

LEGAL BASES FOR *AL-WAQF* IN NIGERIA

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ABSTRACT

*As a common trend in Nigeria, public introduction of any Islamic scheme in the country is always greeted with controversies and antagonism. The debates from the antagonists are usually heaped, inter alia, on the legality of such schemes. Thus, as an approach to impacting the necessary public education about any of such newly introduced schemes, the protagonists bear the responsibility to clarify the legal bases for the scheme. This may not elude the Islamic endowment system in the country. Accordingly, as efforts are on the increase towards promotion of the practice of Islamic endowment system (*al-waqf*) in Nigeria, this paper provides necessary clarifications on the legal bases for *waqf* in the country. The legal bases are examined from the purviews of the constitutional, Islamic law, legislative instruments and human rights bases, among others. The study is accomplished by qualitative legal research methodology. This paper reveals that the legal bases for *al-waqf* in Nigeria can be seen from the constitutional, Islamic law, statutory and human rights perspectives. With the expositions made in this paper, the issue of legal bases for *waqf* in Nigeria is expected to have been laid to rest.*

Keywords: *waqf, Nigeria, legal bases; Islamic endowment, Islamic Law*

INTRODUCTION

Currently in Nigeria, there is no national law¹ regulating the practice of Islamic endowment (*al-waqf*). This is because *waqf* is a matter within the exclusive

¹ A national law within the Nigerian constitutional context is a federal legislation
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legislative power of States.² Nigeria is a federation of 36 States,³ operating a federal legislative system whereby there are separate legislative bodies for the States⁴ as different from the federal legislative body.⁵ This therefore makes it blurred for people to have a national outlook of the legality of *waqf* so much that as the practice of *waqf* is gaining popularity, it may face attacks on the ground of its legal bases.

Therefore, like any other Islamic scheme desiring public participations in Nigeria, it is necessary to understand the legal bases for *waqf* in the country to justify its public propagation. If this is done, the fear of its legality or constitutionality in the country would be laid to rest. This paper therefore discusses various legal bases for *waqf* in Nigeria. This exercise should not be underrated as the desired wide propagation of the practice of Islamic endowment in the country may not have a free embrace as such. The past experiences from other Islamic schemes earlier introduced speak volumes on what could be expected from different quarters. For instance, despite its accommodation and operation within the legal framework in the country, debates have continued to be put forward for and against the constitutionality of Islamic banking in the country (Abdulqadir Ibrahim Abikan, 2009; A.S. Orisankoko & K.K. Eletu, 2012).

Since the practice is for debates from the antagonists to be heaped, *inter alia*, on the legality of any Islamic scheme introduced in the country, it is an imperative approach towards impacting the necessary public education about any of such newly introduced schemes for the protagonists to clarify the legal bases for the scheme. Accordingly, as efforts are on the increase towards promotion of the practice of Islamic endowment system (*al-waqf*) in the country, this paper provides necessary clarifications on the legal bases for *waqf* in Nigeria. The legal bases are examined from the purviews of the constitutional, Islamic law and human rights bases, among others. This study

referred to as an “Act”. The State legislation is called “Law”. See section 318, 1999 Constitution of the Federal Republic of Nigeria (as altered) (hereinafter referred to as “1999 Constitution”).

² There are three levels of legislative powers in Nigeria, namely: Exclusive, Concurrent and Residual. The Exclusive Legislative Power refers to matters within the sole legislative power of the federal legislative body known as the National Assembly. The Concurrent is shared by both the federal and State legislative bodies while the Residual power is exclusively within the legislative power of the State House of Assembly.

³ See sections 2 and 3 of the 1999 Constitution.

⁴ This is called the House of Assembly of each State.

⁵ This is called the National Assembly.

adopts qualitative legal research methodology. With the expositions made in this paper, the issue of legal bases for *waqf* in Nigeria is expected to have been laid to rest.

THE PRIMARY LEGAL BASES: CONSTITUTION AND ISLAMIC LAW

The primary legal bases for any Islamic scheme in Nigeria can mostly be hinged on the Constitution and Islamic law. Both the Constitution and Islamic law can be explored to advance legality for *waqf* in the country. The two primary legal bases are discussed under separate headings below.

1. Nigerian Constitutional Basis for Legality of *Waqf* in the Country

In determining whether there is a legal basis for any scheme in Nigeria, it must first be established that it has the backing of the Constitution, either directly through express safeguards in the Constitution or indirectly by not contravening any constitutional provisions.⁶ This is because the Constitution serves as the litmus legality test for any action or inaction of all persons and authorities in the country (Abdullahi Saliu Ishola, 2013a: 27-63). The Constitution has been conferred with this status of serving as the litmus legality test in the country by its own provision which declares it to be “supreme” and making its provisions to “have binding force on all authorities and persons through the Federal Republic of Nigeria”.⁷

Consequently, scholars in various fields have been driven to strive to establish constitutional basis for their disciplines or schemes, especially when such is newly introduced (Ola O. Olatawura, 2014: 657-89; Abikan, 2012; Orisankoko & Eletu, 2012; Muhammad Bashir Alkali, 2016). In the same vein, antagonists would also approach their attacks strongly from the same constitutional purview⁸ (Abubakar S Orisankoko, 2012: 45-66; Orisankoko & Eletu, 2012; Abubakar Garba, n.d.) and this did not spare the official recognition of Sharia as the official source of legislation in some States when it was reintroduced in 1999 (A. H. Yadudu, 2003: 31-42).⁹ This should not be surprising because once a constitutional support is found for any scheme, the

⁶ See Constitution of the Federal Republic of Nigeria, 1999, section 1(3).

⁷ Constitution of the Federal Republic of Nigeria, 1999, section 1(1).

⁸ Based on this, some antagonists of the Islamic banking systems in the country always advance arguments that there is no constitutional basis for the scheme in the country.

⁹ Examples of such antagonistic articles include Nmehielle, Vincent O. (2004: 730-759), Tyus, Jennifer (2004: 199).

fears that may be entertained for it concerning its legality are halfway allayed if not completely dislodged just as the same constitutional disfavour would firmly render any scheme completely legally useless.

In founding a legal basis for *waqf*, the Nigerian Constitution specifically recognises Islamic law as an independent source or part of the Nigerian law by putting in place separate machineries for administration of its justice system (Chiroma, Magaji, Mahamad Arifin & Hunud Abia Kadouf, 2013: 69). More strongly, recognising that Islamic law is very wide and its subjects which the court may be invited to adjudicate upon are also inestimable, the Constitution has given special recognition to some aspects of Islamic law which the court is empowered to exercise jurisdiction upon and termed them as Islamic Personal Law matters (Umar A. Oseni, 2017: 258; Ishola, 2013a, 67-69; Abdulmumini Adebayo Oba, 2012).

As *waqf*¹⁰ is expressly listed as an Islamic personal law matter in the Constitution,¹¹ it confers constitutional legality on *waqf* in the country. Thus, unlike Islamic banking that has been faced with constitutionality issues over the years in the nation just because there is no direct mention or provision for Islamic banking in the Constitution, with arguments advanced for (Orisankoko, A.S., & K.K. Eletu, 2012) and against it (Abikan, Abdulqadir Ibrahim, 2009), there would not be room for such constitutionality challenges for *waqf*.¹² There is a clear legal basis for *waqf* in the Constitution; there is a direct mention and provision for it.

Further fortifying the legal basis for *waqf* in the Nigerian Constitution are the stipulations that in appointing persons to the offices of Justices of the Supreme Court and of the Court of Appeal, respectively, the President “shall have regard to the need to ensure that there are among the holders of such offices persons learned in Islamic personal law.”¹³

¹⁰ It is written as *wakf*.

¹¹ Constitution of the Federal Republic of Nigeria, sections 262(2)(c) and 277(2)(c).

¹² Controversial issues that may arise would relate to jurisdictional conflicts of courts and interpretation of the disputes that qualify as *waqf* disputes. The jurisdictional conflicts would be addressed in Chapter Six of this thesis under discussions on the viability of the current court system for adjudication of cash *waqf* disputes. For the challenge of judicial misconceptions of mosque disputes as non-*waqf* disputes, see Abdullahi Saliu Ishola and Sharifah Zubaidah Syed AbdulKader (2017).

¹³ Constitution of the Federal Republic of Nigeria, section 288 (1).

Again, while there is no specification on the number of persons learned in Islamic personal law that must be on the Bench of the Supreme Court,¹⁴ the Constitution expressly and mandatorily stipulates that “the Court of Appeal shall consist of such number of Justices of the Court of Appeal not less than forty-nine of which not less than three shall be learned in Islamic personal law”.¹⁵

Therefore, since *waqf* is a subject of Islamic personal law within the constitutional framework,¹⁶ it follows that there would always be persons versed in the field of *waqf* among the Justices on the benches of both the Supreme Court and the Court of Appeal in the country. This is a great constitutional recognition according impressive legal basis for *waqf* in the nation.

Also, impressively, in exercising the jurisdiction conferred on the Court of Appeal, it shall duly be constitutionally constituted when hearing appeals from the Sharia of Appeal only “if consists of not less than three justices of the Court of Appeal learned in Islamic personal law”.¹⁷ Certainly, a transaction that does not have legal basis cannot be so constitutionally safeguarded to have duly constituted court for resolution of its disputes.

2. Islamic Law Basis: Recognition of *Waqf* in the Māliki School

The prime place occupied by Islamic law within the Nigerian *legal corpus* as a distinct source of law (Chiroma, Magaji, Mahamad Arifin & Hunud Abia Kadouf, 2013: 69), a major component of the Nigerian legal system (Oseni, Umar A., 2017: 258). and a potent and valuable source of Nigerian law (Tobi, Niki, 1996: 137) lends legal credence to *waqf* in the nation. As long as Islamic law holds sway in Nigeria as a legal system to be reckoned with, *waqf* would continue to enjoy legal basis in the country.

Notably, the permissibility of *waqf* by the Māliki School, giving it all the necessary legal backings, also strengthens the legal basis for the scheme in the nation.¹⁸ This cannot be otherwise because if the School had rejected the legality of *waqf*, it would have had the consequential negative impact of subjecting the scheme to legality debates within the Nigerian Islamic law context (Oseni, Umar A., 2017: 255). In other words, since the Māliki School

¹⁴ For criticism of this arrangement, see Oba, Abdulmumini Adebayo (2012), Oba, Abdulmumini Adebayo (2004: 859-900), Ishola, Abdullahi Saliu (2013a).

¹⁵ Constitution of the Federal Republic of Nigeria, section 237(2)(b).

¹⁶ *Ibid.*, sections 262(2)(c) and 277(2)(c).

¹⁷ *Ibid.*, section 247(1)(a).

¹⁸ See the conception of *waqf* in the Māliki School.

is the official *madhhab* in Nigeria and the School approves *waqf* as a legal scheme, this also makes *waqf* to be legally well founded in the country. Even the provisions of the Constitution on Islamic personal law are to be interpreted according to the views of the Māliki School.¹⁹

LEGAL BASES IN OTHER LEGAL INSTRUMENTS

1. Legal Basis in the Sharia Court of Appeal Law

Even though the Constitution provides an enabling platform for administration of Islamic justice in Nigeria,²⁰ the final decision to put the Islamic justice structure in place is still left to each State that deems that it desires the structure.²¹ As observed by Yadudu, the provision of section 277 is not couched in an exhaustive term (A. H. Yadudu, 2003: 39). The Northern States have taken this benefit by establishing the Sharia Court of Appeal and enacting the relevant Laws to actualize the structure among which is the Sharia Court of Appeal Law.²² No States in the Southern part of the country has done this.

Expectedly, Muslims in the Southern States have been agitating over the years for the Islamic court structure (Yusuf O. Ali, 2009; Tajudeen Adesina Abdul-Wahab, 2006; Tajudeen M. Abdulganiyu, 2010: 66-71; Abdullahi Saliu Ishola, 2007)²³ and constitutionally, since Muslims in those States need Islamic courts for justice in their Islamic personal law matters,²⁴ it is now mandatory for the governments of those States to establish the Sharia Court of Appeal with necessary auxiliary lower courts from which appeal would arise (Abdulkadir Orire, 2001: 58-59). It may be correct to posit that, failure to have done this has serious human rights implications for those States (Ishola, Abdullahi Saliu,

¹⁹ *Abdulsalam v. Salawu*, 13 Pt.785 N.W.L.R 505-25 (2002); *Abdulsalam v. Salawu*, 6 S.C.N.J 388-403 (2002).

²⁰ Constitution of the Federal Republic of Nigeria, sections 260-264 and 275-279.

²¹ *Ibid.*, section 275 (1).

²² Necessary Laws are also enacted to establish lower courts from which appeals would go to the Sharia Court of Appeal.

²³ For various efforts that have been made by Muslims in Southern Nigeria to have the court established for them.

²⁴ The way cases affecting Muslims' personal law are being handled in customary courts are worrisome. Customary justice system is different from Islamic justice system just as both Islamic law and customary law are completely different. For the way justice is administered in Customary Courts, see J. O. Ajibola (1982).

2014). For one, such failure constitutes inhibition to Muslims in the States to enjoy their human right to freedom of religion and conscience to the fullest.²⁵

As a legal basis for *waqf* in Nigeria, the Sharia Court of Appeal Law (Kwara State as case study),²⁶ as mandatorily required by the Constitution,²⁷ recognises *waqf* as one of the Islamic personal law matters in which jurisdiction is vested in the Sharia Court of Appeal. Accordingly, the Law declares in this regard as follows:

The Court shall be competent to decide:

*c) Any question of Islamic law regarding wakf, gift, will, or succession where the endower, donor, testator or deceased person is a Muslim.*²⁸

Linking to the Islamic law basis for *waqf*, the Law also defines the Islamic law matters which the court is competent to decide, including *waqf* issues, to mean “Islamic law of the Māliki School governing the matters”.²⁹ No law would vest jurisdiction in respect of questions in relation to any transaction or scheme unless such transactions or schemes enjoy the necessary legality. Thus, with the vesting of jurisdiction in the Sharia Court of Appeal, the Law has accorded legality to *waqf*.

By the judicial structure in Kwara State, as in other similar States, the Laws that established lower courts where appeals emanate to the Sharia Court of Appeal also provide further legal basis for *waqf*. Thus, in the State, the original

²⁵ In this regard, the Constitution provides that “every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance”. See Constitution of the Federal Republic of Nigeria, section 38(1).

²⁶ Sharia Court of Appeal Law (Nigeria: CAP S4, Laws of Kwara State, 2007).

²⁷ While the Constitution does not exhaustively stipulate the areas of Islamic law which the Sharia Court of Appeal must exercise jurisdiction, it however requires that in addition to other subject jurisdiction the court may be conferred with in a State Law, the court should also exercise jurisdiction in Islamic personal law matters. See Constitution of the Federal Republic of Nigeria, section 277.

²⁸ Sharia Court of Appeal Law, section 11.

²⁹ *Ibid.*, section 2.

jurisdiction in *waqf* matters is vested in the Area Court.³⁰ In this regard, even though appeals in decisions of any of the Area Courts can go to the High Court,³¹ it has been statutorily clarified that “any party aggrieved by a decision or order of an Upper Area Court or any Area Court, Grade I or II in an Islamic Personal Law matter may appeal therefrom to the Sharia Court of Appeal.”³²

For the same reason as above, the jurisdiction of the High Court to hear appeals from the Upper Area Court has been restricted not to cover appeals from the Area Court “in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal”.³³ Accordingly, the Sharia Court of Appeal exclusively has jurisdiction “to hear and determine appeals in respect of matters in cases of Islamic personal law from any decision of any Area Court”³⁴ and this, undoubtedly, includes *waqf*.

In the States known as Sharia States (Oseni, Umar A., 2017: 261-262)³⁵ such original jurisdiction in *waqf* matters would be exercised by the appropriate Sharia Court.³⁶ Thus, in Kano State, the trial or original jurisdiction in such cases like any other Islamic personal law matter, could either be exercised by the Sharia Court or Upper Sharia Court.³⁷ However, the appellate structure in the State stipulates appeals from the Sharia Court to first go to the Upper Sharia Court and then to the Sharia Court of Appeal while appeals from the decisions of the Upper Area Court lies directly to the Sharia Court of Appeal.³⁸

³⁰ Area Courts are of two main classes of “Area Court” and “Upper Area Court”. See section 2, Area Courts Law (Kwara): “Area Court means a court established under or in pursuance of this Law or deemed to have been so established and shall include an Upper Area Court”.

³¹ The mode such appeals would take to get to the High Court depends on if it is tried at the Area Court of Upper Area Court (section 53, Area Court Law, Kwara). Appeals from Area Courts would first go to the Upper Area Court and finally to the High Court (section 54 (3), Area Court Law, Kwara). But, appeals from Upper Area Court go directly to the High Court (section 54 (3), Area Court Law, Kwara), all in the High Court’s appellate jurisdiction (Constitution of the Federal Republic of Nigeria, section 272(2)).

³² Section 54(1), Area Court Law, Kwara.

³³ Section 62, High Court Law, Kwara, CAP H2, Laws of Kwara State, 2006.

³⁴ Section 10, Sharia Court of Appeal Law, Kwara, CAP S4, Laws of Kwara State, 2006.

³⁵ These are States that introduced “the Islamic code to regulate both private and public law.”

³⁶ Sharia Court also comprises of “Sharia Court” and “Upper Sharia Court”.

³⁷ Section 6, Sharia Court Law, 2000, Kano.

³⁸ Section 6 (2), Sharia Court Law, 2000, Kano.

The legal regime in Kano State on this issue is very clear. Thus, as rightly stated by Yusufari:

By section 6(2) of the Shari'a Courts Law 2000, appeals now from the Upper Sharia Courts in both civil and criminal matters go to the Sharia Court of Appeal leaving the (Appellate) High Court with appeals coming from the Magistrate Courts where English-based Nigerian law applies. It is the Upper Sharia Court (Appellate Division constituting two judges) that entertains appeals from the Sharia Courts (s. 6(1)) (Yusufari, Mamman Lawan, 2004).

The foregoing has shown clearly that the Sharia Court of Law and other sister laws applicable to lower courts with jurisdiction in Islamic personal law matters have provided a legal basis for the practice of *waqf* in the country. All this justifies a strong legal basis for *waqf* in the country.

2. Legal Basis in the State Enactments on Endowments

As part of the socio-economic measures put in place during the Sharia law reforms introduced by some States in the Northern Nigeria, Laws were enacted to regulate endowment practices.³⁹ The successes of the official involvement in the scheme cannot be overemphasised as it serves as “a good way to raise and distribute wealth to the needy” (Ahmed Bello Mahmud, 2003: 49). Even though most of such Laws provide more for *zakāh* “with little or no reference to *waqf*” (Oseni, Umar A., 2017: 265) and despite that “in few instances where endowment is mentioned in the laws, it is directly appended to *zakāh* which gives a situation where there is no clear-cut reference to how *waqf* can be effectively administered in those states” (*Ibid*), those Laws that make reference to endowment still provide the desired legal basis for the scheme. Lack of detailed provisions on *waqf* may be a weakness of the Laws, but this does not dislodge the legal backing given to *waqf* by them.

3. Legal Basis from Human Rights Perspectives

Waqf is an Islamic religious matter, one of the peculiar institutions bequeathed to the world by Islam. Muslims all over the world can therefore espouse it in the exercise of their fundamental human right to religion. Muslims in Nigeria, like other citizens, are conferred with the fundamental right to freedom of religion, conscience, thought and belief.⁴⁰

³⁹ Both *zakāh* were combined together in the regulation with much more focus on *zakāh*.

⁴⁰ Constitution of the Federal Republic of Nigeria, section 38.

Human Rights in the Nigerian Constitution are referred to as “Fundamental Rights”.⁴¹ This has led to arguments on whether human rights are a subject of the Constitution or not and whether by referring to them as “Fundamental Rights” rather than as “Human Rights”, the Constitution has raised the status of the rights to an enviable level.⁴² From another angle, Islamic law has been advanced as a better approach towards human rights safeguards for people living in the country (A.A. Oba, 2002: 201-13; Abdullahi Saliu Ishola, 2009: 79-86; Abdullahi Saliu Ishola, 2013).

All the above controversies aside, what remains certain and relevant to this study is that, implementation of *waqf* schemes, is one of how every Muslim in Nigeria, either alone or in community with others and in public or in private, can choose to manifest and propagate his religion of Islam in or expresses his firm belief and faith in the Islamic endowment scheme.⁴³ By the dint of the same human rights tool, all Muslims in the country have rights to promote *waqf* through teaching, practice and observance.⁴⁴

In view of the much opportunities for Muslims to advance *waqf* practices in the nation in exercise of their right to freedom of religion, there exists a legal basis for the scheme from the human rights perspectives (Ahmad, Mahadi, 2016: 103). It is arguable that, since human rights are inherent and natural to every human being (Ishola, Abdullahi Saliu, Adekunbi Adeleye & Daud Momodu, 2016: 103-113), the human rights instinct of freedom of religion seems to have inspired Nigerian Muslims over the ages to establish one form of *waqf* project or the other. Without doubts, indeed, the Islamic legal system continues to impact positively in the public and private lives of many Nigerian Muslims irrespective of the official posture of the government (Oladosu, A.G.A.S., 2015: 142). Interestingly, *waqf* cannot not fall within a scheme that can be constitutionally challenged as an extension of application of Islamic law in the country from “personal law” to “public law” as erroneously claimed

⁴¹ *Ibid.*, Chapter IV.

⁴² For arguments on the differences between “Human Rights” and “Fundamental Rights” in the Nigerian context, see Femi Falana (2010: 6-8).

⁴³ Constitution of the Federal Republic of Nigeria, section 38.

⁴⁴ The Constitution is very clear on this and it declares as follows: “*Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance*”. See *Ibid.*, section 38 (1).

in respect of other aspects of Islamic legal system being enforced in some States in the North.⁴⁵

It must be further emphasised that, since *waqf* is a subject of Islamic law and Islamic law occupies a significant place in the life of Muslims so much that to deny Muslims access to any aspect of Islamic law will amount to infringing on his right to freedom of worship (Syed H.A. Malik, 2001: 29), *waqf* becomes a human rights issue and its implementation legally hinges on respect for the human rights of the Muslims in that regard.

Notably, as clarified by Yadudu, to a Muslim, freedom of conscience and to profess a religion of his choice alone or in company of others amounts to not much if pre-condition, which by the way may be perfectly acceptable to followers of other religions is stipulated for him (A. H. Yadudu, 2003: 39). Thus, since adherents of other religions in the country practice endowment schemes as it accords with their religious convictions, it would amount to denying Muslims their own human right to freedom of religion if the practice of *waqf* is not respected by all persons and authorities in the country.⁴⁶ To this end, it is clear that, the legal basis for *waqf* in Nigeria is validly founded on the human rights.

4. Legal Basis at the Federal Capital Territory (FCT), Abuja

There is a stronger legal basis for *waqf* in the Federal Capital Territory, Abuja than is found for it at the State level. While both the constitutional and human rights bases apply to the FCT as well, unlike the States that have discretion in the establishment of the Sharia Court of Appeal⁴⁷ towards facilitating the Islamic court structure, the Constitution expressly declares that “there shall be a Sharia Court of Appeal of the Federal Capital Territory, Abuja”.⁴⁸

Accordingly, in the Federal Capital Territory, Abuja,⁴⁹ the original jurisdiction in *waqf* disputes, like in all Islamic personal law matters, is exercised by the Area Court being the court vested with jurisdiction “to hear

⁴⁵ For such misconceived contentions see, Tyus, “Going Too Far: Extending Shari’a Law in Nigeria from Personal to Public Law.”

⁴⁶ It can be argued that such denial would be unconstitutional since violation of human rights is an unconstitutional act in the country.

⁴⁷ Constitution of the Federal Republic of Nigeria, section 277 (2)(c).

⁴⁸ *Ibid.*, section 260.

⁴⁹ Nigeria is made up of 36 States and a Federal Capital Territory located in Abuja, popularly called FCT. See *Ibid.*, sections 2(2); 3(1) and (4).

and determine all questions on Islamic personal law”.⁵⁰ Thereafter, the appeals would lie to the Sharia Court of Appeal, either the appeal emanates from the Area Court or Upper Area Court.⁵¹

Therefore, there is no room for arguments on whether there exists a legal basis for *waqf* in the Territory or not. Implementation of any *waqf* scheme, such as cash *waqf*, should therefore face no legal challenges at the FCT.

5. Peculiar Situation of Its Legal Basis in the Southern States

The Constitutional provisions, the place of Islamic law in the life of Muslims and the human rights legal bases for *waqf* as earlier disclosed, constitute the peculiar legal basis for *waqf* in the Southern parts of the country. This is in view of the absence of the Sharia Court of Appeal in that part of the country which may tend to create the impression that there is no legal basis for the scheme in those States.

Again, since Islamic law is the personal law of all Muslims in the country, as earlier clarified, and *waqf* is stipulated as Islamic personal law in the Constitution, this also constitutes a legal basis for *waqf* in that region. This is the reasonable conclusion that can be reached on this issue. By sections 262 and 277 of the Constitution, Islamic law applies to Muslims alone. It thus follows that “in causes and matters between Muslims, Islamic law shall apply” (Tobi, Niki, 1996: 164).

6. Legal Basis for Non-Muslims’ Participation

Given the multi religious nature of the Nigerian society, it is useful to see if non-Muslims are accommodated under the Nigerian law to participate in *waqf*. As the immediate previous analyses have shown, it is deducible from the constitutional language that non-Muslims can participate in *waqf* in Nigeria.⁵² The Constitution itself recognises *waqf* whose endower is a Muslim as different from one whose endower is not a Muslim in terms of the court with jurisdiction in disputes that may arise in respect of each of the class of the types, respectively.⁵³

⁵⁰ Section 2(2), Federal Capital Territory Area Courts Act, 2011.

⁵¹ Section 51, Federal Capital Territory Area Courts Act, 2011, interprets the Area Court to include Upper Area Court.

⁵² In some countries, non-Muslims are not allowed to participate in *waqf*. For the prohibitions imposed on the non-Muslims in India, see Paras Diwan and Peeyushi Diwan (1995: 277).

⁵³ Constitution of the Federal Republic of Nigeria, sections 262(2)(c) and 277(2)(c).

As regard the social implication of non-Muslims' participation in *waqf*, especially as beneficiaries, part of the results of the empirical research carried out by Amuda and Buang revealed that, the majority of 88.7% (n=266) strongly agreed that Nigerian Muslims should be the major beneficiaries of *waqf* financial aids across the nation but 11.3% (n=34) disagreed (Amuda, Yusuff Jelili & Ahmad Hidayat Buang, 2015: 93). This does not however constitute a legal barrier against non-Muslims to participate in *waqf* in the country even as beneficiaries.

Necessary clarifications have equally been provided on the implication of the provision in the Zamfara State Law stipulating that “the endowment shall be received from any individual persons or groups who professes Islamic faith”⁵⁴ as constituting no barriers against participation of non-Muslims in *waqf*.⁵⁵ Rather, the law seems to put some restrictions on the State *Waqf* Board on the persons from whom it can validly receive endowment. It therefore follows that there is appropriate favourable legal basis for non-Muslims to participate in *waqf* in Nigeria and there is no exception to this for cash *waqf*.

7. Legal Basis for Cash *Waqf* in Nigeria

Even though the foregoing analyses have disclosed firm legal bases for *waqf* in Nigeria without distinctions on whether it is made with any specified forms of property and by which the cash *waqf* can also be included, the rising modern focus on cash *waqf* models justifies specific clarifications on the legal basis for cash *waqf* in the country to be more specially examined. It is therefore posited in clear terms that the foregoing analyses supporting legal bases for *waqf* also constitute the legal basis for cash *waqf* in the first place.⁵⁶

Aside the sweeping conclusion drawn from the general legal bases, there are specific express provisions of the law that more clearly show that cash *waqf* is legally allowed in the country. In Zamfara State, acceptable items for *waqf* include “Part of Salary”,⁵⁷ “Special Grants from Local and State

⁵⁴ Zamfara State Zakat (Collection, Distribution) and Endowment Board Law (Nigeria, 2013), section 31.

⁵⁵ See discussions on the Ingredients of a Valid *Waqf* under the Nigerian law.

⁵⁶ By implications, the Constitution and all other legal instruments, including Islamic law, constitutes legal basis for cash *waqf* in Nigeria.

⁵⁷ *Ibid.*, section 32 (3)(h).

Governments,”⁵⁸ “Donations”⁵⁹ and “Other forms of *Sadaqatun Jariyah*”.⁶⁰ All these items entail cash *waqf*. For instance, the Special Grants which the Board gets monthly from the Local and State Governments are in the sum of ₦2,000,000:00k (Two Million Naira).⁶¹ Further still, the definition of endowment (*waqf*) in the State confirms that the permissible endowment entails “giving out money, items or properties” (Philip Ostien, 2007: 96).⁶² Without any amplification, reference to “money” in that definition section of the law is to “cash endowment” (i.e. cash *waqf*).

On his own part, Ahmad alluded to item 9 in Part II of the Second Schedule to the Constitution to demonstrate the legal basis for cash *waqf* and concluded that “a state in Nigeria is free to enact law on...the collection of *waqf* in form of cash or issuance of *waqf* certificates as a Muslim voluntary donation” (Ahmad, Mahadi, 2016: 124). If *waqf* is also to be integrated into the Nigerian tax system⁶³ as tax deduction for donors (the *wāqif*), as similar proposition has been made for *zakāh* in the country (AbdulGaniyi Abdurroheem Zubaedy, 2016: 66-68), cash-*waqf* would certainly be the point of focus.⁶⁴ Therefore, the legal basis already established to support integration of *zakāh* in that regard (*Ibid*), which is equally supportive to *waqf* as well (Ahmad, Mahadi, 2016: 124), similarly constitutes a legal basis for cash *waqf* in the country.

CONCLUSION

There is a rising hope for the practice of Islamic endowment system (*al-waqf*) in Nigeria. This essentially entails the prospects for its wide propagation for necessary awareness of the prospective proprietors (*wāqif*), beneficiaries

⁵⁸ *Ibid.*, section 32(3)(i).

⁵⁹ *Ibid.*, section 32(3)(n).

⁶⁰ *Ibid.*, section 32 (3)(o).

⁶¹ This is reflected in the side notes written in pen in the copy of the Law made from the Office of the Director of Endowment in the State.

⁶² Zamfara State Zakat (Collection, Distribution) and Endowment Board Law, section 3.

⁶³ For a proposition on possibility for the government to employ *waqf* (cash-*waqf* certificate in particular) to attract more income from Muslims in the place of some direct tax, such as income tax, see Mannan, M.A. (1999).

⁶⁴ It may not be attractive to government to consider *waqf* of other items in the matter of taxation. Tax is basically a monetary financial issue and there is no exception to this even in the Islamic taxation system. On this, see Metin Coşgel, Thomas Miceli, and Rasha Ahmed (2009: 704-17), F Løkkegaard (n.d.), Monzer Kahf (1983), and Abel Ebeh Ezeoha and Ebele Ogamba (2010: 5-20).

(*mawqūf ‘alayh*) and managers/trustees/administrators (*mutawallī*) in the nearest future. As a genuine concern, the stakeholders would be justified in requesting clarifications for the legality of the scheme. Certainly, without satisfactory explanations on such genuine concerns, the scheme may not enjoy the desired patronage.

Accordingly, this paper has explored the legal bases for *waqf* in Nigeria. It is revealing from the findings of this study that there are well founded legal bases for the scheme in the country. The legal bases can be deduced from the constitutional provisions, Islamic law, human rights justifications, state enactments and other socio-legal sources. For those interested in dabbling into the Islamic endowment practices in Nigeria, it therefore can be assuring to them that there are no legal constraints or challenges to be faced with. All that is left for them is just to play the game according to the rules.

The major findings from this study show that the 1999 Constitution of the Federal Republic of Nigeria expressly recognise *waqf* as one of the Islamic personal matters upon which the Sharia Court of Appeal can exercise jurisdiction. It has been analysed from the human rights perspectives that promoting *waqf* falls within the exercise of right to freedom of religion which Muslims can claim. The official recognition enjoyed by the Māliki School in the country also has a significant positive implications for legality of *waqf* in the nation. The study has also revealed that some specific legislative instruments strongly provide legal bases for *waqf*. Such legal instruments include the Sharia Court of Appeal Law and Endowment Laws in some States in the Northern. It can therefore be concluded that the fear of legality should not be a constraint towards advancing and promoting the practice of *waqf* in Nigeria. This is no longer a problem.

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