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PROTECTING THE CHILDREN'S RIGHT TO BASIC EDUCATION AND HEALTH IN NORTHERN NIGERIA: EXPLORING INSTITUTIONALIZATION OF ZAKAT AND WAQF AS A VIABLE OPTION

T. A. Abdulraheem, H. F. Ahmad and M. K. Imam-Tamim

Abstract

Northern Nigeria, dominated by Muslims, has the highest rate of out-of-school children and child mortality among the regions in Nigeria. This is because the government especially the State governments in the region largely do not consider the right of the children to both basic education and health as priority. The purpose of this paper is to examine the legal frameworks for the protection of right of children to basic education and health and highlight the current legal challenges to the attainment of those rights. The paper finds that a major challenge to the effective protection of the right of the children to basic education and health is the prescription of these rights as mere directive of State policy in the Constitution of the Federal Republic of Nigeria 1999. The paper, however, argues that since majority of the States in the Northern Nigeria are Muslim dominated and have adopted shari'ah as one of the operating legal systems, they could adopt the welfare principles entrenched in shari'ah to support the existing legal frameworks to ensure effective protection of the rights of children to health and education. The study is qualitative and employs legal content analysis to analyse both the primary and secondary data obtained from relevant literary materials. The paper thus recommends that the States should institutionalise the collection and distribution of zakah and waqf, whose proceeds would be used to support the children in particular to have access to quality basic education and health.

Keywords: Zakah in Nigeria, Zakah institution, Waqf, *Shari'ah* in Nigeria, Nigerian Child right.

Introduction

Every government prides itself with its ability to provide certain basic amenities for its citizens that will improve their living standards as well as their quality of living. Both from *shari'ah* and international law perspectives, provision of access to education and adequate health facilities are among the foremost responsibilities of a government. Both systems of law recognise provision of these facilities as fundamental rights of the citizens. Indeed, *shari'ah* stipulates them as among the necessities (*daruriyaat*) of life that an Islamic government must provide as part of its commitment to fulfil the objectives (*maqasid*) of *shari'ah*. Under the international law also, they have been recognised as socio-economic rights and have been included as bill of rights in many countries' constitution. As important as the provision of the education and health facilities is to the citizens in general, it is more fundamental for the physical, mental and intellectual development of the children in the society.

In Nigeria, the provision of these facilities is merely stipulated as directives of state policies, which have been declared non-justiciable by the constitution. The implication of this move is that Nigeria holds the record as one of the countries with the highest rates of infant mortality and out-of-school children. The northern region of Nigeria, which is dominated by Muslims, also has the highest number of out-of-school children and infant mortality. While the parents

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cite poverty as one of the major reasons that they could not send their children to school or hospitals, state government complain about lack of financial resources to fulfil their capital intensive obligation of providing access to adequate health and basic education for the children (Dada, 2013, p.3).

On the assumption that the northern states are Muslim-dominated, this paper discusses the possibility of how the states can use certain Islamic institutions to fulfil their socioeconomic obligations. The paper identifies *zakah* and *waqf* as some of such institutions; examines their roles in provision of basic education and health and the viability of institutionalising their operation especially in multi-religious societies such as the northern Nigerian states; and suggests strategies to aid the viability of these institutions in those states.

Children's Right to Education in Nigeria

Recognizing the children's right to education in Nigeria, several International Human rights Instruments have been ratified and even domesticated. The Child Rights Act 2003 in conformity with the United Nations' Child Rights Convention provided for the protection of children rights generally and the educational right in particular as absolute right of children and places a corresponding duty on the government to provide education (Moja, 2000, p. 4). Other legislations that regulate children education in Nigeria include; Education (National Minimum Standard and Establishment of Institutions) Act, Compulsory Free and Universal Basic Education Act, the West African Examination Council (WAEC) Act; the National Examinations Council (NECO) Act.

Obligation of Nigerian government to provide education is also contained in the Nigerian Constitution but the constitution in chapter II placed education among the fundamental objectives and directive principles of the state policy (CFRN 1999, section 18). Giving effect to the provision of section 18, the National Policy on Education was formulated in 1977. The policy is directed at making education available to all Nigerians especially the children in primary and secondary schools. Section 18(3) (a) of the constitution provides for government educational policy that will provide Free, Compulsory and Universal Primary Education in its strive to eradicate illiteracy. For the recognition and protection of children's right to education in Nigeria, the duty imposed on the governments at local, state and national levels includes putting in place a legal framework, administrative and physical structures for the practicability of educational right of children. These structures put together, is to ensure a required standard and quality basic education at the primary and secondary schooling system (Akande, 2000, p.280).

Children's Right to Health in Nigeria

Right to health is the bedrock of all other rights. Other fundamental rights would become meaningless to the citizens in the absence of sound health. Right to health is widely understood to cover access to a wide range of conditions necessary for the attainment of health such as food, housing, safe water, sanitation, healthy working conditions and a healthy environment (Ladan, 2001, p.240; Amuda, 2011, p.160; Paragraph 10 of the preamble of to the Constitution of WHO).

Like the provision of education, Nigeria has committed to protecting the right of children to have access to adequate health care. Section 13 of CRA 2003 declares that every Nigerian child is entitled to have access to the best attainable state of physical, mental, and spiritual health, which must be ensured by the government and the legal guardians of the child. Sub-

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section 3 committed every level government (Federal, state, local government) in Nigeria to ensure the reduction of infant and child mortality rate while also ensuring the provision of necessary medical assistance and health care services to all children (Dada, 2013, p.3).

Notwithstanding the provision of section 13 of CRA, Nigerian children particularly in the Northern states are suffering from diseases because of inadequate of health facilities and medical experts to attend to the sick children. Nnamuchi (2007) reported that the World Health Organization (WHO), Nigeria is among five countries that contribute 50% of the annual global mortality among infants and children under five years of age.

Many Nigerian children lack access to portable and clean water as described under Section 13 of CRA in the School and at home. They also lack good health care services such as dispensaries, first aid and toilet facilities. Therefore, many of these children are susceptible to Malaria, measles, guinea worm, cough, and diarrhoea which can lead to the death of many children in the country (Aliyu, 2006, p.10). The mortality is also caused by the rate of poverty and many of the parents in Nigeria can neither purchase the medication prescribed by the medical doctor nor receive medical treatment from private hospital and clinics due to their financial constrain (FRN, 2003).

Challenges to Children's Right to Health and Education in Northern Nigeria

Despite the country's commitment towards the promotion and establishment of various socio-economic institutions including access to free education at all levels and provision of adequate health facilities (FRN, 1999, sections 13 to 22) especially for children of between 0 and 18 years, Nigeria still records one of the highest rates of illiteracy and infant mortality both in African sub-region and in the world (Abayomi, 2015; Nnamuchi, 2007). Similarly, in Nigeria, the northern region populated majorly by Muslims also records the highest infant mortality and illiteracy rates. One of the effects of the alarming rate of out-of-school children in the northern states is the easy recruitment by the 'boko haram' group and the way it is easy to incite incessant riots in the region. This is because there is always abundant human capital for these nefarious acts and whenever there are incidents of riots or protests, the government facilities are usually vandalised because the urchins are not mentally and intellectually enlightened about the sanctity of lives and properties.

The commitment by the Federal Republic of Nigeria to provide socio-economic infrastructure such as education and health facilities is not burdened on the federal government alone; it is a shared responsibility between the federal, state and local governments (FRN, 1999, section 13). Indeed, the state government should share more of the responsibility since it directly administers the people and directly extracts taxes from them. With the high rate of illiteracy and infant mortality, therefore, it is clear that the government of the states in Nigeria have failed to fulfil their obligations towards the citizens. Meanwhile, reasons for the high number of out-of-school children and infant mortality have always been hinged on poverty (UNICEF, 2000). Many Nigerians, especially the northerners live below the poverty line yet good schools and health care institutions are becoming increasingly unaffordable. The schools built by communities are poorly maintained due to lack of sustainable resources. The government schools are equally badly managed and the citizens are legally handicapped to exercise their rights of calling the governments to fulfil their obligations because the Nigerian Constitution does not recognise the provision of socio-economic infrastructures as a right and has ousted the power of the courts to adjudicate over such matters (FRN, 1999, section 6 (6) (c)). Many state governments complain that they lack

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enough resources to adequately fulfil their commitments to provide access to free education and free health care delivery (Abayomi, 2015). It is, therefore, necessary to harmonise the concerns on both sides and find alternative ways of making the governments, especially of the northern states, fulfil their constitutional obligations and help the poor citizens achieve their expectations from the government. This paper, therefore, proposes that there is need to harness the potentials of *zakah* and *waqf* institutions to supplement the government's funds towards provision of socio-economic facilities especially education and health care delivery for the children especially borne by poor citizens.

Zakah and Waqf and their Roles in Provision of Health and Education Facilities

Zakah and *Waqf* are among the various institutions established under *shari'ah* to enhance the socio-economic welfare (such as provision of education and health facilities) of the poor in the society (Dogarawa, 2009). In *shari'ah*, the term *zakah* denotes a compulsory payment of a prescribed share of the wealth of the qualified rich to the economically underprivileged who are entitled to the distribution of the wealth (Mathews and Tlemsani, 2003). In contrast, *waqf* refers to a voluntary donation of a definite asset to be administered as a trust property while dedicating its products and profit therefrom as charity for the poor or for other good objectives (Nahar and Yaacob, 2011). The main aim of establishing both institutions is to fulfil the primary objective of creation of an Islamic society, that is, establishing socio-economic values premised on social justice and equity (Hasan al-Banna, 2013; Dogarawa, 2009, pp. 13-16). The socio-economic obligation of an Islamic society must primarily be to provide mental and physical security as well as the sustenance of the citizens (Hasan al-Banna, 2013). The achievement of both is among the cardinal purposes of education and healthy living. In fact, they are categorised under the legal category of *daruriyaat* (necessities) that are non-negotiable (Hasan al-Banna, 2013; Ibn Ahsur, 2013). It may be argued that the nature of transfer of ownership differ under *zakah* and *waqf*. While the *zakah* property is generally given to the recipient to use in accordance to his whims; *waqf* property is solely given as an endowment for the beneficial use of the larger society (Ahmed, 2004, p.28). However, *shari'ah* allows *zakah* property to also be used for the societal benefit. According to Shehata (1989), contemporary economists have argued that proceeds from *zakah* can be deployed towards funding socio-economic infrastructures like education, vocational training, medical facilities, etc. while *waqf* are donated for educational, health, religious or for other acts of benevolence (Shirazi, 2014, p. 87).

From the second generation of Islamic history, both institutions, especially *waqf*, have been used for the provision of social welfare such as mosques, orphanages, poor people homes, food for the needy, welfare homes for the disabled and abused persons, public kitchens, wells, fountains, public baths, watchtowers, animal welfare, and innumerable other enterprises of social benefit (Ali, 2009; Dogarawa, 2009, pp. 13 16). They also began to cater for a wide range of social, economic, cultural, and scientific sectors many of which were hitherto solely within the administrative precinct of the government such as education, health, defense, physical infrastructure, cemeteries, salaries, pensions, etc. (Kahf, 2003; Ahmed, 2004, p.28). Since the era of Ottoman Empire, *waqf* endowments have been mainly directed at providing education and health facilities as well as financing research and developments with the aim of developing the minds and ensuring sustenance of the citizens with the aim of furnishing the less privileged with the tools to earn lawful and sustainable income and improve their productive capacity (Ahmed, 2004; Baksan, 2002). The dedication of *zakah* and *waqf* endowments to research and development has been so popular in many Arabian Empires that many properties were specifically assigned to researches in

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both physical and health sciences like mathematics, pharmacology, astronomy, physiology, physics, etc. and other education endeavours (Kahf, 1995; 2004; Ahmed, 2004). Although the practice of collecting *zakah* and donating *waqf* declined for a very long time, these have resurged in many contemporary (Muslim) societies. In Kuwait, students of any field of knowledge and at any level of education are automatically entitled to be trained under scholarships funded by proceeds from *waqf* and *zakah* (Zakah House, 1988, p. 154). Similar scheme is also available to provide comprehensive medical services (including cost of surgeries) for the poor and needy both within and outside Kuwait (Zakah House, 1999, p. 101).

Assessing the socio-economic impact of *zakah* and *waqf* in a contemporary (Muslim) society, Ahmed (2004) considers the revenue coming from these institutions as large investments that are laden with values that will transform the society and empower the less privileged. It is found that provision of education (especially basic education) will raise the economic status of the less privileged and help increase their political power (Ahmed, 2004).

Institutionalisation of Zakah and Waqf

Although the remission of *Zakah* and donation of *waqf* are targeted at providing social welfare to the underprivileged in the society through the provision of education, health facilities and other social and economic infrastructures, they are ordinarily required by *shari'ah* to be done privately (Shirazi, 2014). Therefore, in many Muslim societies like northern Nigeria, *zakah* and *waqf* donations are private affairs without any form of administration. Although, it is noted by Dogarawa (2009) that some of the Nigerian northern states established some *zakah* committees, there is however no evidence that these organisations operate in the states.

According to Dogarawa (2009) and Kahf (1999), the lack of adequate management of these institutions has led to their declined relevance for a very long time in many Muslim societies. Contemporary events have shown the inevitability of the involvement of the government in this institution (Dogarawa, 2009, p. 12). Shirazi (2014) observed that majority of *waqf* and *zakah* were not passing through proper channels, not recorded and did not form part of any planning strategy, which made it difficult to measure the efficiency of these institutions in providing the needed socio-economic infrastructures.

Lack of legal framework or its proper implementation has been identified as some of the challenges to the relevance of *zakah* and *waqf* institutions in Muslim societies (Khan, 2007; Dogarawa, 2009; Ahmed, 2004). The direct administration of *zakah* and *waqf* institutions has been a notable feature throughout Islamic history (Ali, 2009; Dogarawa, 2009, p. 18; Ismail, 2013; Al-Qaradawi, 1973, pp.749-755). Facts from early Islamic history revealed that governors have always supervised the administration of *waqf* and *zakah* proceeds until the supervisory power shifted to judges in later history (Kahf, 2000, p. 91). It has, therefore, been established by several jurists of *fiqh* that the duty to implement *zakah* and *waqf* in Islamic societies lies with the government (Ahmed, 2004; Al-Qaradawi, 1973). Meanwhile, several contemporary Muslim countries and even some Muslim minority societies have institutionalised the administration of *zakah* and *waqf* by establishing government ministries, departments or agencies charged with the responsibility of administering the collection and distribution of *zakah* and *waqf* (Ali, 2009). While in some of these countries, such as Yemen, Saudi Arabia, Malaysia, Libya, Pakistan, Sudan, etc., payment of *zakah* is made compulsory; in others like Jordan, Kuwait, Qatar, Bahrain, Bangladesh, South Africa, Indonesia, Oman, etc., the government agencies only collect *zakah* voluntarily remitted by

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individuals (Kahf, 1989 and 1997; Ahmed, 2004; Dogarawa, 2004). The government agencies or in some instances, similar organisations are also established for the administration of *waqf* in virtually all of these countries and societies (Ahmed, 2004, p. 43).

Viability of Institutionalisation of *Zakah* and *Waqf* in Northern Nigeria

Nigeria is loosely referred to as a Muslim-dominated country because the Muslims constitute around 50% of the population (CIA, 2014). The larger percentages of the Muslims, however, reside in the northern states of the country (Ostein, 2002). Since the year 1999 when Zamfara state initiated the idea of running a *shari'ah* administered state within Nigeria, many of the northern states also adopted *shari'ah* as one of the operating systems of law in their state territories (Ostein & Dekker, 2010, pp.575-576). Although there are few groups of non-Muslim ethnic tribes in northern Nigeria, the impact of Islam and the Muslim way of life has being so entrenched among the northern people that majority of other indigenous cultural practices have been subsumed (Agbede, 1991). The Nigerian constitution allows the operation of Islamic law provided that the religion of Islam is not adopted as a state religion (see section 10 CFRN 1999) although the scope is limited to only matters of "Islamic personal law", which includes *zakah* and *waqf* (FRN, 1999, sections 262 and 277). It can therefore be concluded that from the position of the Nigerian constitution, the states have the statutory power to make policies and laws on the administration of Islamic personal law matters, which expressly include *waqf* and *zakah*.

The success of these policies and laws in the northern states of Nigeria may, however, be challenged on the fact that these states comprise both Muslims and non-Muslims. The governments are elected by both Muslims and non-Muslims and thus, the states cannot be considered as Islamic societies. Any effort, therefore, to establish institutions that primarily operate on the principles of *shari'ah* would be deemed to violate the fundamental human rights of the non-Muslims to freedom of religion and thought as enshrined in section 38 of the Constitution. The *zakah* and *waqf* institutions are established to create a socio-economic balance in the society by catering for the welfare of the underprivileged whether Muslims and non-Muslims (especially the people of the book). The relevant verse of the Qur'an on payment of *zakah*, especially chapter 9, verse 60 gave general description of the persons qualified to benefit from *zakah* fund and it does not exclude the non-Muslims (Kahf, 1980). Majority of Muslim scholars including the Maliki scholars opine that the *shari'ah* expressly recognises the right of the non-Muslims to benefit from *zakah* (ibn Qudamah, 1348 A.H., pp. 653-654; Basri & Khali, 2014, p. 96; Doi, 1981; Abu Yusuf, 1396 A.H., p. 144; Imam Abu Yusuf, 1396 AH; Imam al Jassas, 1928; Imam Tabari, n.d.; Abu 'ala Mawdudi, n.d.; Abu 'Ubaid, 1969; Doi, 1981; Sayyid Sabiq, 1986; Kahf, 1980; Al-Shawi, 1993; Hashim Kamali, 1999; Basri, 2014). This argument is even more concrete for the reason that since modern states have become welfare states in line with the principle of *shari'ah*, they should therefore be permitted to use *zakah* fund for the well-being of all citizens including the non-Muslims. (Basri & Khali, 2014).

The responsibility of the northern Nigerian states to institutionalise *Zakah* and *waqf* for the purpose of providing health and education facilities for the children could also be further justified on the ground that the non-Muslims pay taxes to the government like their Muslim counterparts. This could be loosely likened to payment of *jizyah* by the *dhimmis*. Zawadi (n.d.) highlights the relationship between the jizyah, the modern day tax and *zakah* and explained that:

> All citizens should pay some of the expenses for public services established for the common good, such as courts, police, public works, repairing of

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roads and bridges, as well as all other services which lead to the enjoyment of a normal life for all.

Moreover, all the jurists and scholars of Islamic *fiqh* are unanimous that once a *dhimmi* pays his due to the government, his wellbeing must be ensured by the government (Abdullah, 1988; Al Qaradawi, 2005, pp. 8-9; Al-Baladhuri, 1959, p. 159). This position applies in Nigeria because the Nigerian Muslims follow the *fiqh* of Maliki School. (Ambali, 2014, pp.47-48). It is therefore submitted that the states in northern Nigeria are legally empowered under both the Nigerian Constitution and the prevailing *shari'ah* to institutionalise *waqf* and *zakah* and use their proceeds to provide socio-economic infrastructures for the benefit of all their citizens, Muslims and non-Muslims.

Another issue that may arise is in relation to the viability of the institutions to achieve their aim as projected under the *shari'ah*. Studies by several Islamic economists have shown that the *waqf* and *zakah* institutions are fertile socio-economic tools that can be used to supplement the states' effort towards fulfilling their obligation to provide infrastructures such as education and health facilities (Ali, 2009). According to Ahmed (2004), *zakah* and *waqf* would be relevant to the modern states in the process of formulating their macro-economic policies. In this context, the institutions would be useful for improving the human capital and for designing programmes specifically for the less privileged such as building hospitals, schools, libraries, skills development and other public goods (Ahmed, 2004, p.63). Another reason that strengthens the viability of the institutions is their perpetual ability to help the state generate predictable and constant resources either to provide new education and health facilities or to continually refurbish the existing ones (Dogarawa, 2009, p.19). Khan (2007) further explains that the income from these institutions is immune from economic fluctuations due to the reasons that their income base is wide and because temporary setback in the financial condition of the individual payer or donor does not always have immediate effect on their ability to continue to give their due *zakah* and *waqf*. The existence of formal *zakah* and *waqf* institutions would also enable the states to benefit from the surplus *zakah* and *waqf* funds from Islamic countries and other international Islamic financial institutions such as International Development Bank (Khan, 2007).

However, to be able to effectively institutionalise a viable and virile *zakah* and *waqf* economic systems in the northern states of Nigeria, especially the ones that have introduced *shari'ah*, certain important strategies must be employed as highlighted by Ahmed (2004, pp.17-18). Firstly, the states must embark on economic policy reform to accommodate and integrate the *waqf* and *zakah* into their respective developmental plans. Thus, their projections towards provision of socioeconomic infrastructures, especially education and health facilities must contemplate incomes from the *waqf* and *zakah* funds. Secondly, the states must seize the advantage of their legislative powers as enshrined in the Nigerian Constitution to pass laws that will formally establish government agencies whose responsibilities will be to collect, administer and distribute the *zakah* and *waqf* funds. This step has been successfully explored in Muslim majority societies like Egypt, Bangladesh, Indonesia, Malaysia, and Yemen as well as Muslim minority countries like India and South Africa. Thirdly, the law could also recognise the establishment of nongovernmental non-profit organisations (NPOs) that will be registered with the established government agency. The NPOs should be required to remit a certain percentage (for instance 60%) of their *zakah* takings (after deducting operational costs) to the government agency. Such NPOs including any similar board/committee floated by the regulatory government agency must be run by a

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board of trustee in order to ensure that the organisations employ proper organisational structures. The existence of corporate organisational structure would increase the trust of the donors and payers as well as promote better awareness of paying *zakah* and donating *waqf* among the rich Muslims (Ahmed, 2004, p.17). Similarly, the law may also allow registered companies to act as collectors of *zakah* (*al-amileen*). Whatever they are able to collect would be remitted to the government. This model has been successfully operated in some states in Malaysia (Ahmed, 2004). Fourthly, the states must begin and continue to sponsor expert researchers to keep working for the continuous development of the *fiqh* of *waqf* and *zakah* and their further roles in modern economics. Fifthly, the government agencies, NPOs and the registered collector companies should include certain marketing strategies that would drive proper identification of eligible *zakah* payers (especially) and the eligible beneficiaries (where necessary). Although this strategy may not directly impact on the provision of schools and health facilities for the children, it may however be useful in some instances to identify abandoned or orphaned children who may not have parents who would enrol them at *zakah* and *waqf* funded schools or take them to such hospitals when they fall sick.

Conclusion

Nigeria has committed herself through various international instruments, such as the Convention on the Right of the Child, African Charter on the Welfare and Rights of the Child and the Constitution to provide socioeconomic infrastructures to its young citizens. What constitute socioeconomic infrastructures in the Nigerian constitution are the same which constitutes *daruriyah* under the *maqasidu shari'ah*. Nigeria, notwithstanding, still has alarming rates of both infant mortality and out-of-school children. Within Nigeria, the northern states also harbour the highest numbers of out-of-school children and infant mortality. The states still grapple with how to overcome these problems because virtually all the states in Nigeria, especially the northern states rely solely on the federal allocation to fulfil their obligations. Majority of the northern states have, however, introduced the application of *shari'ah* within their territories even though the introduction target mostly penal and religious aspect, while neglecting the economic aspect of the *shari'ah*. The alarming rate of infant mortality and out-of-school children is due to the fact that majority of the parents could not afford either medical or school fees for their children.

Recommendations

The states, therefore, need alternative source(s) of income to fulfil their obligations. Since majority of the northern states are either Muslim dominated or consist of a large number of Muslims, they could look into the option of harnessing the economic objectives and benefits of both *waqf* and *zakah* institutions. Although certain concerns could be raised regarding the legality and viability of the institutionalisation of *zakah* and *waqf* both from the constitutional and *shari'ah* perspectives, this paper has shown that the exercise is supported under both systems. One of the legal issues that could also arise is the eligibility of the non-Muslim citizens to benefit from the *zakah* collected by the government but the paper was able to show that apart from the fact that their eligibility is supported by majority of classical and contemporary jurists and scholars of Islamic *fiqh*, Imam Maliki whose principle of *fiqh* is followed in Nigeria is among the main proponents of supporting the non-Muslims to benefit from the *zakah* funds. The paper similarly suggests practical strategies that would boost the success of institutionalisation of the *waqf* and *zakah* institutions in a multi-religious society, which the states are.

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