[36] in a country which sadly boasts of the richest man in Africa (Aliko Dangote) who according to Forbes,[37] is said to be worth 14.1 billion dollars and is the 51st richest man in the world. In this area of supply of public goods, *waqfs* can sure help to provide resources for its provision in the country. This assertion is because, historically and more recently (in Turkey), there have always been over supply of public goods in the Islamic world and there is indeed a basis to assume that the Muslims of today will continue to endow

Waqfs Work for Nigeria.

32 Cizakca, M., *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present,* 2.

33 Cizakca, M., *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present,* 2.

34 Cizakca, M., *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present,* 2.

35 Cizakca, M., *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present,* 2.

36 Punch Newspaper, 'Bridging the yawning infrastructure deficit,' https://punchng.com/bridging-the-yawning-infrastructure-deficit/, accessed on 31 May 2021.

37 Forbes, 'The Forbes Billionaires' List: Africa's Richest People,' 22 January 2016.

voluntarily as their predecessors did. This assertion of sustained endowments has been observed in a number of Islamic countries in history as well as the present.[38] It thus follows that employment generation will be a dividend of a thriving *waqf* system owing to the supply of social services.

Resonating the need for *waqfs* institution (in Nigeria) is the submission by Salamon[39] that a multiplicity of instruments or tools are now more being used in solving public problems and various types of institutions are springing up in the process. Of course, one of such emerging institutions being continuously activated for solving public problems is the *waqf* system. Nevertheless, the actualization of economic "goodies" so described above is largely hinged on a fundamental assumption i.e. effective administration cum management. The management of the *waqf* must be seen to be up to the task, frugal and dependable. This therefore necessitates a well functioning *waqf* system supported by a workable legal framework which is what this paper is all about.

A CONCISE DESCRIPTION OF THE NIGERIAN LEGAL SYSTEM

Nigeria draws her governing laws generally, arguably from five main sources; Received English law, customary law, Nigerian legislation, judicial precedent, and the Shariah law. The reception clauses in various enabling statutes allow the applicability of laws that were in force in England as at 1st January 1990 to Nigeria. This derived legitimacy presupposes that these laws were made by competent Nigerian legislature. Common law, Doctrines of Equity and Statutes of General application constitute the received English laws of Nigeria.

Customary laws as the name implies are those laws that have anchorage in the customs and traditions of native or local communities in Nigeria, as such, variations exist so far as communities as well as tribes differ. Customary law more or less includes the Shariah law in northern Nigeria.[40] In a deliberate attempt by the then colonial powers and subsequent indigenous government to sideline customary laws and relegate it to the background for ease of rule, percolation of foreign ideologies and for legislative ease, they i.e. the customary laws have been reduced to the governance of personal matters such as marriage, divorce and custody of children, inheritance and distribution of assets.[41] They

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38 Cizakca, M., *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present,* 2

39 Salamon, L.M., 'Scope and Structure: The Anatomy of America's Nonprofit Sector,' *The Nature of the Nonprofit Sector*, ed. J. Steven Ott (Boulder, CO: Westview Press, 2001), 23-39.

40 Northern Nigeria Native Court Laws (1956).

41 In one of my correspondences with Professor Murat Cizakca, he stated categorically

are no longer applicable to commercial and criminal effects as section 33(12) of 1999 constitution and Aoko v. Fagbemi suggests. For customary law to be validly applied in the country they must not be; repugnant to justice, equity and fairness, contrary to public policy and incompatible either directly or by implication with the law for the time being in force.[42]

Legislation refers to laws made by competent lawmaking body in the country. Legislation in Nigeria includes edicts, decrees, laws, acts and bye-laws made by military state administrators, military federal governments, civilian state governments, federal civilian governments and local governments respectively. Essentially it refers to laws made by legislatures such as the upper (Senate) and lower (House of Representatives) houses in the country. Judicial precedent, an important source of law in Nigeria is the principle of law upon which a judicial decision in a particular case is based. It is thus the *ratio decidendi* or effective cause (reason for the decision) where a new case is decided based on the ruling in an earlier case. It essentially arise(s) when a judge in applying an existing rule or law widens and extend the existing rule and in the process creates existing new principles of law. The precedence thus created makes the decision of higher courts binding on lower courts. Vividly, established court hierarchy coupled with efficiency in law reporting are necessary ingredients for operational judicial precedence.

Shariah wise, prior to the English "invasion" of the geographical territory now known as Nigeria in the name of colonization, the Nigerian legal system consisted of customary law and essentially the Shariah laws which diffused through the contact with Arab Muslims as a result of the trans-Saharan trade. Although there are no explicit permeating governing Shariah laws in the country (even though, it could be argued that penal codes are indeed Shariah laws), section 262(1) of the 1999 constitution somewhat accedes to the its legitimacy with the provision for a Shariah Court of appeal in all states of the federation including the federal capital territory. While the powers conferred in the Shariah Court of appeal is limited to Islamic personal matters where all parties consent or are Muslims, some states in the Northern part of Nigeria have explicated and extended Shariah laws to matters bordering on crimes and social interaction.

Hierarchically, the Supreme Court is the highest ruling body in the country closely followed by the Appeal Court in 8 states across the country. Next in the stratum are the Federal and State High courts sitting in all states of the

that "family law is always left to the customary law by all colonial powers. Any state or empire that tries to impose another system would get into trouble".

42 High court of Lagos State Act 26(1), Evidence Act 14(3).

federation with the Federal High courts having more jurisdiction than the State high courts.[43] Then the Shariah[44] and Customary courts of appeal followed by the Customary, Area and Magistrate courts whose hierarchies and extent of functionality to some extent depend on the state judicial structures. It is however worthy of note that there are clear issues of overlapping jurisdiction which has led to series of litigations in a bid to decipher correct jurisdiction on specific cases e.g. Savannah Bank of Nig. Limited v. Pan Atlantic Shipping Transport Limited (1985), Eze v. Federal Republic of Nigeria (1987), Alhaji Mandara v. Attorney General of the Federation (1984).

As for the Nigerian Court System, *waqfs* being an Islamic personal law[45] subject under the Nigerian constitution falls within the purview of Islamic civil causes in the Nigerian courts. An expose of the (Islamic) Nigerian court system relative to Islamic civil law matters is thus necessary. Courts which have jurisdiction on *waqf* matters hierarchically in ascending order are the Area/Shariah Courts, Shariah Court of Appeal, High courts, The court of appeal and the Supreme court.

1. Area Courts and Shariah Courts[46]

Metamorphosed into full-fledged Shariah Courts in the State which have declared the Shariah in northern Nigeria,[47] the area courts (old Alkali Courts) still subsist in the northern states which have not declared the Shariah. Whilst

43 Section 251(1), The 1999 constitution.

44 In some instances, the Shariah Courts of appeal together with the High courts have coordinate jurisdiction.

45 It should be noted that the term Islamic personal law (an aspect of Islamic civil law) is not known to early Islamic jurists and is not traditional to Islamic teachings. In Islam, there is no distinction between civil i.e. personal and criminal cases, all fall under Islamic law. It is the duty of the Islamic judge to identify the rights that have been impinged upon and to apply the law accordingly. The dubious dichotomy of Islamic law into (civil) personal and criminal law is a relatively new import and development. It appears to be a policy to oust the Shariah Courts from criminal cases and other civil cases which do not amount to personal and to largely limit the jurisdiction of the Shariah Courts whilst expanding the jurisdiction of the high courts in the country.

46 It might be instructive to note that there are different grades of area and Shariah Courts. These differences are of degree and not of kind. They more or less have the same operational procedures and jurisdictional powers. Nevertheless, the lumped discussion here suffices for this paper.

47 Shariah Courts law no.5 of Zamfara state, 1999.

the jurisdiction of the Shariah Courts had been controversially expanded to include both civil and criminal matters by the state governments, the area court's jurisdiction still caters for basically Islamic personal law which is deemed to be native law and custom prevailing in the north and therefore subject to the tripartite test of repugnancy, incompatibility and conformity with public policy (Area Court Law). In fact, Section 14 and 20 of the Area Court Law stipulates that; any person may press charges on any cause or matter in an area court and that "(1) subject to the provisions of this Edict, and in particular of section 21, an area court shall in civil causes and matters administer; (a) the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties." There is somewhat a consensus among jurists and scholars of the Nigerian laws that the connotation "native law and custom or binding between the parties" includes Islamic law for chiefly Muslims and that the prevalence of Islamic civil law and its full application in matters of inheritances, marriages, gifts, wills, contract, sales, recovery of debt, customary tenancy, disposition of land under the customary right of occupancy and so on in the area courts in the northern states has not changed same since pre-colonial times subject to the tripartite test.

However, this luxury that the area court provision presents for the northern Muslims is not enjoyed by the southern states who have domicile Muslims where the native law preponderant or prevalent is not Islamic law. Little wonder the customary courts in the southwest and south barely adjudicate on cases akin to Islamic civil causes. With no support from the state but somewhat with the backing of major non-governmental Islamic religious conventions,[48] the Muslim communities in these states especially the southwest[49] have decided to set up private arbitration panels arrangement called the 'Independent Sharia Panels' (ISPs), a self-governing initiative to enable them apply Islamic law in the settlement of disputes especially in the field of personal and family law and penal law among themselves willingly. This community of Muslims thus consent to the ISP's legitimacy cum jurisdiction over them and obey judgments emanating therefrom.

Qualified to sit on the bench of the Area courts and hear, determine ascertain or answer all questions of Muslim personal law is any member of an area court learned in Muslim law sitting alone (Section 4(2) Area Court Edict). The court is empowered by law to hear the following cases; "(a) Any question of Muslim law regarding a marriage concluded in accordance with

[48] Supreme Council for Islamic Affairs and the Supreme Council for Sharia in Nigeria.

[49] e.g. Lagos, Ibadan, and Ijebu-Ode.

that law, including a question relating to the dissolution of such a marriage or a question that depends on such a marriage relating to family relationship or the guardianship of an infant; (b) Where all parties to the proceedings are Muslims, any question of Moslem law regarding a marriage, including the dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant; (c) Any question of Moslem law regarding a Wakf, gift, Will or Succession where the endower, donor, testator or deceased person is a Moslem; (d) Any question of Moslem law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or (e) Where all parties to the proceedings (whether or not they are Moslems) have by writing under their hand requested the court that hears the case in the first instance to determine that case in accordance with Moslem law, any other question."

With respect to appeal of cases from the Area Court on Islamic personal law, the Sharia Court of Appeal is the appropriate destination. While for appeals from the same court on Islamic law matters distinct from Islamic personal law, the High Court is the court of appropriate jurisdiction. The High Court must however decide such appeals with reference to the "Shariah law".

2. Shariah Court of Appeal

Initially instituted 1960, to replace the Muslim court of Appeal, which heard appeals from area courts in all aspect of Islamic law, the Shariah Court of appeal as continued to take a centre stage in the progressive determination of Islamic civil causes in Nigeria. It actually surfaced to put a nip in the bud of injustices done to Islamic law cases when appeals were made from native/ area courts incorrectly to all manners of seemingly incompetent courts such as native court of Appeal, Magistrate Court, Supreme Court and even the West African Court of Appeal as these courts in hearing such appeals apply the tripartite test which should not be the case.

The Shariah Court of Appeal derives its legitimacy directly from the Nigeria Grundnorm i.e. the 1999 constitution. They are visible in about 19 states of the federation, all of northern extraction Its constitutional jurisdiction is limited to matters bordering on Islamic person law,[50] but its jurisdiction could be extended by the state of establishment as she deems fit.[51]

[50] Section 275, 277 1999 constitution, Section 11, Shariah Court of appeal law.

[51] Section 277 (1), 242, 1999 constitution.

It is worthy of being noted that section 277 (2) (e), 1999 constitution excludes non-Muslims from seeking judgement in the Shariah Court of Appeal even if they willingly decide to. This provision might not be unconnected with ensuring the religious "independence" of non-Muslims, but this however comes at the expense of their constitutional right to freedom and discrimination.[52]

3. High Court

Following the British colonialist Township Ordinance of 1917, the High Courts in the Northern Region of Nigeria were established in four "Townships" viz; Kano, Zaria, Kaduna and Jos which were commercial havens/centres. Shariah was considered not to be justifiably applicable to these townships dominated by Southern Nigerians who were mainly traders and non-indigenes. Thus, the then High court had no jurisdiction to decide Shariah cases which were the exclusive jurisdictional preserve of the local area courts.[53]

Now, the high courts have unlimited jurisdiction. It can adjudicate on all cases including Islamic civil ones except otherwise stated by the constitution, as such, the exclusive original jurisdiction accorded the native courts on Islamic civil cases it thus shattered.[54] As hinted earlier, the appeals from area courts on Islamic personal cases should go to the Shariah Court of Appeal while cases bothering on "other aspects" of Islamic law not classified as personal law should go to the High Court.[55] Nevertheless, the constitution which is the Grundnorm does not seem to grant such jurisdictional autonomy and separation.

Thus, in practice some confusion appears. High courts are by law empowered to apply Islamic law as the Islamic law is viewed as "just" a form of law like customary law and the likes,[56] which is thus subject to the repugnancy, incompatibility clause and public policy lines. This is however incorrect as the Islamic law is divine according to the Muslim and cannot be inhumane and subservient to human reasoning. Owing to qualification requirements, the competence of the High court Judges to apply the law is also

52 Section 42, 1999 constitution.

53 Bello, M., 'Sharia and the Constitution,' in *The Sharia issue: Working Papers for a Dialogue* (Lagos: CCC, 2000), 1.

54 Section 272, 1999 constitution; Adisa v Oyinwola.

55 Section 54 of the Area Court Edict.

56 High court laws 34(1), Alkamawa v. Bello, 8 NWLR (Pt.561)173 (1998)

an issue.[57] Illuminating more on these points is the case of Maina Gambo v. Hajja Kyariran JD/39A/1962 wherein a contract involving lending an interest bearing principal was held to be void under both the Islamic law and prevailing law, however, the Islamic law provision that allows the respondent to recover the principal sum was held to be incompatible with section 5 of the Money Lenders Act, in observance of the tripartite test. The case of Tsofo Gubba v. Gwandu Native Authority where the court rejected the death sentence verdict for intentional homicide under the Islamic law amongst other cases also reveals one of such intricacies.

Therefore, the issues of competency of the High court Judges[58] and the tripartite test pose serious legitimacy concerns for High courts, ruling on Islamic personal law cases which include *waqfs*. The issues are so serious that they are in escapable and culminate into miscarriage of justice. This is because even if we say the judges are Muslims and have some knowledge of Islamic law, they still have to apply the tripartite test against their creed. This might mean a religious deficiency on the part of Muslim Judges of the High courts. Furthermore, if the Islamic law is not found wanting to go by the tripartite test, the application of the law by an incompetent judge could also amount to injustice.

4. Court of Appeal

The second most important court in the country, the court of appeal is empowered by the constitution to hear all appeals of Islamic personal case from the Shariah Court of Appeal.[59] It is also empowered to adjudicate on other cases of Islamic law in the form of appeals or first instances from the High Court.[60] However, in addressing such Islamic civil cases, the president of the Court of Appeal as empowered by the constitution, in appointing his Justices shall ensure that persons learned in Islamic personal law are among his selections.[61] It is thus commonsensible to expect that such judges will be required to be more knowledgeable than those judges of the lower courts with

57 This issue is relevant for *waqfs* and will be addressed in this paper.

58 Some may argue that expert witnesses could be called, but such witnesses role are advisory and even if they are followed, they could be misleading. It cannot be as good as the judge himself having the requisite knowledge of the law to applied (directly).

59 Section 244, 1999 constitution.

60 Section 241-243, 1999 constitution.

61 Section 288, 1999 constitution.

respect to the Islamic law because the court of Appeal by hierarchy is higher than the ones which the appeals emanate from.

Unfortunately, this is not the case. While a justice of the Shariah Court of Appeal is required to have bagged a recognized qualification in Islamic law,[62] it is sufficient for a Justice of the court of Appeal to have some knowledge of Islamic personal law to decide on Islamic civil causes.[63] However preposterous this might seem, there is precedence for this in the constitution where a (non-Muslim) High Court Judge is empowered to preside over serious Islamic issues.[64] Again, this defies all logic and portends problematic dispute resolution issues for *waqfs*. Further bizarre is the reality that only a handful of these judges have the so called "knowledge" of Islamic personal law.

Under normal circumstances, the bench of the Court of Appeal consists of three judges learned in Islamic personal law when deliberating on an appeal from the Shariah Court of Appeal.[65] This sitting requirement of knowledge of Islamic law is however not stipulated for appeals from the High court which involves other aspects of Islamic law asides Islamic personal law and forms a chunk of the cases.

5. Supreme Court

The ultimate final determination for all cases as far as the court system is concerned in the country rests with the Supreme courts. Similar to the appeal court provision, the president of the Supreme Court whilst appointing his constituent justices he must ensure that some of them are learned in Islamic personal law for the purpose of handing justice in Islamic civil cases. However, unlike the appeal court stipulation in which there is a required number of justices to adjudicate on Islamic civil cases, the same is not a requisite for the sitting of the Supreme court on similar cases. This could portend misrepresentation and misplacement of justice in that if the "unlearned" justices on the bench in a particular case are more than the learned ones, and their opinions differ, then the unlearned one's judgement is followed as this is the favoured pragmatic judicial procedure.

62 Section 247(1)(a), 288, 1999 constitution.

63 Section 276(3) 1999 constitution.

64 Abdul Salam v Salawu (2002) JELR 44519 (SC) LCN/3137(SC).

65 Section 247(1)(a), 1999 constitution.

It is to be noted that it is enough harm to allow a jejune judge to sit on a case he has little or no knowledge of let alone have a non-Muslim preside over an Islamic case for obvious and unobvious reasons.[66] The constitution is nevertheless silent on the religious affiliations of the judges of the Shariah Courts, court of Appeal and the Supreme courts. As hitherto stated, it only states that they must be fairly knowledgeable in Islamic law. By implication, a non-Muslim graduate with other requisite cognate requirements as enunciated by the constitution can be appointed a justice of the hitherto relevant courts of "appropriate" jurisdiction owing to him being learned in Islamic personal law.[67] This is the constitutional right of the non-Muslim from which a deviation may qualify as a breach of that human right to freedom form "religious discrimination".[68] Nevertheless, it is illogical and unislamic for one not bound by a law to rule on and determine the fate of another bound by that law even if it is a constitutional right.

As hinted earlier regarding the court of appeal, there seems to be a paucity of learned judges in Islamic personal law let alone deeply knowledgeable judges with degrees in Islamic law at the level of appeal and supreme courts. This might not be unconnected to a requirement in the constitution that stipulates that only legal practitioners in Nigeria can be on the bench in those courts with respect to Islamic civil cases.[69] It is arguable that the reason this is so because the judges need to be aware of the terrain in which they judge and the fact that customs has a place in Islamic law, but for the single fact that Islam is universal, binding on all Muslims whose cultural sentiments are "invokable" to the extent of their consistency with the Islamic law, this argument is jaundiced. It is also contentious whether not practising in Nigeria always translates to being divorced from one's culture. This is not true. It is noteworthy that there are a reasonable number of justices of the Shariah Courts who are quite learned in Islamic law but cannot sit on Islamic civil causes at the superior instances.

In all, one thing to be taken away from the above discussion is that there are genuine problems such as jurisdictional, competency issues associated with the court system especially when Islamic civil causes are the subject. In the subsequent discussions we examine some of these problems fully as it relates to *waqf* operationality in the country.

66 More on this to come.

67 Sections 276 (3) and 288 (1) & (2) (a) of the 1999 Constitution.

68 Section 41 of the 1999 constitution.

69 Section 231(3), 238(3), 1999 constitution.

THE PROBLEMS WITH OPERATIONALIZATION OF *WAQFS* IN NIGERIA

There appears to be no dedicated legislated document for the regulation of *waqfs* in Nigeria. *Waqf* spelt *Wakf* in the 1999 constitution of Nigeria (the only and most authoritative governing mandate) appears rather passively under section 277(2) c, 262(2) c, where it is proclaimed that "the Shariah Court of appeal of a state and that of the federal capital territory shall be competent to decide on any question of Islamic personal law regarding *wakf*, gift, will or succession where the endower, donor, testator, or deceased person is a Muslim". There are no explicit laws on *waqfs* in Nigeria. A pseudo-law however exists in the form of law on trusts, incorporated and unincorporated. Consistently, there are no explicit laws asides the inherited English common law, governing the unincorporated trusts, even though the provisions of section 45 of the 1999 constitution provides an approximation and could be construed in a general sense to allow for unincorporated trusts. Conversely, comprehensive laws indeed exist and are operational as far as incorporated trusts are concerned. As provided by the law, they could either be registered as companies limited by guarantee or associations with incorporated trustees.

Somewhat specific to Nigeria are some issues relating to inadequacy of the trust laws and subsisting legal infrastructure provisions which are pertinent for *waqf* operability in the country. These issues or problems are discussed below;

1. Obscurity in Court Jurisdiction and Governor's Power over Land

As stated earlier, the 1999 constitution of Nigeria confers adjudication and jurisdiction on *Wakf* matters to the Shariah Courts of appeal seating in the states including the federal capital territory even though there are no explicit and specific laws (administrative, institutional, operational) to; be interpreted, be applied and ruled upon. This is paradoxical and problematic even as the same constitution grants jurisdiction and adjudication powers to High courts on all landed properties and also through the Land Use Act[70] (LUA) of 1978, Section 39. The prospective implosions and bottlenecks become apparent and more pronounced when landed property is the corpus of the *Wakf* as issues of perpetuity and effective dispute resolution arise. Perpetuity issues surface because the act stipulates that virtually all lands in urban areas as well as lands carrying statutory right(s) of occupancy title in rural areas belongs to the Governor of the state who has the imprimatur to grant statutory rights of

[70] A law of the federal republic of Nigeria which appropriates all land matters.

occupancy to applicants for a tenured period, specified fee and rent.[71] This cast grave aspersions on the "surrenderability" of such land to the Creator. In terms of effective dispute resolution, the point is that the law implicitly sidelines the Shariah Courts and ultimately strips it off its powers on potential *waqf* related cases involving land by granting same to the High courts. Case(s) of Korau v. Korau (1998), Baka-Jiji v. Abare (1999), Magaji v. Matari (2000), Maishanu v. Manu (2007) and Adisa v. Oyinwola (2000) simulate such intricacies.

A closer look at the Land use act provides an imminent resolution as the act grants some powers to the municipal government for the control and management of lands in its territories supposedly rural areas though with restrictions on accessible land.[72] The local governments are therefore empowered to issue customary rights of occupancy for landed properties to applicants and the rights so granted is perpetual and not tenured. Prima facie, this seems to resolve the problem of perpetuity as anyone wishing to set up a *waqf* can opt for a corpus type rural land and thus obtain customary rights of occupancy (as opposed to statutory rights of occupancy) under the municipal governments, this would have been the case and the plausible option if and only if the act clearly differentiates and delineates between urban and rural lands.[73] This lack of clarity also impedes the effective dispute resolution opportunity that the powers conceded to the local government affords, as the law clearly gives the customary courts or area courts as well as courts of similar/equivalent jurisdiction, adjudication rights however not devoid of High courts.[74] While awareness of this provision in the act might help *waqf* seeking Muslims fulfil their wishes albeit restrictively by choosing a landed corpus, it does not totally solve the problem and resolve the attendant complexities intertwined with such adaptations.

Perhaps, a much more ending and lasting solution to the problem of the governor's land ownership and tenure powers is the adoption of a cash corpus for (potential) *waqfs* in Nigeria. The cash *waqf*, a powerful form of *waqf* which is simply of cash corpus variety was made permissible as far back as the 8th century based on the *fatwa* of Imam Zufar and became widespread in the 16th century ottoman period and more recently in the contemporary Muslim world.[75] In addition to resolving the issues surrounding the governor's powers, the cash

71 LUA Sections1,2, 5, 8, 34(5)b).

72 LUA Section 3, 6(2).

73 LUA Section 3.

74 LUA Section 41.

75 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 78-98.

waqf will equally eliminate the inefficiency concern associated with the use of land for (real estate agricultural) *waqfs* especially if it is gainfully utilized via sharecropping as was usually the case in relevant history. Joseph Reid mainly within the periods of 1973 to 1977 had asserted that sharecropping is not the most efficient way to utilize farm lands particularly in the face of (point and sequential) uncertainty.[76] According to him, "…any equilibrium distribution of expected income and risk between factors of production could be achieved without resort to sharecropping".[77] Although, Nigeria has an abundance of land which somewhat effectively neutralizes Reids assertion (assuming that all *waqf* lands are utilized or invested via sharecropping or equivalent circumstances/mediums), the cash *waqf* will still prove useful. This is because as time progresses pressure is likely to increase on the abundant land, therefore, the adoption of the cash *waqf* will be a foresightful policy option for Nigeria.

It is thus instructive to shed some light on the modus operandi of cash *waqfs*. Operationally, the corpus i.e. cash is invested and the proceeds used in line with the endowers wish and directive, in most cases for charitable purposes. With specific reference to the Ottoman cash *waqf*, the *waqf* is initiated when a seemingly affluent individual wishing to dedicate his wealth declares his intention publicly through approved legal channels. Once the endowment is made, the cash is invested through a process called *istighlal,*[78] in modern terminologies; a sort of lease, buy back arrangement.[79] Such arrangement entails a fund seeking entrepreneur relinquishing his ownership/usufruct right to his property e.g. house, to the *waqf* in exchange for working/investment capital he needed.[80] The obtained fund is invested by the entrepreneur and this arrangement remains in force for a specified period of time usually a year. The entrepreneur can request to assume usufruct rights on the hitherto relinquished property for a rental fee in favour of the *waqf* which is to be paid for as long as the capital obtained from the *waqf* is still with him. In most cases, the

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76 Uncertainties could be in the form of irreversible and irreparable effect on the product of land and labour such as natural disasters e.g. huge flood, tornadoes etcetera.

77 Reid, J. D., 'Sharecropping and Agricultural Uncertainty,' *Economic Development and Cultural Change* (1976): 575.

78 There are other (Islamically permissible) ways of investing *waqf* corpuses in general. Some of them are mentioned in the author's forthcoming article; Removing the Cog in the Wheel of Waqfs; An Attempt at *Waqf* Policy for Nigeria.

79 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,*78-98

80 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 78-98

entrepreneur returns the capital obtained from the *waqf* within a year and his thus entitled once again to the ownership rights of his property.[81] This process is replicated comprising of a number of fund seeking entrepreneurs and as such the returns emanating from such arrangement constituted the mega profit of the *waqf* which is then channelled to philanthropic purposes as stipulated by the endower. Of course, administrative cum management expenses and other overhead expenses are taking into consideration before the *waqf* funds are disbursed or better still the endower's wish(es) is/are carried out. Through this process, the corpus (cash) is somewhat maintained and sometimes enhanced if the *mutawallī* or *waqf* management decides to augment the existing corpus by adding some of the profit which are not disbursed. Essentially, the *waqf* was able to protect the corpus, ensure continuity and consequently able to generate income from the property of the entrepreneur who obtained his much needed capital for investment. It is however worthy of note that the *waqfs* could not come together in the name of financial cooperation to lend out cash endowments, this restriction helped them preserve their identity as social services organizations as opposed to commercial ones.[82]

It is worthy of note that the modern *ṣukūk* rendering mimics the ottoman cash *waqfs* modus operandi. This analogy draws credence from the fact that the special purpose vehicle (SPV) element which is readily seen in *ṣukūk* operates just like the ottoman cash *waqfs* as far as the deployment of *istighlal* (sale-lease-buyback) is concerned.[83] The use of *istighlal* as an investment conduit has however generated some controversies. While the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) subscribes to its use in the form of *ṣukūk al-ijārah* i.e. the revenue generating part, the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation (OIC) disallows its use citing indistinguishability with the mainstream bond as well as (disguised) *riba* concerns as some of its reasons.[84] This is apparently a setback for the ottoman cash *waqf* and prevents its direct seamless import into the modern Islamic financial (*waqf*) scene today. A solution is thus seen in the stock *waqf.* Supported by the 1908 fatwas of the muftis of Egypt and Alexandra, the 1907 fatwa of the *Mujtahid* of Kerbala as well as the 1967 proclamation in Turkey which permitted it, the stock *waqf* i.e. the modern

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81 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,*78-98.

82 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 78-98.

83 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 78-98

84 OIC Resolution 188 (3/20), September, 2012.

cash *waqf* has evolved into a pragmatic wealth redistribution mechanism and removes from the ottoman cash *waqf* its deficiencies.[85]

The stock *waqf* is essentially a synthesis of the concept of joint stock companies and the traditional cash *waqfs*.[86] As the name implies, the corpus for this form of *waqf* is stocks otherwise called shares. The endower of stock *waqf* normally an individual who is capable and has sufficient wealth earmarks his share ownership in a company for the purpose of *waqf* which in turn becomes the beneficiary of profits accruing to the company by virtue of (ownership) shares in such company.[87] If the shares belong to several incorporated joint stock companies, the waqf's existence is further strengthened as a portfolio is born and risks are diversified such that potential company losses are compensated for by the others as it is rare to find that all companies in the portfolio will make losses simultaneously.[88] More often than not, in fulfilling its mandate, the *waqf* keeps or maintains an emergency fund from its revenue to enable it meet capital enhancement obligations of participating or member firms when they occur in order to be at par with such firms as far as share ratio is concerned whilst spending on necessary overheads as well as property investments if need be with the chunk of its revenue or yearly dividends disbursed for charity purpose which is its main objective ab initio.[89] Beautifully, the stock *waqfs* also permit pooling of endowments by founders wherein such pooled funds translate into huge funds which then becomes the *waqf*.[90] The *mutawallī* is to ensure the continuous existence and functionality of the *waqf* by generating revenue through the sale of social services such as private hospitals, citadels of learnings etcetera. The revenues so derived are expended on necessary

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85 Such deficiencies include; non-compliance with halal investment stipulation, usurious-like lending, asymmetric information occasioned by founder investment rigidities, untenable pooling of waqf funds made possible with the advent of stock *waqfs*. See Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

86 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

87 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

88 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

89 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

90 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

expenses with net profits ploughed back as additions to *waqf* capital.[91] To fulfil the mandate of the *waqf*, part of the services carried out by the *waqf* overseen by the *mutawallī* are also done on charitable basis thus balancing profit and charity activities.[92]

Hence, to effectively nip the problem in the bud via the adoption of the modern cash *waqf* as well as embracing rural lands carrying customary rights of occupancy, there is need for instituting a defining *waqf* law to formalize the practice as well as orchestration of *waqfs* in the country. This will set the record(s) straight by ensuring the removal of complexities associated with the continued use of proximate trust laws and thus ensure adequate recognition of *waqf* institution in Nigeria.

2. Registration

All civil society organization seeking legal entity status are required to register with the corporate affairs commission[93] (CAC) under the Companies and Allied Matters Act[94] (CAMA) of 1990. As hitherto stated they could be registered as companies limited by guarantee or as association(s) with incorporated trustees.[95] Structurally, attributively and characteristically, both provide contestable approximations to the *waqf* but the company limited by guarantee seems closer as it does not vest any form of ownership rights what so ever on/to the members [CAMA Section 26(2)]. After the initial registration, the organization thus formed is further required to furnish the CAC with statements of annual revenue as well as incomes, seek permission for any alterations to memorandums and other information deemed necessary by the commission. This close monitoring coupled with registration related publicity somewhat affects; willingness to establish similar institutions by intending persons, operational flexibility cum ease and ultimately encourages hostile and unwarranted takeovers by the state.

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91 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

92 Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future,* 99-131.

93 An agent of the federal government who registers and regulates (mainly) private businesses and non-governmental organizations e.g. trusts.

94 A law of the federal republic of Nigeria which regulates business and non-governmental organizations.

95 CAMA Section C, Section 673, Section 26(1).

3. Taxation

Companies whose activities fall under public benefit as defined under the fifth schedule of the Companies Income Tax Act,[96] CITA 23(1) (c) are granted tax exemption. Such eligible activities include charitable/benevolent, educational, sporting and ecclesiastical ones. "Islamic motivated trusts" sure enlists as one. However unincorporated trusts as well as individual donations do not qualify for tax exemptions. It is noteworthy that the finance minister is empowered under the CITA 25(6) to amend the listing of institutions eligible for tax exemptions. Nevertheless, the Value Added Tax (VAT) is payable by all organizations irrespective of its activities so long as it conducts lawful activities. Some goods are however not VATable (VAT Act 1993(3), VAT Amendment Act 2007, Federal Inland Revenue Service (FIRS)[97] Act 2007). An impediment for the flourishing of "Islamic motivated trusts" is thus apparent.

4. Investment

The CAMA somewhat restricts the investment propensities of the incorporated trust if it must be eligible for tax exemption. The profits of incorporated entities or companies engaged in activities of public benefit hitherto mentioned are tax exempt so far as the profits in question are not derived from commerce, trade or business orchestrated by such companies.[98] Companies registered as those limited by guarantee are eligible for holistic tax exemption on profits from any lawful sources if an application for such is initiated and granted by the President of the federal republic of Nigeria.

5. Constitution of Bench, Qualification and Religion of Judges

Summing up the issues invoked in section 3.3.4 and 3.3.5 above, quoting ipsissima verba, sections 261(3) and 276(3) of the 1999 constitution which provides for the qualification of the Shariah Court judge; "A person shall not be qualified to hold office as Grand *Kadi* or *Kadi* of the Sharia Court of Appeal of the Federal Capital Territory, Abuja unless -(a) he is a legal practitioner in Nigeria and has so qualified for a period of not less than ten years and has obtained a recognised qualification in Islamic law from an institution

96 A law of the federation of Nigeria which deals with tax issues of businesses.

97 An organ of the government responsible for (majorly) tax revenue.

98 CITA Section 23(1) c, d.

acceptable to the National Judicial Council; or (b) he has attended and has obtained a recognised qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than twelve(ten) years; and (i) he either has considerable experience in the Practice of Islamic law, or (ii) he is a distinguished scholar of Islamic law", and contrasting this with Sections 256(3) and 271(3) which provides for the qualifications required for an high court judge; "A person shall not be qualified to hold office of a Judge of a High Court of a State unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years", reveals a stack difference in the requisite qualifications for justices of both courts and of course the incompetence of the High Court Judges to handle *waqf* issues especially where the corpus is land and when not all the parties involved are Muslims.[99]

This problem will also recur when appeals are to be heard at the Court of appeals and Supreme courts as the qualification requirements for judges here are also inadequate. In addition, the Supreme courts will be plagued with the problem of insufficient constitution of the bench if cases of *waqfs* are to be decided. The religion of the judge is also an issue as stated earlier. Thus, relevant for this discussion is the need to highlight the classical knowledge requirements, credentials as well as prerequisites for an Islamic judge. For any mortal to be a judge of Islamic cases, a) He must be a Muslim, free person, male and matured person. b) He should possess auditory and visual capacities c.) He should be literate, virtuous and should be capable of stretching the intellect in making independent research and interpretation of the Quran and the Sunnah or at least possess the capacity to interpret what an exponent of Islamic law has interpreted on the basis of the Quran and Sunnah. None of the fundamental credentials are met by the judges of these courts sanctioned by the Nigerian constitution to adjudicate on *waqf* subject. This is "indeed repugnant to justice, incompatible with the law in force and of course contrary to public policy" and presents genuine problems for *waqf* operability in Nigeria.

By and large, the above appraisal and prior analysis point towards the need for dedicated *waqf* legislation for Nigeria. The *waqf* legislation will go a long way in mitigating a lot of the protruding problems if not all.

[99] Unless the parties to a case are Muslims and agree to the jurisdiction of the Shariah Court, the High court automatically becomes the court of first call in a case of real estate waqfs for instance.

FURTHER EVIDENCE IN FAVOUR OF DEDICATED LAWS FOR *WAQFS*

Cizakca and Alias[100] have earlier argued for a fresh approach to *waqfs* in Malaysia by way of a model law for the country. They cite limitations of the company law of 1965, Trust Incorporation Act of 1952, Trustees Act of 1949 and the rule against perpetuities as main reasons for the need for a *waqf* law for Malaysia. Explicitly, the main points of Cizakca and Alias[101] are as follows;

a) There is much need for a legal reform in Malaysia if *waqfs* must function effectively and realize their immense charitable potentials.

b) That "Waqf-capable" Malaysians presently have a preference for establishing "*waqfs*" under the secular foundations and (its) applicable regulatory provisions.

c) That this provisions namely; the Trustees (Incorporation) Act of 1952, Companies Act of 1965, Trustees Act of 1949 and the Rule against Perpetuities have drawbacks and thus affect effective *waqf* functionality.

d) For Instance, the Trustee Incorporation Act incorporates the boards of trustees and not the trust body. The Companies Act amongst other limitations precludes the establishment of community cash *waqfs* by making public funds raising difficult. The Trustees Act restricts trustees' investment choices cum strategies and channels so much so that entrepreneurial supportive and beneficial business ventures of micro finance and venture capitals cannot be taken advantage of. As a result, the Act infringes on the Islamic Shariah which largely does not limit the extent of disposal of ones rightfully earned property and possession. The rule against perpetuities also technically prevents the establishment of perpetual (family) *waqfs* in the country.

e) The bottom line is that they submit that the prevailing Malaysia Trust laws as well as the relatively new IDB/IRTI/KPF law (for lack of specificity) are inadequate for *waqf* operability in the country.

f) Consequently, an all-purpose law encapsulating virtually all concerns and addressing the identified shortcomings was prepared for use by the Malaysian state.

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[100] Cizakca, M. & Alias, A., 'Should Malaysian States Have a Fresh Approach to Waqfs? A Proposal for a Model Waqf Enactment?' 135-139.

[101] Cizakca, M. & Alias, A., 'Should Malaysian States Have a Fresh Approach to Waqfs? A Proposal for a Model Waqf Enactment?' 135-139.

For Nigeria, the following arguments are applicable;[102]

1. Limitations of the CAMA, 2004

Despite interview reports[103] revealing the little or no awareness of *waqfs* in Nigeria which makes Muslims who need to do charity opt for Trusts governed under the CAMA, the CAMA in itself has some drawbacks which makes it not a ready usable tool to establish *waqfs* in Nigeria. In fact, undersection 59(1) of the CAMA "where one or more trustee are appointed and authorized by a community of persons, they may apply to the corporate affairs commission (CAC) for incorporation of the entity they represent known as incorporation of trustees". In other words, it is the board of trustees that is incorporated and not the trust body. However, it is the antithesis that is required for smooth running of *waqf* at least for a relatively fresh *waqf* jurisdiction like Nigeria. Furthermore, under section 594(1) of the same Act, applications for non-profit organizations in the country are to be advertised in two (national) dailies one of which must be a national one. The advertisement shall invite objections and if made within 28 days, the concerned authorities can decide under section 594(2-4) to accept or reject the objections. Clearly, this will not augur well with *waqf* establishment and development in the country.

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[102] It might be instructive to note that the applicable laws for the establishment and functioning of not-for-profit organizations in Nigeria including trusts include; Constitution of the Federal Republic of Nigeria (1999), Companies and Allied Matters Act (CAMA), Companies Income Tax Act (CITA), Criminal Code Act, Taxes and Levies (Approved List for Collection) Act 1998, Value Added Tax Act (1993), VAT Amendment Act (2007), Federal Inland Revenue Service (Establishment) Act 2007, Personal Income Tax Act 2004, Personal Income Tax (Amendment) Act 2011, Money Laundering (Prohibition) Act 2011, Prevention of Terrorism Act (PTA) 2011 and the Companies Income Tax (Exemption of Profits) Order 2012. Administration Of Estate Law Cap1 Laws Of Western Region 1959, Property And Conveyancing Law Cap 100 Laws Of Western Region Of Nigeria 1959, Public Trustee Act Cap 98 Lfn 1958, Sale Of Goods Act 1893, The Military Tenure Abolition Act 1660, Trustee Edicts, Trustee Law Cap125, Laws Of Western Region 1959, Trustees Investment Act (TIA) Cap 98 Lfn 449, Lfn1990, Common Law Procedure Act, 1854, Factors Act 1899. Functioning and of particular intruding effect are the CAMA, TIA, CITA and the VAT Act.

[103] For details of the interview, please see Saidu, (2018)

2. Limitations of the Trustees Investment Act 2004

Section 3 (a)(b)(c) of the Trustees Investment Act states that ; "No investment shall be made in exercise of the power conferred by subsection (1) of this section *(i.e. in the exercise of the trustees investment power)* if the investment would cause- (a) the value of the part of the trust fund invested in the exercise of that power to exceed one-third of the total value of the fund; or (b) the value of the part of the fund so invested in the shares and debentures of a particular company to exceed one-tenth of the total value of the fund; or (c) the value of the part of the fund so invested in the shares of a particular company to exceed one-twentieth of the total value of the fund." This clearly limits the risk penchant of the trustees or *mutawallī*. The implication of this law is that a trust (*waqf*) is denied of huge potential profitable investments which in turn limits its probable assets, capital augmenting capacity and of course the extent of its philanthropic impact. Also, the law contradicts the Islamic Shariah in limiting the extent of use of one's rightfully owned or possessed property. Under the Islamic Shariah, so far a person is sane or of sound mind, has reached puberty and is matured or "prudent", there are normally no limits in the expending or use of one's property or possession. This directly points to the concept of gift or *hibah* under the Islamic Shariah. In other words, where a gift (*waqf*) is given intervivos i.e. during the life time of the donor (who is of sound health), to a recipient who actually takes possession of the gift, there is no upper limit to the quantum of gift that could be donated.

3. Limitations of the CITA and VAT Act

The CITA limits *waqf* operability in that income tax exemptions are only applicable to profits of companies engaged in ecclesiastical, charitable, or educational activities of a public character so long as such profits are not derived from a trade or business carried on by such company.[104] Thus, for associations with incorporated trustee registered as companies under the CAMA who derive profits from doing business directly or through a for profit subsidiary will be subject to the regular tax rate as there are no tax rules that delineate between commercial or economic activities related or unrelated to the objects of the association. The same goes for companies limited by guarantee under the CAMA as well, except that they can apply to the president of Nigeria for an order exempting them from all or any profits from any source.[105] Presently,

[104] CITA, Section 23(1)(c).

[105] CITA (23)(2).

there is a presidential order in force since 2012 for the exemption of profits to last a period of five years ending in 2017. The tax exemption covers income tax relief of 5% on assessable profits or gross salaries paid to employers (whichever is less of the two) for employers who employ recent graduate and satisfy other criteria. There is also the Work Experience Acquisition Programme Relief (WEAPR) which grants an income tax exemption of 5% on assessable profits at the end of the second year of employment for relevant employees for companies or employers with a minimum net employment of five employees and who retain them for a minimum of two years. In the same presidential order, 30% of the cost incurred by Nigeria companies in the provision of infrastructure or facilities of a public nature is now exempted from income tax. Relatedly, it is pertinent to iterate that the laws of Nigeria do not permit the deduction of donations made by individuals to Nigeria not-for-profits. However, companies which are usually taxed at 30% are eligible for deductions if they make donations to some Nigerian institutions specified in the fifth schedule of the CITA and double as ecclesiastic, charitable, benevolent, educational and scientific institutions. This deduction is nevertheless to the tune of 10% of the total profits of the company for the year in question and may not exceed that.[106]

While *waqfs* can avail some of these "palliatives", there is need for a *waqf* law that will particularly simplify the process of tax exemption, make tax exemption process easier and expressly consider tax exemption for *waqfs* in three facets namely; Tax exemption for profits or revenue from all sources, all donations accruing to the *waqfs* and finally on profits of companies associated with the *waqfs*.[107]

Concerning the VAT, Nigeria not-for-profits are not exempted from VAT which is currently imposed at the rate of 5%. Under the VAT Act 1993, Section 3 and VAT schedule as amended, restrictively, providing the following goods and services will make the VAT obligation shelved; medical and pharmaceutical products; basic food items; books and educational materials; baby products; commercial vehicles and commercial vehicle parts; fertilizer, agricultural and veterinary medicine, farming machinery and farming transportation equipment; all exports; medical services; services rendered by Community Banks, People's Bank and Mortgage Institutions; plays and performances conducted by educational institutions as part of learning; all exported services; plant and machinery imported for use in the Export Processing Zone; plant, machinery and equipment purchased for utilization of gas in downstream

[106] CITA 25(3).

[107] Cizakca, M., *Islamic Capitalism and Finance: Origins, Evolution and the Future.*

petroleum operations; and tractors, ploughs and agricultural equipment and implements purchased for agricultural purposes. Again, a *waqf* law will go a long way in legalizing the needed VAT exemption for *waqf* activities in the country for the fact that taxes eat into the final profits/revenue of the *waqfs* which is what it uses to benefit the public, thus reducing the amount of the greatest good to the greatest number that the *waqfs* can undertake.

4. Rule against Perpetuities

More general, important and pertinent is the rule against perpetuities which Nigeria being a common law jurisdiction imposes on (family) trusts formed in the country. In the absence of statutory Nigeria law, the rule applies[108] to trusts formed by the settlor either intervivos or via a testament. By rule against perpetuity, it is meant that "no interest in property is valid unless vesting[109] takes place not later than twenty-one years, after the death of the last relevant person who was living at the date the trust was created."[110] Put differently, the rule against perpetuity under the common law does not allow for non-vested future interest (executory interest, contingent reminders etcetera) that cannot vest or will not vest within a cognizable time period of (within) 21 years. In other words, "a property is not to be tied up in trust subject to restricted use, or otherwise held subject to any contingency, for longer than twenty-one years after the death of a person who is alive at the time of the disposition and whose life is relevant to the validity of the disposition".[111] Actually, the rule surfaced to confront the practice whereby property will be left to a line of successors and wherein no one could prevent their successor from reaping such benefit after them. More pragmatically, a perpetuity rule will try to disrupt a case whereby a property owner had bequeathed such in trust for his daughter for life and then for his daughter and so on in a successive fashion, holding the property within the same family and precluding any dealing with such property in a manner a particular successor may have wished, different from the endower's wishes. In such a case, by way of the perpetuity rule, the trust interests will be invalid

[108] The rule can also apply to all sort of property interest such as options to purchase, remainder estates and so on but it is commonly associated today with trusts.

[109] A property interest vests when it is given to a person in being (a person currently living) and is not subject to a condition precedent.

[110] Perchstone and Graeys, 'Trusts – the rule against perpetuity; private client update,' Private client department, http://www.perchstoneandgraeys.com/Private-Client/trust-the-rule-against-perpetuity.html, accessed on 14th May, 2016

[111] LRCNS. (2010). The Rule Against Perpetuities. Law Reform Commission of Nova Scotia, 4.

unless vesting takes place (if at all) within a defined period of time from the creation of the trust i.e. 21 years.

It might be clarifying to put forward hypothetical examples showcasing when and when not the rule against perpetuities apply. For instance; Mr, A bequeaths to Mr. B a particular property for life and then to the oldest of Mr. C's children when he or she reaches the age of 30. The rule of perpetuity can apply here and thus make the bequeathal invalid under the common law because all of Mr. C's children could die and Mr.C could have another child, Mr. B could then die when that child is two years old implying that the interest will not vest in Mr. C's oldest child until 28 years after the death of Mr. B thus exceeding the 21 years bench mark. Take for instance another scenario. Mr. A transfers a landed property to Mr. B so long as the property in question is not used as a bar. The rule does not apply and the bequeathal is valid. This is because although, Mr. B's grand children could loose the property if they use it for a bar, the future interest in this case is in the grantor i.e. the bequeather who in this case possesses a "possibility of reverter" in legal terminologies. Take a last case where Mr. A bequeaths a property to Mr. B so long as it is not used as a Bar and on to Mr. C. Here, the rule against perpetuities apply and the bequeathal cannot stand. This is because Mr.C has an executory interest which could vest when Mr. A's descendant, say a century later transforms the property into a bar. This exceeds the 21 years limit for interest to vest and besides Mr.C would not be able to assume ownership of the said property as he will be dead but his descendant would be able. Clearly, the rule therefore does not state that a trust must only last for a particular period of time, but it instead controls the extent of time the trust should last for by making sure that the property vests at a particular point in time. In short, the rule puts certain time restrictions or limits in the form of time on the use and transfer of property.[112] Invariably, it restricts a person's power to control perpetually the ownership and possession of his or her property after death ensuring the transferability of property.[113]

Of course, this rule goes against the fundamental grain of *waqfs* which is an intergenerational purposive charity which one of its fundamental beauty and historical identity lies in its "everlasting" feature to which history confirms from generation to generation. For the records and to restate and reiterate, for any charitable exercise to qualify as *waqfs* under the Islamic law, it must normally be perpetual, have ascribed beneficiaries who benefit from an endowed object

[112] Duke of Norfolk v. Howard, 3 Ch. Case.1 22 E.R.431 (1682)

[113] WEAL, 'Rule against Perpetuities. West's Encyclopedia of American Law,' The Gale Group, http://legal-dictionary.thefreedictionary.com/Rule+against+Perpetuities, accessed on 17th April, 2016.

and of course a founder otherwise called the *waqif* who has endowed the *waqf* corpus. Hence the need for a *waqf* law to set the records straight on this issue by granting *waqfs* the much needed perpetuity it requires to function as the useful age-long Islamic charitable institution it has always been.

5. Developing *Waqfs* and Forestalling Future Attack on *Waqfs*

With growing democratization in most countries especially with the recent happening in Nigeria where it is the case for the first time in 2015 precisely, that the opposition unseated an incumbent sitting president not by the barrel of the gun but through the electorate via an electoral process, a law on *waqfs* duly passed by the legislature and assented to by the president appears to be the surest way to develop *waqfs* and prevent future attack on the institution of *waqfs* in the country thereafter. This will prevent the set back of centralization as informed by history. As we would see in the country case studies, almost all the *waqf* jurisdictions which had relatively functioning *waqfs* and foundation had a legislative document for its operation. A law is thus a sine qua non for *waqf* operation as it is with most phenomena that need officiation.

Having argued for a law for *waqfs* in Nigeria, Other studies by the author based on in-depth interviews and comparative studies of prominent and relevant *waqf* jurisdictions have shown that the way forward for *waqfs* in Nigeria is a defining dedicated law. In fact, with respect to comparative case studies, Saidu[114] submitted that it is clear that from the country case studies examined that philanthropy (*waqf*) in each country he examined is governed by established laws. He reveals that; Bangladesh has an Act called the *Waqf* Ordinance 1962 which has gone through many amendments, Singapore follows suit, by way of the AMLA enacted as far back as 1968 which also undergone many amendments, the Turks have the "super" 1967 law, as well as more recent foundation law of 2008. He further highlights the laws governing the United States foundation such as the inland revenue code and non-profits acts for incorporation and equally points out the fact that Cizakca and Alias[115] having understood the need for a fresh approach to *waqfs* is Malaysia have also come up with a dedicated *waqf* bill for *waqfs* "putting aside" the state enactments for administration of Islamic religion and associated rules or laws. It is thus inferable and clear that for meaningful *waqf* operability,

[114] Saidu, O.S., *A Quick Guide to Establishing Waqfs in Nigeria*; Saidu, O.S., *Rethinking Philanthropic Foundations: Making Waqfs Work for Nigeria.*

[115] Cizakca, M. & Alias, A., A Proposal for A Waqf Bill for Malaysia' (Unpublished, 2014).

development and functionality, a *waqf* law for Nigeria is inevitable as it is through it that the various numerous *waqf* experiences of these countries can be effectively, selectively and judgmentally adopted. Adopting other countries' laws uncritically for Nigeria in cut and paste manner would surely fail. First, a thorough understanding of the Nigerian scene is essential. Only then a synthesis of the local with other's experience can be attempted. In other words, what is clear from the foregoing is that dedicated *waqf* laws encapsulating and spelling out specific provisions on how *waqfs* should run (for a country) are a sine qua non for any prospective *waqf* jurisdiction.

SALIENT FEATURES IN THE PROPOSED *WAQF* BILL FOR NIGERIA[116]

1. Introduction

From the forgone discussion in this paper, it is prima facie clear that there is need for Nigeria to have a specific harmonised law to establish and regulate the matters of *waqf*. The law dealing with trust is insufficient to cover *waqf* as the administrative matters of *waqf* need to be *in pari materia* with Shariah law. The section thus discusses the proposed law (herein after referred to as bill) for effective *waqf* operation in Nigeria. It discusses the pertinent provisions of the bill proposed.

It should be said here that although, *waqf* is a form of charitable institution stuffed with religious ideology, it should be seen at least within the Nigerian context as an alternative to the Nigerian trust. As such, any Nigerian irrespective of religious inclinations can opt to be charitable under either of the laws governing trusts or *waqfs* whilst however considering his or her "spiritio-socio" aspirations and needs. To this end, we therefore propose this to be a federal republic bill to fall under the exclusive legislative list with the state being able to domicile the bill.

2. Pertinent Areas Covered in the Proposed *Waqf* Law

In the *waqf* law proposed for Nigeria, the following aspects are covered; there is a preambulary which is the part one. In it there is the title, statement of

[116] Professor Oluwaseun Saidu personally wrote this law; the first ever waqf law for Nigeria and have made several frantic attempts to get it to the parliamentary floor. This process is still ongoing.

interpretation and bill coverage. There is a *waqf* declaration section which forms part 2, the section centres on *waqf* creation. There is also a *waqf* structure section which forms part 3. Here, issues of nature, alteration, *waqf* substitution etcetera are entertained. There is also the income utilization section which is the 4th part where priorities of income expenditure and other disbursement issues are provided for. Part five is the *waqf* management section. In it, remuneration of *mutawallī*, *waqf mutawallī* successors as well as other issues relating to *waqf* management are sanctioned. There is also a *waqf* commission section which is the sixth part where issues relating to *waqf* commission establishment, composition, powers and so on are given backing by the bill. Then there is the legal relations section which is the 7th part where breaches, litigation procedures, rules as well as regulations pertinent to *waqfs* are tabled and sanctioned. We discuss each section below;

We should state here that the bill is perfectly in consonance and within the ambit of the Nigerian constitution. The bill is the product of a well thought out process and not an uncritical submission. As hinted earlier, the author had conducted elsewhere, a thorough analysis of the constitutional impediments to Islamic institutions (*waqfs*) in Nigeria vis-à-vis investigating the legal social, political and economic peculiarities and landscape of the country as a prelude to the appraisal of the provisions relevant for *waqf* functionality in Nigeria. In short, every care was taken to avoid collusion with the Nigerian "Grundnorm".

3. Preambulary

This section which is the first section of the bill gives the bill its nomenclature, an interpretive yard stick, a power spread and it more or less serves an introduction to the proposed bill. It effectively defines the technical jargons associated with *waqf* institutions. The section is crucial to the bill as it sets the limit and realm of operation of the bill. An important feature of the section is clarity in stating that the bill shall be interpreted in consonance with the principles of the Islamic Law.

By providing this salient features, the section guarantees the preservation of the classical *waqf* identity and ensures its intergenerational features, permanence and beneficiary-founder features are clearly defined and maintained in the Nigeria *waqf* scene. It forestalls dispute and makes ascertainment/ determination process relatively straightforward which is highly required to clarify the obscurity in the jurisdiction of the Shariah Court of appeal and high courts when real estate *waqf* cases emerge or surfaces.

4. Declaration of *Waqf*

This is the second section of the bill. It sets rules for *waqf* creation. Some salient points of the section includes; that *waqf* be set up by making definitive and non-definitive unambiguous statements directly signifying intention to establish a *waqf* or by carrying out activities indirectly signalling intention to set up *waqfs* from the asset a founder (he or she) owns and possesses; that declarations must be written down for validation; that the use of the word *waqf* is essential for the validity of a declaration of *waqf* but not conclusive to show that a dedication by way of *waqf* was intended to be made; that the written documentation shall, for all intents and purposes, have the same force and effect as if it were a notarial deed; that notice of the creation of any *waqf* registered with the court shall be made public on the notice board of the court, city squares local government township boards, via social media.

Other flashpoints of the section include that; no portion of the declaration of *waqf* can be altered by the founder after the *waqf* has been declared, unless the power to alter has been reserved in the declaration of *waqf* i.e. in the lifetime by the founder and that if the founder has reserved for him/herself this power, then he/she can do the following; (i.) increase the shares of any beneficiaries (*ziyadah)* (ii.) decrease the share of any beneficiary (*nuqsan)*, iii.) add a new beneficiary (*idhkal)*, (iv.) remove a beneficiary (*ikhraj)*, (v.) grant a larger share of distribution to a beneficiary (*i'ta)*, (vi.) exclude a beneficiary from a distribution exercise (*hirman)*, (vii.) use his or her discretion to apply the income of the *waqf* to sustaining *waqf* corpus, enhancing *waqf* corpus or augmenting the *waqf* corpus *(taghyir)*, (viii.) change the use or investment of the *waqf* corpus (*tabdil)*, (ix.) exchange the *waqf* property with another one (*Istibdal)* but subject to obtaining an order of the Court, (x.) sell the *waqf* property for cash (*ibdal)* but subject to obtaining an order of the Court.

Another important section of the bill is the provision for inter vivos or testamentary *waqf* where; a *waqf* activated inter vivos of property of the founder shall not be affected by events at the time of death of the founder and the beneficiaries of such *waqfs* receive their benefits according to the rules laid down by the founder in the endowment deed; a will activated *waqf* must not exceed a third of the founder's estate and if and any of the beneficiaries under it are the heirs of the founder, the portion of the income to which such heirs are to be entitled under the *waqf* shall be divisible among all the heirs of the founder in the proportion of their rights of inheritance. Importantly the section mentions that a declaration of *waqf* shall be construed in accordance with the intention of the founder, and not in accordance to the strict interpretation of any particular wording.

The main rationale for this section is its ability to ensure that *waqfs* are instituted correctly from the outset such that they conform with the Islamic dictates of the traditional *waqf* institution as failure to get it right from the outset might in fact pose a problem for the institution at least within the Nigerian scene as there would be no scientific distinction between a trust for example and a *waqf* which might cast aspersions on the need for a law in the first place. "Analogousity" is certainly not what is needed for a fledging institution but a distinctive feature which makes it preferable to an existing one. The section therefore tries to make protrude the distinction between trusts and *waqfs* by spelling out what a founder can or cannot do at the very thought of instituting a *waqf.* The provisions of this section further helps to forestall aggressive takeovers in the future by mandating a court registration and skeletal disclosures where necessary as opposed to details of *waqf* activities being furnished to government apparatchik.

5. Structure of *Waqf*

This third section provides for *waqf* to be in perpetuity and that the corpus ceases to be owned by the founder after consummation. It further stipulates that a *waqf* shall not be alienated or transferred, either by the founder or the *mutawallī*, nor may their heirs take it by way of inheritance. Other highlights of the section are that it identifies the possible corpus types. It says that cash, stocks and real estate kind such as monies, shares of companies landed property, building structures or physicals/property of value capable of being held in permanence as well as other physicals or things which are consumed by use are allowable and that such corpuses of *waqf* has to be owned and possessed by the founder at the time when the *waqf* is made. It further grants tax exemption to associated businesses of *waqfs* which are wholly to support the beneficiary or to fulfil the wishes of the founder.

It also specifies that where a *waqf* is deemed to have been made expressing a general intention of charity, but either specifying no objects, or specifying failed objects, the property may, by an order of the Court, be devoted to the poor or other Islamically permissible causes based on nearness to those that have failed. It stipulates scenarios where *waqf* will be invalidated such as when; it is established with borrowed money, the corpus of the *waqf* is not clearly defined and when it is established for uncharitable purposes.

The section effectively solves the problem of Nigeria's land tenure and imposing powers of the governor over land by admitting the cash and stock *waqf* typically into the Nigeria *waqf* scene, thereby making it relatively easy

to establish *waqfs* without worrying about infringing on "surrendability" (true ownership and disposition powers with respect to potential *waqf* assets) and permanence conditions requirement of classical *waqfs* in the Nigeria space. It also adequately removes the restrictions and deficiencies imposed by the VAT and CITA Acts by granting full tax exemptions to associated *waqf* companies, donations as well as *waqf* incomes. Amongst other resolutions of this section is the quelling of the limiting effect of the rule against perpetuities and thus guaranteeing an ever increasing and constant supply of *waqf* assets for Nigeria.

The structure here is an assortment of structures and not a direct representation of a particular one. Historiography and the country case studies conducted in the study has enlightened on the need for selective institutional borrowing, a sort of institutional borrowing triangulation where *madhab* biases that stem from one jurisdiction as well as demerits that flow form one jurisdiction can be compensated for or overcome by adopting the merits of another. For example, the structural demerits of taxation in the Malaysia, Turkey and Singapore sphere can be compensated with the generous taxation structure in the United States and Bangladesh. Furthermore, the preponderance of real estate *waqf* poor fairing in Malaysia and Bangladesh can be compensated for, by adopting the commercial real estate drive of Singapore and the cash and stock *waqfs* of Turkey. Similarly, the impermissibility of investing cash *waqfs* with *istighlal*, have led to the adoption of other investing strategies including the domestication of stock *waqfs*.

6. Expending Income of *Waqf* Property

This section which provides for spending priorities is the fourth. The following; the maintenance and repairs of the corpus of the waqf; the specified object of the waqf; that which is necessary for the general purpose of the specified objects; benefiting of the poor, augmenting *waqf* corpus; additions to *waqf* capital are accorded priority in the order in which they have appeared here.

This section ensures the continuity of *waqfs* in the Nigeria space by providing the guidance with the limits of the Shariah as to how *waqfs* funds are to be disbursed. It again helps to distinguish between a *waqf* and trusts (which does not necessarily provide disbursement mechanisms, with such decisions wholly left to the board of trustees.) which is relevant within the Nigeria scene for speedy growth of the institution. By encouraging additions to *waqf* capital, chances of fulfilment of the *waqif's* mandate as well as charity stipulations are further enhanced. The section thus clearly prevents disputes that might arise

from spendings which are an integral part of the *waqf* institution and any *waqf* jurisdiction.

7. Management of *Waqf* Property

This fifth section deals with the appointment, duties, powers and removal of *waqf* managers. It provides for; that the founder may during his life time provide for the filling of the following positions in the *waqf* declaration; a *mutawallī* to act as manager or administrator of the waqf; a successor to the *mutawallī*; the conditions on which; the manner in which; the period for which; and the person by whom, the *mutawallī* and his successor may be appointed. It further provides for the court to appoint *mutawallīs* should a founder die and there are no provisions in the *waqf* declaration for the appointment of successive *mutawallīs*. It provides that a *mutawallī* be removed if he is deemed to have acted in breach of trust; found wanting in his duties or responsibility or is deemed to have mismanaged the *waqf* and a case is instituted against such *mutawallī* by interested parties. Under this section, however, the *mutawallī* has powers under the law to employ and remove agents in going about normal administration of the *waqf*, where he is empowered to do so by the *waqf* declaration or where it is necessary for him to do so. He may lease leasable assets of *waqf* he manages subject to the conditions stipulated in the deed. As part of his duties, he shall prepare in every year monthly, quarterly and annual statements and in any case not later than 1 March, a true statement in English of the accounts of the *waqf* property in respect of the preceding year; cause the statement of accounts to be audited by an auditor in respect of that period; and submit a certified copy of the audited accounts to the court and keep a copy, not later than 1 April of each year.

Particularly, this section removes the problems imposed on *waqf* functionality in the Nigeria scene by the TIA and the CAMA Acts by giving the *mutawallī*/*waqif* a free hand in investments of *waqf* assets so far it is within the purview of the Islamic Shariah. Also, by not granting immunity to the *mutawallī* by way of incorporation, thus making the manager liable for negligence and outright recklessness in his duties, the section therefore guarantees the flexibility and constant growth of assets within the country, prevents recklessness, encourages transparency and accountability (albeit to the courts and not to the state) which in turn helps to preserve the permanence, recurring benefit traditional features of *waqf* within the Nigerian state. This provision is an amalgamation of examples of *waqf* provisions found in the country case studies.

8. The *Waqf* Commission

The sixth section provides for Inauguration of a *waqf* Commission where; the President (commander in chief of the armed forces) federal republic of Nigeria shall inaugurate a *waqf* commission and using his discretion, appoints eleven persons wherein at least five persons who profess Islam have to be appointed and the other members who form the majority may be from other faiths. Such commission's constitution shall have representatives from the government (senior government officials who are civil servants), The Inland Revenue Service, The non-profit sector, Wealthy business men. It provides that the commission's appointees can only be removed by passing a vote of no confidence by fellow appointees and that where vacancy arises in the commission's board as a result of death of a member, the president shall appoint a new member and further that the president may do all within its powers to ensure the smooth running of the commission.

As part of the provisions of the section, the commission is empowered to; supervise cum administrate all *waqfs* without a designated *mutawallī* by assuming the position of *mutawallī* until the Court appoints a *mutawallī* for such *waqfs*, demand records of *waqfs* registered with it, if the need arises, ensure registration with it *waqfs* which are by virtue of this bill are to register with it and summon any *mutawallī* or its representative if need be.

The section this effectively tries to carry along the state and civil society albeit at arms-length and restrictively in the administration of *waqfs* in Nigeria by conceding powers for the commission to administer *waqfs* without designated *mutawallīs*. This helps to prevent centralization and hostile takeover of *waqfs* as history informs thereby preserving the Islamic Shariah dictates of permanence, continuity, inalienability of *waqfs*. It therefore redeploys the extensive power of the finance minister and other government functionaries to other positive uses. The section invariably also removes the CITA and VAT Act limitations. This *waqf* law feature is to be seen vividly in the Turkish legal philanthropic scene.

9. Legal Relations

This section which is the last section handles breach of trust, proceedings, other laws' applicability to this law and specific power of judges. It provides that alleged breach of trust in the management of a *waqf*, or where the direction of the Court is deemed necessary for the management of a *waqf*, a person having interest in the *waqf* or the Commission may apply to the Court to obtain an

order; vesting a property under a *mutawallī*; removing a *mutawallī*; appointing a new *mutawallī*; ordering accounts inquiries, audits and related exercises; declaring what part of a *waqf* property, or of interest in *waqf*, to be allocated to a particular object of a waqf; authorizing exchange or sale of *waqf* property, enforcing the registration of *waqf* declaration, grant damages and costs against the *mutawallī*, granting other reliefs as the case may be.

It further provides that the court may also take the following actions in cases of breaches; compell the *mutawallī* to do any of the things mentioned in the section in cases where the responsibility or onus to comply with the order lies with the *mutawallī*, deprive a *mutawallī* of his remuneration where he has been found wanting in discharging his duties and go on to order a *mutawallī* who has been found to be profligate to file, at close regular intervals, a true representation of income and expenditure account of the *waqf* and activities with regards to *waqf* property under his care, order the attachment and sale of *waqf* property in the execution of a judgment against the *mutawallī*, order that the rents and profits of a *waqf* be seized in the execution of a judgment against the *mutawallī*.

On proceedings, it is provided for that; where proceedings before a Court may affect the interests of a *waqf*, notice of the proceedings shall be given to the Commission in time by the party entering the proceedings so that the Board shall have representative at the proceedings and that where there is a *waqf* case wherein both litigants are Muslim, they can opt for the Shariah Courts with Muslim judges thus effectively excluding the High courts from such jurisdiction. It also says that if the litigants opt for a Shariah Court to hear their case and there are no Shariah Courts in such regions, the independent Shariah panels shall handle such cases and their judgements shall be enforceable in the High courts, Court of Appeal and Supreme courts of these regions. It also provides that where the subject matter of dispute is a piece of landed property, there has to be an ascertainment process of determining whether the case is a *waqf* case by referring to the preamble section of the law for definitions and modus operandi. If in the affirmative, then the case has to be adjudicated upon by the chosen court of jurisdiction albeit subject to the provisions of the *waqf* law and also where there is a *waqf* case where both litigants are Muslims, then, on grounds of appeal, the appeal court bench of Muslim judges who are learned in Islamic personal law must statutorily sit on *waqf* cases at all times and under no circumstances shall any other dramatis personae sit on ascertained *waqf* cases. In a similar vein, the bill provides that, where there is a *waqf* case where both litigants are Muslims, then, on grounds of further appeal to the Supreme Court, the bench must be constituted by a majority of Muslim judges learned in Islamic personal law.

Importantly, the section also stipulates that all other laws asides this *waqf* bill relating to or have a bearing or are intrusive to non-profits shall not apply to *waqfs* and that the Judges of the Court may make rules governing the procedure to be followed in matters within the jurisdiction of the Court under this bill.

The section thus effectively eradicates the obscurities in court jurisdiction and competing/faith issues that surround potential *waqf* adjudication disputes by clarifying ascertainment processes and assigning adjudication process clearly. It beautifully advocates for alternative dispute resolution options in regions without Shariah Courts and preserves the constitutional sanity or powers of the courts in Nigeria. This ensures the preservation of the institution by forestalling unnecessary distractions which litigations might portend. By also clarifying procedures for instituting proceedings against *waqf* managers, it also helps to prevent distraction and ensure the continuous workings of the institution of *waqfs* thus ensuring the sanctity of *waqfs* in Nigeria. The section also effectively sidelines and prevents all other laws asides the bill, related to it, or intrusive or having a bearing to it from applying to the *waqfs* in Nigeria, thus ensuring the overall protection of the *waqf* bill and by extension preserving the legality as well as Shariah features of the *waqf* institutions. Therefore, the section ensures flexibility of the institutions by granting leeways to Judges of relevant courts to define rules that govern procedures on matters within its jurisdiction if need be. This feature of the bill is to be seen in the countries examined in the case study but of course adjusted to the Nigerian *waqf* scene.

CONCLUSION

Waqfs are an historical, yet modern spiritually sanctioned philanthropic institutions which has far reaching positive implications for any country it thrives in. It is for this realization that the study set out to institutionalize *waqfs* within the Nigerian context. This quest cannot be any more needed than now in the country where the institution of *waqfs* is almost visibly non-existent and especially when the country faces high inequality/relative poverty, infrastructural cum public goods deficit, insurgency whose precursor is the high material poverty prevalent in the country, falling crude oil prices in a monolithic economy, pervasive bleeding corruption, excessive squandermania and kleptomania, near shutdown of the economy owing to oil pipeline vandalization and deliberate destruction of oil production facilities and installation, free fall of the exchange rate of the local currency in relation to major currencies of the world, rising price levels and a myriad of related

problems even in the midst of plenty; natural resources, tremendous manpower, population advantage as well as capable youthful human resources.

Utilizing documentary analysis, archival analysis, legal reasoning, description and narratives, the institution of *waqfs* in general and the applicable provisions cum legislations relevant for *waqf* functionality in Nigeria were examined by taking a survey of the existing laws in a bid to effectively operationalize and institutionalize *waqfs* in Nigeria. Numerous laws and particularly *waqf* intrusive and functioning laws; the 1999 constitution, extant trust laws cum not-for profit provisions; Company and Allied Matters Act (CAMA) 2004, Trustees Investment Act (TIA), 2004, Company Income Tax, 2004, Value Added Tax (VAT) Act, 1993 and 2007, Rule Against Perpetuities of the English Common Law, tax concession laws etcetera were critically examined within the Nigeria context. Furthermore, the Nigerian socio-political economy cum democratic ethos alongside her *waqf* pertinent legal structures; the Nigerian court system, legal adjudication system for *waqfs*, court decisions, constitutional impediments to *waqfs* in the country, the state of charity giving in the country were all together critically examined.

It became clear that although constitutional democracies might often enshrine freedom of religion and thus provide for equal treatment of all religions within a given state, the Islamic characterization of the *waqf* institution transcends the subsisting limits allowed for in the not-for profit legal infrastructure including their taxation exemption provisions in the Nigerian state. Explicitly, it was discovered that; there are no explicit regulatory frameworks for *waqf* operations in the country, there is obscurity in court distribution where the high court has exclusive jurisdiction over all lands in the country stripping the Shariah Courts of original jurisdiction which poses a problem to other courts of competent jurisdiction where and when *waqf* cases are involved, there is a problem of competency and educational qualification associated with the faith of High court judges when it comes to appreciating and judging a *waqf* case and that the traditional corpus permanence feature of *waqf* is eroded as all lands constitutionally belong to the governor of a state who allocates statutory certificates of occupancy on a tenured basis.

There are also inadequacies relating to incorporated and unincorporated trust provisions as far as the functioning of classical *waqfs* are concerned, centring on; strict requirements to register and disclose to government agencies required operational salient information, the non-qualification of such trusts as well as donations to them for tax exemption, the extensive power of the state conferred on the Minister of finance to amend tax eligibility at will, the restriction on investments on certain trusts if they are to qualify for

tax exemption and vast differences between trusts and *waqfs* at least within the Nigerian context. It was further uncovered and seen that there are grave limitations relating to the Company and Allied Matters Act, 2004, Trustees Investment Act, 2004, Company Income Tax Act, 1990 and 2004, The Vat Act, 1993 and 2007, The Rule Against Perpetuities of the English Common Law, constitutional impediments as well as a strange prevalent use of trust laws all of which have a negative bearing on *waqf* operability in the Nigerian state.

Harmonization then became the "watchword". We therefore saw a ready solution to the *waqf* institutional hiccups in Nigeria in the form of a dedicated *waqf* law for Nigeria. The challenge then became to arrive at a clearing situation and solution i.e. to come up with a law that is compatible with the Shariah and at the same time in tune with the legal socio-economic political ambience of Nigeria. A law receptive and amenable to Nigerians, preferable to extant not-for-profit laws and which removes obstacles to effective functioning of *waqfs* in the country. Even though the drafted law has been designed primarily in conformity with the Islamic Shariah, it is actually for all Nigerians, regardless of their religious affiliations. The salient features of the law consisting of seven sections; a preambulary, *waqf* declaration, structure of *waqf*, expending income, management, *waqf* commission and legal relations are exposed in this paper.

It is thus safe to conclude that the research is about the first of its kind on the Nigeria *waqf* space which precludes further meaningful researches on *waqfs* in the country, as we are now very much aware of the relevant laws and those that are pertinently intrusive and important for *waqf* functionality in the country. We are further aware of the "adequacy" as well as drawbacks surrounding such provisions necessitating a dedicated *waqf* law for the country Nigeria. Relatedly, we know that until this time there was no known dedicated *waqf* law for the entire Nigerian state, a factor which has contributed to penumbral existence of such institutions in the country. We are also definitely reassured of a solution in a law on *waqfs* at resolving the envisaged/raised issues or problems as well for the development of formidable institutions of *waqfs* in the country. We are optimistic that once the law is passed, the institution of *waqfs* will be expanded, ignited and reinvigorated in the country. This will boost the third sector as well as the growth of Islamic finance and by extension the country at large. The research opens further doors for the meaningful conduct of researches on *waqfs* in the country. In the near future, we expect to see a survey of initiated *waqfs* since the law was passed which might shed light as to the functionality cum effectiveness of the law.

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