

REMOVING THE COG IN THE WAQF WHEELS: A POLICY FORMULATION FOR NIGERIA

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ABSTRACT - The Nigerian state is the most populous African nation with a sizeable number of Muslims. While other countries with a significantly fewer number of Muslims benefit from the visible dividends of a thriving waqf institution, the same cannot be said of Nigeria. The institution of waqfs in the country is almost non-existent or, at best, described as comatose. Therefore, this study attempts to formulate workable prescriptions for waqf development in Nigeria. Data were gathered from relevant documents, such as related local regulations and the result of previous studies. Considering the normative characteristics for the functionality of waqf institution, the data were analysed using documentary enquiry, legal reasoning, descriptions, narratives, and critical studies on the waqf system in Nigeria. The findings indicate a dire need for dedicated legislation for waqf operations in the country that will expedite establishing a sound and well-functioning waqf system. This future law should incorporate the policy briefs contained in this paper.

Keywords: Waqfs in Nigeria, waqf policy, waqf law, endowments, Islamic trusts, enhancing waqfs.

ABSTRAK – Menghilangkan Hambatan Perputaran Wakaf: Analisis Kebijakannya untuk Nigeria.

Nigeria adalah negara di Afrika yang terpadat dengan jumlah Muslim yang cukup besar. Tidak seperti negara-negara lain yang bahkan jumlah penduduk Muslimnya jauh lebih sedikit, Nigeria hampir tidak mendapatkan keuntungan apapun dari adanya sistem wakaf dalam Islam. Eksistensi lembaga wakaf hampir tidak terlihat di negara ini, atau, dapat dikatakan sedang mati suri. Oleh karena itu, kajian ini berupaya untuk menghilangkan hambatan-hambatan operasionalisasi wakaf dengan merumuskan formulasi yang dapat diimplementasikan untuk Nigeria. Data penelitian dikumpulkan dari studi dokumentasi seperti undang-undang dan peraturan terkait serta hasil-hasil kajian yang relevan. Dengan pertimbangan karakteristik normatif fungsi lembaga wakaf, analisis dokumen dilakukan dengan penalaran hukum, telaah deskriptif, naratif, dan studi kritis terhadap fungsi wakaf di Nigeria. Hasil kajian menyimpulkan bahwa ada kebutuhan mendesak bagi Nigeria untuk membentuk undang-undang khusus wakaf yang dapat mempercepat pembentukan sistem wakaf yang sehat dan fungsional. Formulasi policy brief dari kajian ini dapat digunakan sebagai bahan pembentukan aturan dimaksud.

Kata Kunci: Wakaf di Nigeria, kebijakan wakaf, hukum wakaf, dana kebajikan Islam, peningkatan wakaf.

INTRODUCTION

Waqf enlists as one of the essential phenomena in today's voluntary redistribution and wealth management discourse. While its ascendancy permeates countries with a majority Muslim population such as Malaysia, Turkey, Indonesia, etcetera, the same cannot be said about Nigeria, with a teeming Muslim population of about 100 million people. Waqf as an institution is almost non-existent in Nigeria. While there are endowments (albeit negligible and size-petty) which might be (after a closer look) approximately or somewhat technically classified as Waqfs in states like Bauchi, Borno, and chiefly Zamfara; such purported "Waqfs" usually are not consciously and adequately done, endowed or rendered (which makes it mere charity) or are primarily dysfunctional or inoperable (Chesworth & Kogelmann, 2014).

Preliminary investigation suggests that the necessary paraphernalia for Waqf functionality in Nigeria is amiss. Indeed, the foray into the Nigerian case suggests that the reason for the unfavourable absence of Waqfs in the country is due to the virtually non-existent legal infrastructure cum operational framework necessary for the smooth functioning of such a formidable institution of Waqfs. It was also discovered that the inherited trust laws from the British colonial "masters" subsist in the country, which might have contributed to Waqf's absence as some Muslims might think it sufficient to set up trusts in place of Waqf. This action is, however, fraught with religious and technical weaknesses as the English trusts are not the same as the classical Waqfs (at least within the Nigerian context). Equally problematic are the provisions of the Nigerian constitution, which somewhat grant conflicting powers to Shari'ah courts and High courts on issues bordering on land, which is pertinent as far as real-estate Waqfs are concerned. The researcher seeks to ultimately establish how to do Waqfs in Nigeria by suggesting workable policies. Against this backdrop, the study focuses on the operability of Waqfs in Nigeria in a bid to lay the foundations for the maximisation of its potentials.

To this end, the author explains waqfs, gives a rationale for its discussion, presents the country Nigeria within the waqf context, distinguishes between the conventional trusts and waqfs, analyse the state of charitable giving in Nigeria, investigates the laws in place for potential full-blown Waqf functioning in the country including existing trust laws and further, examines



the adequacy of such laws. Nigeria-centric Waqf policies are then prescribed for smooth waqf operation and institutionalisation in the country. The object of this study is thus seminal as it somewhat precludes all further progressive researches on functional Waqfs in Nigeria.

LITERATURE REVIEW

Waqfs Explained

In what appears to be a "license to be part of the inhabitants of heaven", Prophet Muhammad (Peace be upon Him, henceforth PBUH) sanctioned the (real estate) waqfs when Umar bin Khattab got some land in Khaibar. He went to the Prophet (PBUH) to consult him about it, saying, "O Allah's Messenger (PBUH) I got some land in Khaibar better than which I have never had, what do you suggest that I do with it?" The Prophet (PBUH) said, "If you like, you can give the land (corpus) as endowment and give its fruits in charity." So `Umar gave it in charity as an endowment on the condition that would not be sold nor given to anybody as a present and not to be inherited, but its yield would be given in charity to the poor people, to the Kith and kin, for freeing slaves, for Allah's Cause, to the travellers and guests; and that there would be no harm if the guardian of the endowment ate from it according to his need with good intention, and fed others without storing it for the future (with a view to becoming rich)" (Al-Bukhari, 1997).

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" (Dictionaries, 2015). More rigorously, it is an inter-generational purposive religious, charitable quest borne out of a non-coercive process (Noipom & Hassama, 2017). 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, the Supreme Being (Saidu, 2018a). Running through the waqf literature is a trend and tendency to bifurcate waqfs into family and charitable waqfs. As the name implies, family waqfs connote waqfs to benefit the founders' direct family members. In contrast, charitable waqfs refer to that Waqf for other beneficiaries other than the families usually stipulated by the founder. Although, Cizakca (2011) 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.

Pragmatically, 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. The original property or corpus (now 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 which ultimately plunges the concerned to Paradise (Majah, 2007). The aforementioned 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. However, 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. Its income is spent on education or health orphans/poor welfare, building mosques or buying Qurans in mosques, and so forth.

Background on Nigeria

The Nigerian state is the most populous African nation. Based on the 2006 census in Nigeria, the total population stood at 140,431,790 (NPC, 2006). Considering the country's annual population growth rate of 3.2%, the population now stands at a little above 200million. This data invariably means the country alone accounts for about 2.4% of the world's total population. A little above 50% of the population profess Islam, about 3% are traditional worshipers, and the rest are Christians (PEW, 2009). Ethnically and culturally diverse, the country has over 250 ethnic groups (Grimes, 1996), over 500 identified indigenous spoken languages and English language as the lingua franca (Blench, 2011). The country has a total land area of 923,768 km² composed of 37 states, including the federal capital territory and is bounded to the; east by Chad, west by Benin, south by Cameroon and north by Niger. The country runs a presidential system with three arms of government; executive, judiciary and a bi-camera legislature. The country is somewhat a federalist.



The Creator blesses Nigeria with a vast amount of natural resources ranging from good weather, climate, arable land, minerals, and humans, the majority of which remain underexplored; however, petroleum resource serves as the mainstay of the economy. Before the commercial discovery of oil, agriculture served as the main foreign exchange earner, but this position has changed since the 1970s. The contribution of crude oil to the value of total domestic export trade was to the tune of 69.2% in 2012 (NBS, 2012a). The monolithic oil sector also accounts for about 20% of gross domestic product, 95% of foreign exchange earnings, and about 65 percent of a budgetary benchmark (CBN, 2012). The country and the rest of sub-Saharan Africa had an impressive growth (1.6% per capita income growth) rate throughout the '60s and the 70's comparable to that of today's rich countries during the industrial revolution of the early 19th and 20th centuries (OPEC, 2012). Nevertheless, in the '80s, the reverse was the case; perhaps particularly suspect was the IMF stabilisation and structural policies imposed on these countries (Saidu, 2014). Nevertheless, the Nigerian economy has maintained an appreciable real GDP growth rate since 2008. The country grew in real terms by 5.98%, 6.96%, 7.98%, 7.43%, 6.61%, 6.75 in 2008, 2009, 2010, 2011, 2012, 2013 respectively and is projected to grow by 7.27%, 6.93% , 6.62% in 2014 ,2015 and 2016 respectively (NBS, 2016).

However, all forms of poverty co-exist in Nigeria. It is tragic and has been on the increase over the years; relatively, between 2004 to 2010, poverty increased by 14.6%, putting 112,518,507 Nigerians in the poverty bracket. In this context, the poverty incidence in the Northeast and Northwest was 77.7% and 76.3% in 2004 and 2010, respectively. In the South-west poverty rate was 59.1%. Sokoto state had the highest poverty rate of 86.4%, while Niger State had the lowest at 43.6% in 2010. Poverty increased by 6.2% between 2004 and 2010, with about 99,284,512 Nigerians in poverty in 2010. In this parlance, Sokoto had the highest rate of 81.2%, while Niger had the least, 33.8%. The southwest recorded a poverty rate of 49.8% while the North-West and North-East recorded 70% and 69%, respectively. It is also documented that in 2004, about 51.6% of Nigerians earned below one dollar a day, and the percentage increased to 61.2% in 2010. In Southwest Nigeria, 50.1 % of the people lived below the one-dollar mark, while 70.4% of the people in the Northwest geo-political zone lived below the one-dollar mark. In addition, 81.9% of the people in Sokoto lived below one dollar per day, while 33.9% of the inhabitants of Niger live below the one-dollar mark. It was also estimated



that in 2011 poverty will have increased to 71.5%, 61.9% and 62.8%, corresponding to 2.5%, 1% and 1.6% (increase), respectively (NBS, 2010).

Table 1. Relative Poverty: Non-poor, Moderately Poor, Extremely Poor (%) 1980-2010

Year	Non-Poor	Moderately Poor	Extremely Poor
1980	72.8	21.0	6.2
1985	53.7	34.2	12.1
1992	57.3	28.9	13.9
1996	34.4	36.3	29.3
2004	43.3	32.4	22.0
2010	31.0	30.3	38.7

Source: NBS (2010)

The statistics allude to the severity of poverty within the Nigerian state. Poverty is dangerously high in Nigeria. Also worthy of mention is another dimension to the poverty situation in Nigeria, where most people feel they are poor. For example, in 2010, 93.9% of Nigerians believed they were poor, an 18.4% increase in their self-perception in 2004. The people in Abuja considered themselves the poorest with 97.9%, while the people of Kaduna considered themselves the least poor, with a percentage point of 90.5 (NBS, 2010).

Table 2. Relative Poverty Headcount (1980-2010)

Year	Poverty Incidence (%)	Estimated Population	Population in Poverty (Million)
1980	27.2	65	17.1
1985	46.3	75	34.7
1992	42.7	91.5	30.2
1996	65.6	102.3	67.1
2004	54.4	126.3	68.7
2010	69.0	163	112.47

Source: (NBS, 2010)

Further compounding the problem is the insurrection in the Northern part of the country, which analysts have linked to the poverty situation in the country. It has been argued, from various quarters, including the government's two commissions, that the provision of essential infrastructural and social amenities cum employment in the war-torn areas might help stem the tide of the insurgency (Kamri, Ramlan, & Ibrahim, 2014). Perhaps, a functional waqf system presents itself as a potent tool for such panacea since waqfs are



arguably the most potent instruments for poverty alleviation, especially in the face of growing poverty in the midst of appreciable economic growth.

The State of Charitable Giving in Nigeria

Despite the paucity of data on waqfs in the country, there is ample evidence of charitable causes in the countries, especially in helping strangers, volunteering time, and donating money.

In 2013, Nigeria placed an enviable 20th position among 135 countries represented in the world giving index. Contributing to this 20th position is that the country ranked 8th among countries whose citizens participated in helping strangers, ranked 14th amongst those countries who volunteered the most, and ranked 52nd amid countries who donated money. This statistic derives meaning from the fact that on average, 44% of all Nigerians engaged in charitable ventures, where disaggregated 66% helped people they did not know, 30% donated money, and 36% volunteered time as a charitable means. In addition, a total of 62 million Nigerians were estimated to have helped strangers in 2013.

Narrowing down the analysis to Africa, Nigeria placed second as far as being charitable is concerned, second only to the state of Libya, where 46% of her people engaged in charitable causes. It could be readily seen that the margin between the two countries is just a meagre 2%. Taking it piecemeal, Nigeria fell short of Libya by five percentage points when those who helped strangers were considered. It also fell by one percentage point as far as donating money is concerned. In comparison, Libya also surpassed Nigeria by seven percentage points when examining volunteering time.

Looking at the MINT countries, Nigeria ties with Indonesia as the firsts amongst the four countries (Ibrahim & Ilyas, 2016). Although an average of 44% of the people in both countries are considered charitable, individual statistics reveal that while 66%, 30%, and 36% of Nigerians helped strangers, donated money, and volunteered time, respectively; 40%, 63%, and 30% respectively did the same in Indonesia (Ibrahim, 2014; Suzuki, Pramono, & Rufidah, 2016). Thus, both countries have their strong points. Singling out the donation of money, Taking the analysis further to cover the Next Eleven¹ (N-

¹ A group of eleven countries (Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, the Philippines, Turkey, South Korea and Vietnam) tipped to be among the world's largest



11) countries, cursorily, Philippines beat Nigeria to the second place with one percentage point by scoring 45% in the giving index. However, scrutinising the result, Nigeria ranked higher than the Philippines when helping strangers is in the purview. In this ramification, Nigeria ranked 8th while the Philippines occupied the 20th position in 2013. Taking the MINT and N-11 counties together, Nigeria came third after Indonesia and the Philippines as only 30% of her people donated money in 2013. However, she places first as far as helping strangers is concerned. Nigeria also placed second after the Philippines when volunteering time is the crux, as 36% of her populace volunteered in 2013.

Analysing the Muslim majority countries in the index numbering over thirty, only Qatar and Libya were ahead of Nigeria, which placed third. Whilst 51% and 46% of Qataris and Libyans expended on charitable causes, only 46% of Nigerians did in 2013. Nigeria, however, forged ahead of these countries when the number of people who donated in these countries is considered were 62 million helped a stranger in 2013. Further decomposing the results, whilst 73%, 6%, and 19% of Qataris helped strangers, donated money, and volunteered time in 2013, translating to her 2nd, 14th, and 60th ranking respectively in the index, only 66%, 30% and 36% of Nigerians were found to be in a similar act which translated to her 8th, 52nd, and 14th positions.

Similarly, Libya, who came 2nd aggregately amongst the Muslim countries, ranked 3rd, 54th, and 11th. It is noteworthy that despite Libya and Qatar beating Nigeria wholly in the league table, they did not surpass it in all categories individually. This information is evident as Nigeria placed higher than Qataris when volunteering and before Libya when donating money.

Nigeria has nevertheless not been consistent in its performance as a charitable nation. It failed to make the first twenty positions when countries are examined over five years, i.e., from 2008 to 2012. Only the Philippines, amongst the following eleven countries, made a list. At the same time, Qatar was the only Muslim majority country that made a list by taking the 9th position where 46% of her people engaged in charity. Liberia was also the only African country that made a list as 45% of her people gave to charitable causes over the years in question.

economies in the 21st century. They together have promising outlooks for investment and growth.



In 2014, Nigeria did not make the first 20 positions it made in 2013. In fact, amongst the Muslim majority countries nations, only Malaysia, Indonesia (the only MINT and next eleven country who made the list), and Iran made a list ranking 7th, 13th, and 19th, respectively. Furthermore, between 2009 and 2013, Nigeria also failed to mark among the first 20 countries engaged in charitable causes. Again only Qataris, Turkmenistan, and Indonesia (Khalidin, et. al., 2010), amongst the Muslim countries, made a list ranking 9th, 14th, and 16th, respectively. Again, dissecting the statistics further, Nigeria did not make the first ten countries that helped a stranger by participation. The Muslim countries that made a list are Iraq and Saudi Arabia, which ranked 2nd and 7th respectively. Nigeria, however, ranked 5th in terms of the number of people who helped strangers as 61million of its people did in 2014, second to Indonesia that ranked 4th because 85million of its people were reported to have helped strangers. It immediately preceded Pakistan that ranked 8th with 58million of its people helping strangers in 2014. As far as donating money is concerned, Nigeria was not among the first ten countries but made the first ten as far as volunteering time is concerned. It was tied with Malaysia in the 10th position and after Tajikistan and Turkmenistan in the 5th and 1st position respectively, with 41% of their people volunteering in 2014. It is also ranked 5th in the league of charitable countries and 2nd amongst Muslim countries when the number of volunteers is examined.

Nigeria nevertheless occupied the 21st position out of 135 countries of the world in the charitable business in 2014. Amongst the Muslim countries, it came 4th overall after Indonesia, Malaysia, and Iran (Usman, et. al., 2020). In Africa, Nigeria was second, only after Kenya, while amongst the MINT and next eleven countries, she also came second after Indonesia. The statistics revealed that on the aggregate, 44% of Nigerians gave to charity in 2014 in which 63% helped strangers, 29% donated money, and 41% volunteered time, translating into 19th, 50th, and 10th rank respectively among all the countries of the world.

Perhaps controlling for population demographics amongst these countries with the possible exception of Indonesia might greatly tweak the result favouring Nigeria. Overall, Nigeria without a functional waqf system seems to be doing reasonably well as a charitable country but has not been consistent; hence, there is room for improvement and consistency. With the advent of a functional waqf system stuffed with religious ideology, one can



picture or imagine the boost charity causes will have in Nigeria's place in the league of charitable nations.

Waqfs as Opposed to Trusts

While there are similarities between the Islamic Waqf and the (English) Trust, panoramic analyses suggest that there are evident and far-reaching differences between the two institutions which do not make trust laws or the availability of trust laws an adequate substitute for running a waqf, especially in a majority Muslim country like Nigeria. First, the assets that 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 *mutawalli* is only the "administrare" of the assets and will not usually be able to make some decisions, e.g. Istibdal or sale of the assets without clearance from an Islamic court. Another difference is that the rule against perpetuities, a protruding feature of Trust laws, has no place in the waqf establishment (Alias & Cizakca, 2014). In other words, by default, a waqf will generally continue to exist in continuum while Trust and its assets are vested for specific specified periods in the deeds. This point is somewhat technically linked with the first point of difference.

Expectedly, the administrator of the Waqf, i.e. the *mutawalli*, and the *endower*, i.e. the *waqif*, do not have the imprimatur to revoke a waqf. However, this waqif/mutawalli "powerlessness" is 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 acceptable corpuses such as stocks and cash restrict investible channels. In contrast, there are virtually no restrictions on "endorsable" trust assets, and it is known that usufructs can be bona fide trust assets.

A significant 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 be governed by a prime religious motive, which is the requirement for all Muslims to do acts of worship that invariably includes waqfs solely for the sake of Allah the Creator. This requirement is evident in the Hadith contained in Sunan an-Nasa'i 3140: Book 25, Hadith 56,



where the Prophet is reported to have said; "...Allah does not accept any deed, except that which is purely for Him, and seeking His Face." This message is further reinforced in the Hadith narrated by Abu Hurairah (may Allah be pleased with him) wherein the Messenger of Allah (PBUH) said: "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 have that action renounced by Me to him whom he associated with Me'" (Al-Bukhari, 1997).

On the contrary, a settlor is normally primarily driven by other considerations distinct from the sake of Allah's motives. For example, public benefit or altruism, a purely private benefit that accrues to him, i.e., the settlor or mixed benefits, which include both public and private benefits (Saidu, 2018b). Such motives include; the insulation of family wealth from state taxes and 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 capitalising 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 many other "benefits" through innovative Trust structures can also be garnered.

It could be argued that some of these motives that motivate Trust establishment also apply to Waqf (Cizakca, 2011). While this might be true, the normative motive for a waqf is to please Allah and for his sake alone. Some persons in the past and present have declared their primary motives to



be other than the Islamic normative motive. 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.

One does not change the Islamic dictates and makes such persons or endowers correct or necessarily on the right path. Such persons will have to purify their intention(s) if they have to be rewarded for such noble acts by their Creator. Therefore, it is worthy of emphasis and further clarification that this intention factor is profound and needs thorough pondering. It is 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.

However, this is not so, as people can give public benefit for reasons other than because Allah has enjoined us to be charitable. For example, suppose a person was asked why he/she has done a charitable act. In that case, he/she might say, “Well, I did because she is a friend”, or “because he has helped me before”, or “because he is my supervisor”, or probably “because he might help me in the future”, or for fear of shame or sanctions, or any of the motives described above. These intentions are unacceptable in the view Islamic Shari'ah. Of course, by an 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 doing so of Allah and are deemed futile according to the hadiths above.

Therefore, there is a constant need for Muslims to purify their intentions when doing charitable deeds. It is one of the reasons why waqfs is the best choice for a Muslim seeking to engage in (perpetual) charity and not Trust. At the very thought of a waqif, the Muslim should immediately become conscious of its rationale as an Islamic institution. Such intentions might be purified if such potential *waqif* is a sincere Muslim. In addition, since intentions usually are 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.



METHODOLOGY

This study utilizes a qualitative method with a normative approach. Data for this study is gathered from relevant documents, such as related local regulations, and the result of previous studies. Considering the normative characteristics for the functionality of waqf institution, the data were analysed using documentary enquiry, legal reasoning, descriptions, narratives, and critical studies on waqf system in Nigeria.

RESULT AND DISCUSSION

An Appraisal of Waqf Law/Provisions in Nigeria

There appears to be no dedicated legislated document for Waqfs regulation 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. It is proclaimed that "the Shari'ah 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 a *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 besides from the inherited English common law governing the unincorporated trusts, even though the provisions of section 45 of the 1999 constitution provide an approximation and could be construed in a general sense to allow for unincorporated trusts. Conversely, comprehensive laws 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.

Pertinently, Alias and Cizakca (2014), 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, the board of trustees is incorporated and not a trusted body. The same law does not grant individual trustees the limited liability status, thereby making them personally liable entities that, 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 to support young entrepreneurs, for instance, due to its



conservative risk posture. Further, they posit that the 1965 companies act hampers charitable ventures' activities (e.g., public fundraising and cash waqf), especially those registered as companies limited by guarantee.

Somewhat specific to Nigeria are issues relating to the 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:

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 Shari'ah courts of appeal seating in the states, including the federal capital territory; even though there are no clear and specific laws (administrative, institutional, operational) to; be interpreted, be applied and ruled upon. It is paradoxical and problematic even as the same constitution grants jurisdiction and adjudication powers to High courts on all landed properties and through the Land Use Act² (LUA) of 1978, Section 39. The prospective implosions and bottlenecks become apparent and more pronounced when a 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, belong to the Governor of the state, who has the imprimatur to grant statutory rights of occupancy to applicants for a tenured period, specified fee and rent (LUA Sections 1, 2, 5, 8, 34(5)b). This cast grave aspersion on the "surrenderability" of such land to the Creator. In terms of effective dispute resolution, the point is that the law implicitly sidelines the Shari'ah courts and ultimately strips it of its powers on potential Waqf-related cases involving land by granting the same to the High courts. Case(s) of Korau vs. Korau (1998), Baka-Jiji vs. Abare (1999), Magaji vs. Matari (2000), Maishanu vs. Manu (2007), and Adisa vs. Oyinwola (2000) simulate such intricacies (Nigeria, 1978).

A closer look at the Land use act provides an imminent resolution. It grants the municipal government some powers to control and manage lands in its territories, supposedly rural areas, with restrictions on accessible land (LUA Section 3, 6(2)). Therefore, the local governments are empowered to issue customary occupancy rights for landed properties to applicants, and the rights

² A law of the federal republic of Nigeria which appropriates all land matters.



so granted are 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 differentiates and delineates between urban and rural lands (LUA Section 3). This lack of clarity also impedes the adequate dispute resolution opportunity that the powers conceded to the local government afford, as the law gives the customary courts or area courts and courts of similar/equivalent jurisdiction adjudication rights, however not devoid of High courts (LUA Section 41). 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 solve the problem. It resolves the inherent complexities of such adaptations (Nigeria, 1978).

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 (Cizakca, 2011). In addition to resolving the Governor's powers, the cash waqf will equally eliminate the inefficiency concern associated with land use for (real estate agricultural) waqfs primarily if it is gainfully utilised via sharecropping as was usually used in the case in relevant history. Joseph Reid(1979), mainly within the periods of 1973 to 1977, had asserted that sharecropping is not the most efficient way to utilise farmlands, particularly in the face of (point and sequential) uncertainty. According to him, "...any equilibrium distribution of expected income and risk between factors of production could be achieved without resort to sharecropping". Although Nigeria has abundant land that somewhat effectively neutralises Reid's assertion (assuming that all waqf lands are utilised or invested via sharecropping or equivalent circumstances/ mediums), the cash waqf will still prove useful. As time progresses, pressure is likely to increase on the abundant land; therefore, adopting 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 are 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 *Istiglal*, in modern terminologies; a sort of lease, buyback arrangement (Cizakca, 2011). 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 (Cizakca, 2011). The entrepreneur invests the obtained fund, and this arrangement remains in force for a specified period, 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 entrepreneur returns the capital obtained from the Waqf within a year and is thus entitled to the ownership rights of his property (Cizakca, 2011).

This process is replicated comprising of several funds seeking entrepreneurs. 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 considered 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 *mutawalli* or Waqf management decides to augment the existing corpus by adding some of the not disbursed profit (Akmal, Musa, & Ibrahim, 2020). Essentially, the Waqf was able to protect the corpus, ensure continuity, and generate income from the entrepreneur's property, 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 organisations instead of commercial ones (Cizakca, 2011).

It is worthy of note that the modern *sukuk* 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 *sukuk*, operates just like the ottoman cash waqfs as far as the deployment of *Istiglal* (sale-lease-buyback) is concerned (Cizakca, 2011). However, the use of



Istiglal as an investment conduit has generated some controversies. While the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) subscribes to its use in the form of Sukuk al-ijara, 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 (OIC, 2014). This setback for the ottoman cash waqf prevents its direct, seamless import into today's modern Islamic financial (waqf) scene. A solution is thus seen in the stock waqf. Supported by several fatwas--the 1908 fatwas of the muftis of Egypt and Alexandria, the 1907 fatwa of the *Mujtahid* of Kerbala, and the 1967 proclamation in Turkey that permitted it--the stock waqf, i.e., the modern cash waqf has evolved into a pragmatic wealth redistribution mechanism. It removes its deficiencies from the ottoman cash waqf (Cizakca, 2011).

The stock waqf is essentially a synthesis of the concept of joint-stock companies and the traditional cash waqfs (Cizakca, 2011). As the name implies, the corpus for this form of Waqf is the Stocks, otherwise called the Shares. The endower of stock waqf normally an individual capable and has sufficient wealth earmarks his share ownership in a company for Waqf, which in turn becomes the beneficiary of profits accruing to the company under (ownership) shares in such company (Cizakca, 2011). Suppose the shares belong to several incorporated joint-stock companies. In that case, Waqf's existence is further strengthened as a portfolio is born and risks are diversified. The others compensate for potential company losses. It is rare to find that all companies in the portfolio will make losses simultaneously (Cizakca, 2011).

The Waqf keeps or maintains an emergency fund from its revenue in fulfilling its mandate. It is to meet capital enhancement of obligations from participating members of 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 primary objective (Cizakca, 2011). Beautifully, the stock waqfs also permit pooling of endowments by founders wherein such pooled funds translate into huge funds, which then becomes the Waqf (Cizakca, 2011). The *mutawalli* is to ensure the continued existence and functionality of the Waqf by generating revenue through the sale of social services such as private hospitals, citadels of



learnings, etcetera (Ibrahim, et, al., 2015). The derived revenues are expended on necessary expenses, with net profits ploughed back as additions to waqf capital (Cizakca, 2011). To fulfill the Waqf mandate, part of the services carried out by the Waqf overseen by the *mutawalli* is also done on a charitable basis, thus balancing profit and charity activities (Cizakca, 2011).

Hence, to effectively nip the problem in the bud via the adoption of the modern cash waqf and embracing rural lands carrying customary occupancy rights, there is a need to institute a defining waqf law to formalise the practice as orchestration of waqfs in the country. This action 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 institutions in Nigeria.

Registration

All civil society organisations seeking legal entity status must register with the corporate affairs commission (CAC) under the Companies and Allied Matters Act (CAMA) of 1990. As hitherto stated, they could be registered as companies limited by guarantee or as an association(s) with incorporated trustees [CAMA Section C, Section 673, Section 26(1)]. 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 whatsoever on/to the members [CAMA Section 26(2)]. After the initial registration, the organisation thus formed is further required to furnish the CAC with statements of annual revenue and 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.

Taxation

Companies whose activities fall under public benefit as defined under the fifth schedule of the Companies Income Tax Act, CITA 23(1) (c) are granted tax exemption. Such eligible activities include charitable/benevolent, educational, sporting, and ecclesiastical. "Motivated Islamic trusts" sure enlist as one. However, unincorporated trusts and individual donations do not qualify for tax exemptions. Notably, 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 organisations irrespective of their activities so long as it conducts lawful activities. Some goods are, however, not VATable (FIRS, 1993). An impediment to the flourishing of "Islamic motivated trusts" is thus apparent.

Investment

The CAMA somewhat restricts the investment propensities of the incorporated the Trust if it must be eligible for tax exemption. The profits of incorporated entities or companies that previously mentioned public benefit activities are tax-exempt. The profits in question are not derived from commerce, trade, or business orchestrated by such companies (CITA Section 23(1) c, d.). 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.

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 Shari'ah 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 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 stark 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. Unless the parties to a case are Muslims and agree to the jurisdiction of the Shari'ah court, the High court automatically becomes the court of first call in a case of real estate waqfs for instance.

This problem will also recur when appeals are heard at the court of appeals and Supreme courts as the qualifications for judges here are inadequate. In addition, the Supreme Court will be plagued with the problem of the short 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, and prerequisites for an Islamic judge. For any mortal to judge Islamic cases, a) He must be a Muslim, free person, male and mature person. b) He should possess auditory and visual capacities c.) He should be literate, virtuous, and capable of stretching the intellect in the 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 based on the Quran and Sunnah. None of the fundamental credentials is met by the judges of these courts sanctioned by the Nigerian constitution to adjudicate on waqf subject. It 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 preliminary analysis point towards the need for dedicated waqf legislation for Nigeria. The waqf legislation will go a long way in mitigating many protruding problems, if not all.

Problems Associated with Waqf Operability in Nigeria

For proper alignment of thoughts and ease of reference and progression, the most critical issues, as well as problems running through the earlier discussions relative to waqfs, are as a result of this highlighted, viz;

- a. There are no explicit regulatory frameworks for Waqfs in the country.
- b. Obscurity in court jurisdiction where the High court has exclusive jurisdiction over all lands in the country. The Shari'ah court of appeal, which is supposed to have original jurisdiction, is thus stripped of its powers over any (potential) Waqf cases where landed property is the corpus.



- c. Directly flowing from the obscurity problem is the competency of a High court judge who might be a Muslim or non-Muslim to appreciate and adjudicate on a Waqf dispute. It is worth remembering that the requirement for being a Shari'ah court judge requires a degree in Islamic law in addition to cognate experience, while that of a High court judge does not require knowledge of Shari'ah.
- d. The traditional corpus permanence feature of Waqf is eroded as all lands constitutionally belong to the Governor of a state. He allocates statutory certificates of occupancy on a tenured basis.
- e. The inadequacy of the incorporated and unincorporated trust provisions in Nigeria as far as the functioning of a classical Waqf is concerned. These problems centre on the following;
 1. The requirement to register and disclose to government apparatchik under unincorporated trusts.
 2. The non-qualification of unincorporated trusts, incorporated trusts (e.g. in the case of Value Added Tax), as well as donations to such trusts for tax exemption.
 3. The extensive power of the state conferred on the Minister of Finance to amend tax eligibility.
 4. Restriction on investments by incorporated trusts if they qualify for tax exemption.
 5. Vast differences between Trusts and Waqfs, at least within the Nigerian context.
 6. The prevalent use of approximate trust laws by a populated Muslim country like Nigeria. This dampening the awareness and preponderance of Waqfs in the country prevents the orchestration of Waqfs' religious philanthropy act or make Muslims settle for such trust laws out of no choice or against their wish or will. It means the performance of trusts at the expense of waqfs, which is the amenable faith choice for Nigeria Muslims.

Waqf Policy for Nigeria

The following is a collection of Nigeria-peculiar policies from previous discussions in this paper. In other words, the policy strands from earlier discussions are now put into one read or pieced together; as such, it is not a complete policy brief for Nigeria. It is an attempt to proffer workable recommendations for waqfs in Nigeria.



Policy One: Providing for Settling Waqf Cases

There is a waqf case wherein both litigants are Muslims. They can opt for the Shari'ah courts with Muslim judges, thus effectively excluding the High courts from such jurisdiction. Where the subject matter of a 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 waqf law for definitions and modus operandi. If in the affirmative, then the case has to be adjudicated upon by the chosen jurisdiction court, albeit subject to the provisions of the waqf law. Thus, the High Courts still maintain its jurisdiction over all lands in the country. It is a mere delineation of waqf issues from land simpliciter issues.

On the 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. Under no circumstances should any other dramatis personae sit on ascertained waqf cases. This could be ensured by the president of the Court of Appeal without tampering with the constitution. Similarly, there is the need for a (statutory) majority of Muslim judges learned in Islamic personal law to sit on the bench of the Supreme Court for Waqf cases. This could be ensured by the Chief Justice of the Nigerian federation without tampering with the constitution. There is also the need for Shari'ah courts in the southwest and southeast of the country for adjudication on waqf cases (if it is the choice of the parties concerned). In the meantime (if this is not realisable), there should be independent shari'ah panels that should be given legal backing to the extent that their judgements are enforceable in the High courts, Court of Appeal and Supreme courts these regions. Such a panel should be an effective alternative dispute resolution mechanism through arbitration and mediation for waqf cases. Some independent panels already exist in Ijebu-Ode, Lagos, Osun, and Oyo environs but will be fully backed by the enabling Waqf Act in the next chapter.

In the long run, there might need to be a relaxation of section 231(3), 238(3) 1999 constitution so that there would be an allowance for those qualified as *kadis* (judges of Islamic law) to be appointed as justices in the Islamic courts of Nigeria. It will cater to the paucity of Islamic law judges in the country.

Policy Two: Providing for Raising Awareness on Waqfs



There is a need for an aggressive sensitisation campaign on waqfs in the country. There is an urgent need for the "re-education" of the populace, particularly the Muslims, on the institution of waqfs. The true origin and connection with all religions sent by Allah should be highlighted. It could be done through numerous standalone Islamic organisations which would disseminate the information to their members or through the (local) mosques in each local government area. Through awareness, the society or community should now be aware of waqf institutions and their purposes, encouraging people to do more waqfs. The caretaker of established Waqf should regularly publish its mandate, modus operandi cum beneficiaries' rights towards sensitising the public of its existence through blogs, social media platforms; Ummalad, Facebook, Twitter, Youtube, and via other quasi costless media such as local government notice boards in public squares or centres.

Thus the public can initiate proceedings against the *Mutawalli* whom they deem as non-performing in the Shari'ah courts for non-presence of waqf activities in their domain or non-fulfilment of waqf mandate and by so doing helping and ensuring the continued existence of the institution and the accountability of the *mutawalli*. This is a beautiful check. A report of activities of the waqfs should be kept adequately; monthly, quarterly and yearly to be produced upon request peradventure there is any case for determination requiring an inquisition into the activities of the waqfs; the Islamic court can request for such books to be examined. Also, proper and essential is the sensitisation of the arms of government on the importance cum benefit of such Islamic institution for the country's polity.

Policy Three: Providing for the Introduction of Cash and Stock Waqfs

Waqf of stocks and cash waqfs are indeed powerful forms of waqfs. As we have earlier submitted, the modern cash waqfs essentially solve the problems associated with landed waqfs. Waqf endowers in Nigeria are encouraged to utilise urban property or cash as well as shares for their endowments as they least infringe on the institutions of waqfs going by the existing laws in the country.

Policy Four: Providing for Registration with Courts

The managers, i.e., the Mutawalli of a (prospective) Waqf should only be required to inform the Shari'ah local court or courts of similar standings like the Area courts operated by the Islamic judges of the intention to establish



one. This is for record purposes, and potential state incentives inclusion benefit only. They should be registered in the court books. They should not report to any state apparatus as this portends significant negative implications as history informs, and for the institution to align or remain in conformity with classical waqf practice. Where there are no Islamic courts, for example, in the southeast and west, the independent Shari'ah panels would temporarily serve as registrars or documenters. The registration would, of course, spell out the beneficiaries and purposes of the Waqfs. The beneficiaries should be informed if specified by the establisher. If endowment's beneficiaries are unnamed but a general purposes variety, such purposes should still be documented. As hinted under policy two, the managers of the Waqf still have the responsibility of informing the target group or general beneficiaries through mentioned platforms of their activities.

Policy Five: Providing Tax Exemption for Waqfs

Waqfs activities in the country should be tax-exempt. If associated businesses are whole to support the beneficiary or fulfil the founder's wishes, they should also be tax-exempt. According to Schedule 3, parts 1 and 2 of decree 102 of 1993 and the FIRS Information circular number 9901 of 1999 services, item d, waqf activities being a religious service, they should also be exempt from the VAT. This will be reinforced in the law to follow. The tax eligibility, concession, or holiday so conferred can only be reviewed by the legislature, i.e., amending the Waqf Act. The finance minister will not and cannot unilaterally amend tax eligibility. This would ensure waqf development, continuity, and operational stability.

Policy Six: Providing for Limits to Endowments

If a waqf is endowed in good health by the endower, then the concept of *hiba* is activated, and as such, there is no upper limit to the "endowable" property or amount. However, suppose the endowment is made at the point of death or during a "death-illness". In that case, the concept of bequest is activated, and as such, a limit to the "endowable" property is set by the Islamic shari'ah at a third of the endower's estate.

Also, the author proffers that waqfs could be (1.) charitable waqfs and (2.) family waqfs in the strict sense. In other words, family waqfs will refer to waqfs activated by bequests made to non-legal heirs who are, of course, relatives whose shares have not been expressly stipulated by Allah or who do



not have ordained allowed shares and can be cut off from inheriting by the legal heirs. Legal heirs typically include parents, sons, mothers, siblings, and spouses. There are about 15 possible male categories and 11 female categories of legal heirs, depending on the family situation, deaths, and survivor stats. The non-legal heirs who are relatives are usually the maternal uncle and sister's sons, brother's daughter, etcetera. Family waqfs should essentially cover the latter group. General clauses in the will institute Waqf, that at the instance of death, wealth not exceeding one third should go to the non-legal heirs/relatives mentioned above if they do not normally qualify under legal heir survivors will be a requirement. This might include legal heirs who do not have prescribed shares and are cut off under legal heirs cum survivors (Saidu, 2019).

The waqf founders will have to fear Allah concerning their inheritance and wills because the Messenger (Pbuh) was reported to have said; "A man may do the deeds of the people of goodness for seventy years, then when he makes his will, he is unjust in his will, so he ends (his life) with evil deeds and enters Hell. And a man may do the people of evil for seventy years; then he is just in his will, so he ends (his life) with good deeds and enters Paradise" (Majah, 2007). They should equally remember the statement of Allah in chapter 4 verses 13-14 of the glorious Quran, which reads; "These are the limits [set by] Allah, and whoever obeys Allah and His Messenger will be admitted by Him to gardens [in Paradise] under which rivers flow, abiding eternally therein; and that is the great attainment. And whoever disobeys Allah and His Messenger and transgresses His limits - He will put him into the Fire to abide eternally therein, and he will have a humiliating/disgraceful punishment/torment"

Policy Seven: Providing for Who Can Set Up and How to Invest Waqfs

The Nigerian waqfs could be established by any individual who so wishes. It will be intergenerational and perpetual and of cash, stock, and real estate kind. The Islamic judges or the court reserves the right and permit any corpus for waqfs while acting within the Islamic Law. There will indeed be a place for the practice of *Istibdal* in the Nigerian waqf establishment. As hinted in chapter 2, section 2.4.6, the *Istibdal* is strict and will be apropos a matter of necessity with conditionalities. For a start, the permissible modes for real estate waqf investment would be Ijara, i.e., lease/rent, and of course modified ijaratyn, i.e., modified double lease with definitive or specified lease terms,



stipulated reasonable payments were ensuring the non-dilution of waqf property rights (Cizakca, 1998). Also Mudarabah, Musharakah, Istisna, Salam, classical Hukr, and Modern Hukr of flat-sharing (Cizakca, 2011) and hybrids of these investment forms would be acceptable modes of investment as cash and stock waqfs are concerned. Istibdal would also come in handy to reduce some of the problems associated with the real estate waqfs. The above-mentioned fact people have learned from history.

Policy Eight: Providing for how to Consummate Waqfs

A waqif could set up the Nigerian waqfs by making definitive and non-definitive unambiguous statements or carrying out activities indirectly signalling intention to set up waqfs from the property he or she owns and possesses. As stated earlier, the waqf contract would be written down, and registration would follow in the shari'ah courts for practical documentation purposes. It relatively makes setting up the religious institution easy and largely conforms with the classical waqf establishment practices whilst being practicable in a "modern" setting.

Policy Nine: Providing for legal Status, Salary of Waqf Manager and How Waqf Will Operate

The waqfs in Nigeria will be run by their beneficiaries acting as *mutawallis* or designated *mutawallis* by the founders who register the waqfs in the Islamic court. As hinted earlier, they do not have to show their books to anyone and are primarily independent. There will be no oversight or supervision from the state authorities. As stated earlier, the oversight, monitoring, and supervision will come from the informed beneficiaries and the Mutawallis spiritual conscience and fear of sanctions from the authorities having a recourse to the law of the land if a case is instituted against them (i.e., the Mutawalli) in the *Shari'ah* court for non-performance or recklessness.

Thus, the waqf managers or the Mutawallis enjoy no separate legal entity. This fact prevents the recklessness of the *mutawallis* as this puts them on their toes. Above all, this reminds them that they would be held accountable ultimately in the world and the hereafter concerning the management of the waqfs. In light of this, there will be provisions or stipulations in the waqf law for the *waqif* to stipulate choice of intergenerational *mutawalli* successors with conditions or to expressly empower the mutawallis for as long as the Waqf exists in a beneficial state to appoint successive mutawallis. The



endower must fix the salary of the *Mutawalli*. Over time, the amount due to the *mutawalli* must be in tandem with the economic realities of the times calculable, e.g., by the implicit deflator or other relevant yardsticks.

There might be a need for a waqf commission to officiate waqfs who will have no designated managers in the future. The commission, primarily civil and non-governmental composition-wise, might also perform oversight functions.

Policy Ten: Provision for How to Spend Waqf Income

Suppose an established waqf generates more than is needed. In that case, the excess will be spent on a similar course initially stipulated by the founder of the (original) Waqf or the excesses spent on charity for the poor. Also, such excess(es) can be ploughed back to the Waqf as additions to capital or capital enhancement. Furthermore, the *mutawalli* may change (annual) disbursement modalities considering the widely known "ten" stipulations or conditions. This statement is in line with the *mutawallis* mandate to do all that is permitted to sustain the Waqf whilst at the same time fulfilling the waqf purposes. Relatedly, as a matter of policy, if the beneficiary stipulation of the founder is person-specific to the tune of a stipulated amount or benefit, any extras should be spent on similar courses and should not be withheld.

Policy Eleven: Provision for How to Ensure Good Conduct of Waqf Manager

Compulsory religious talks might need to be organised by the Islamic judge or someone appointed/designated by him in the locality for the *mutawallis* at least once a month. The *Mutawallis* attendance is recorded. This might go a long way in maintaining the waqf system through a self-correcting/check mechanism that is mainly expensive and prevents the *mutawalli* from dubious characters and encourages them to perform their duties as expected.

Policy Twelve: Provision for How to Set up Waqfs in Nigeria from Abroad

As a matter of international cooperation, Muslims can set up waqfs in Nigeria from outside of the country if they wish. However, the laws of Waqf in the land prevails as the waqf property belongs to Allah immediately it is endowed and activated.



CONCLUDING REMARKS

By and large, having examined waqfs within the Islamic legal space and Nigeria, its meaning, its distinction with trusts, the state of charitable giving in Nigeria, appraised pertinent regulations as well as laws requisite for waqf functionality. The researcher deduced problems associated with waqf operability and proffered workable policies for its operation. Explicitly, it was found out that the main issues beseeching the Nigeria waqf space include: 1) the lack of explicit regulatory frameworks for waqf operations in the country, 2) the obscurity in court distribution where the high court has exclusive jurisdiction over all lands in the country stripping the shari'ah courts of original jurisdiction which poses a problem to other courts of competent jurisdiction where and when waqf cases are involved, 3) the 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 4) 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 is concerned, centring on 1) strict requirements to register and disclose to government agencies required salient operational information, 2) the non-qualification of such trusts as well as donations to them for tax exemption, 3) the extensive power of the state conferred on the Minister of finance to amend tax eligibility at will, 4) the restriction on investments on certain trusts if they are to qualify for tax exemption, and 5) vast differences between trusts and waqfs at least within the Nigerian context.

It was prescribed that if any waqf cases wherein both litigants are Muslims, they can opt for the shari'ah courts with Muslim judges such that the High Courts still maintain their jurisdiction over all lands in the country. This policy essentially delineates waqf issues from land simpliciter issues. On the grounds of appeal in ascertained waqf cases, a fully constituted bench of Muslim judges learned in the area of Islamic personal law of which Waqf falls would statutorily sit on such cases at all times. Where there are no shari'ah courts, the shari'ah panels in those parts will adjudicate in such instances. In the future, a relaxation of a section of the constitution might need to be done to allow for some more qualified *Khadis* to be appointed as justices in the



Nigerian system, thereby further enhancing the institutionalisation of waqfs in the country. There is a need for an aggressive sensitisation campaign on waqfs in the country. A decisive policy prescription of introducing the cash waqfs and the modern waqfs of stocks was also made, which helped to essentially bypass the Governor's impediment of land tenure and absolute powers. It was conceived that the prospective *mutawallis* should only be required to inform the shari'ah courts or courts of similar standings like the Area courts operated by Islamic judges of intentions to establish a waqf, thereby protecting the traditional sanctity of waqf institution.

The tax exemption was also advocated, where waqfs and associated businesses established wholly to support beneficiaries will be tax-exempt. Investment modalities were also prescribed, and it was prescribed that the Nigeria waqfs will be permanently written down, with a documentation process to follow in the shari'ah courts. Managerial modalities were also prescribed wherein *mutawallis* or beneficiaries in administrative capacities will enjoy no separate legal entity that prevents managers' recklessness and ensures intergenerational sanctity of the waqfs. Other establishment modalities, including income spending prescriptions and guidelines for international cooperation and continuity ensuring prescriptions were also formulated. Non-Nigeria peculiar waqf policies adaptable to the Nigerian system were also prescribed. These include the *Hanafite* ten conditions stipulating the powers of the founder and the *mutawalli*, the supremacy of intentions in the establishment of waqfs, the adoption of a waqf commission to cater for mainly waqfs not under the courts or which have no *mutawallis*, breaches of trust prescriptions etcetera.

Therefore, the policy briefs above serve as a prelude to the Nigeria waqf law (Saidu, Cizakca, & Wilson, 2021). They more or less should represent the would-be peculiar main features of the Nigerian waqf space. Highlighting the salient features in the proposed waqf bill and rendering the waqf law for Nigeria would be the concern of another paper and thus falls outside the purview of this paper.

The study is thus an attempt at concretising the operations as well as the institution of waqfs in Nigeria. Attention to this institution might be what the Nigerian state needs to float above the waters in the aqua of a macabre social-economic conundrum and malaise it finds itself, whether this is a truism posterity will tell. We hope that the policymakers would avail the opportunity



this article brings to the table to fulfil their electoral mandate to serve the people better and bring to fruition and realisation the quality of life to which each Nigerian aspires.

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