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CONCEPT OF TRUST AND ALIENATION OF RIGHT OF OCCUPANCY UNDER THE LAND USE ACT, 1978: IS CONSENT REQUIRED FOR CREATION OF TRUST?

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Abstract:
The article examined the provisions of sections 21 and 22 of the Land Use Act, 1978 which provides for consent of the local government or Governor to alienation of Customary Right of Occupancy or Statutory Right of Occupancy respectively. The provisions of the aforementioned sections clearly lay out methods of alienations of right of occupancy for which consent is required and instances where consent shall not be required. The article relied on the doctrinal research methodology to analyse the concept of trust as a method of alienation of right of occupancy with the objective of determining whether consent is required for creation of trust over land covered by right of occupancy. To this end, the article explored the principles governing creation of trust, evolution of trust, and classification of trust. The article found that although the Land Use Act does not mention trust as a method of alienation, creation of express trust does not automatically involve alienation of right of occupancy by the holder to another. More so, implied trusts are not contemplated by sections 21 and 22 of the Land Use Act since such trusts arise by operation of law. Based on the foregoing finding, it is suggested that in determining whether consent is required for creation of trust, the approach should be based on substance rather than the form of the trust. Therefore, the article concluded that requirement of consent for creation of trust depends on whether the trust operates to transfer the holder's interest to another person as trustee.

Keywords: Alienation, Trust, Consent, Right of Occupancy, Land Use Act, Property

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1.1 Introduction

The Right of Occupancy is one of the innovations of the Land Use Act which represents the most important interests in land in Nigeria. The significance of land for socio-economic development cannot be over-emphasized because it is a source of food, shelter, clothing and other resources that are necessary for production.[1] Before the Land Use Act, land ownership was characterised by insecurity of title to land and as a result, commercial banks relied more on the credit of the customer for security than the instruments affecting land.[2] This resulted to increase in the level of inflation and, to address the problem, the Federal Government inaugurated an Anti-Inflation Task Force in 1975 to identify the cause(s) of inflation in the economy and make recommendation.[3] The Task Force identified the land tenure system as one of the causes of inflation in the country and recommended that a decree be promulgated to vest ownership and control over lands in the state governments. Although this recommendation was not accepted, a Rent Panel to review the structure of rent in Nigeria was subsequently set up in 1976. The Panel also identified the land tenure system as a major hindrance to economic development and recommended that government should take control of lands in Nigeria.[4]

In 1977, the government set up the Land Use Panel to examine the land tenure system in the country and make recommendation. Consequently, the Federal Government adopted the minority report which recommended vesting of lands in

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[1] A.A. Yakub, 'An Appraisal of the Procedures for Direct Grant and Conversion of Statutory Right of Occupancy in Kaduna, Nigeria,' *Journal of African Studies and Development* [2014] (6)(10) 179.

[2] I.A. Umezulike, 'The Land Use Act- A Catholic Legislation?' in Amos Agbe Utuama (ed) *Critical Issues in Nigerian Property Law* (Malthouse Press Ltd, 2016) 97.

[3] Oshio,P Ehi,'The Indigenous Land Tenure and Nationalisation of Land in Nigeria', *Boston College Third World Law Journal*, [1990] (10)(43) 51.

[4] ibid.

the Governor of each state in trust for Nigerians although the majority report did not recommend nationalisation of lands.[5] Nationalisation policy was therefore, introduced to guarantee access to land for development and give the government control over land. To preserve the title vested in the Governor and to protect the right of Nigerians to land, the Land Use Act created a right of occupancy system whereby Statutory Right of Occupancy and Customary Right of Occupancy over lands are to be granted by the Governor and the Local Government respectively.[6]

Both statutory and customary rights of occupancy are transferable subject to consent requirement. The consent requirement is important as it ensures security of title by controlling and regulating transactions and proper record keeping.[7] However, the holder of a right of occupancy is not entitled to the Governor's consent to alienation as of right. Therefore, if the Governor withholds his consent, there is no remedy for such a person.[8] In addition, although the law requires consent to be sought and obtained before alienation, there are certain transactions such as an equitable mortgage by way of deposit of title deeds and charge by way of legal mortgage which do not require consent because they do not involve alienation.[9] Notwithstanding the foregoing, it seems there is uncertainty as to whether creation of trust is a form of alienation which requires the consent of the Governor for its validity since sections 21 and 22 have not mentioned trust as a method of alienation. This raises the question whether the consent of the Governor is required for creation of trust over land subject of Right of Occupancy? The aim of the article is therefore, to examine the concept of trust and alienation of right

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5 ibid, 52.

6 C.C, Okagbue, and A.N. Udobi, 'An Analysis of Revocation of Right of Occupancy for Unity and Pocket Layouts by Anambra State Government,' *International Journal of Civil Engineering, Construction and Estate Management*, [2024] (12)(1) 59. Doi: https://doi.org/10.37745/ijcecem.14/vol12n14769.

7 Adewale Taiwo, *The Nigerian Land Law*, (Princeton & Associates Publishing Co. Ltd, 2016), 238.

8 Chris C. Wigwe, *Land Use and Management Law*, (Mountcrest University Press, 2016) 54

9 ibid

of occupancy by way of trust under the Land Use Act with the objective of determining whether consent is required for creation of trust over land subject of right of occupancy.

1.2 Nature and Evolution of Trust

It is not easy to give an entirely satisfactory definition of trust probably because trust cuts across many branches of law and it will not be easy to give a definition of trust for all purposes. However, trust is defined as "an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestui que* trust) of whom he may himself be one and any one of whom may enforce the obligation".[10]But this definition is not altogether satisfactory for it is not wide enough to cover trust for purposes rather than persons. Trust for charitable purposes (e.g. for the repair of a church or the prevention of cruelty to animals) may lack human beneficiaries and yet it is valid as trust and there may also be other trusts which lack human beneficiaries who can enforce them.[11]

Watt opines that "trust is a unique way of owning property under which assets are held by a trustee for the benefit of another person, or for certain purposes in accordance with special equitable obligations".[12] This definition suggests that obligations arising from trust are equitable in nature though some equitable obligations are now incorporated into statutes. Similarly, Hayton believes that "a trust arises where ownership of property is transferred by a person to trustees to be managed or dealt with for the benefit of beneficiaries or a charitable purpose: such is not part of the trustees' patrimony but is a separate fiduciary patrimony

[10] Megarry, R. and Baker, P.V. *Snell's Principles of Equity*, (Twenty-Seventh Edition, Sweet & Maxwell
Ltd, 1973) 87.
[11] ibid., p.87.
[12] Watt, G. *Trusts and Equity* (Third Edition, Oxford University Press Inc.,2008) 18.

not available for the trustee's private creditors, spouse or heirs."[13] However, Prof. Keeton seems to give a fairly satisfactory definition as follows:[14]

> All that can be said of a trust, therefore, is that it is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one(sic) and who are termed beneficiaries) or for some objects permitted by law in such a way that the real benefit of the property accrues not to the trustee but to the beneficiaries or other objects of the trust.

This definition of trust encapsulates all the features of trust and thus has been adopted by the Nigerian Supreme Court in the case of *Huebner vs. A.I.E. & P.M.CO. Ltd.*[15] The ownership of the trustee creates a special relationship (fiduciary in character) with respect to the property. This relationship imposes on the trustee certain equitable duties and obligations, enforceable in equity against the trustee by a person (beneficiary under the trust) who has beneficial interest in the trust property. Along with the trustee's duties and obligations, there are vested in him, certain powers and discretions the purpose of which is efficient control and management of the trust property. The trustee is absolutely responsible for the exercise of his powers (with some statutory restrictions) though in equity, he must exercise these powers in accordance with the instrument creating the trust and for the benefit of the beneficiaries.

Historically, Trust can be traced to the exercise of equitable jurisdiction by Court of Chancery which recognized the institution of Trust thereby making it the most

[13] D.J, Hayton, *Commentary and Cases on the Law of Trusts and Equitable Obligations* (Eleven Edition,
Sweet & Maxwell, 2001),1.
[14] G.W, Keeton, and L.A. Sheridan, *The Law of Trusts*, (Ten Edition, Professional Books Limited, 1974)
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[15] (2017) 14 N.W.L.R. pt. 1586 p.397.

important branch of equity.[16] The enforcement of trust by the Chancery is perhaps the most remarkable interference with powers of the common law courts because the Chancery not only deprived the legal owner of property of all the benefits in the property, but also created a distinct title in the same property in the beneficiary.[17]Such an innovation of the Chancery attracted the attention of both early and contemporary Equity scholars.

Nevertheless, the origin of Trust is remains one of the controversial topics of jurisprudence.[18] There are different theories on the origin of trust, and each theory has attracted proponents.[19] Scholars like Blackstone, Spence and Story held the view that English law of trusts evolved from the Roman *Fidei Commissum*.[20] This view was popular in the early part of the 19th Century before the emergence of the modern school of legal historians.[21] The *Fidei Commissum* was an inheritance device by which property is transferred to an individual with the understanding and confidence that the transferee would dispose of the property and or its profits at the will of another. It was used to circumvent the strict rule of *ius civile* which did not enable certain persons to benefit under a will.[22] Under Roman law, a will

[16] G, Williams, *Learning the Law* (London: Stephens & Sons, 1982) 26.
[17] ibid., pp.1-2.
[18] Jegede, M.I. *Law of Trusts, Bankruptcy and Administration of Estate* (MIJ Professional Publishers ltd, 1999) 1.
[19] ibid. 2; Jegede, M.I, 'An Overview of the Concept of the Concept of Trust' in: A.A. Utuama and Ibru, G.M. (Eds) *The Law of Trusts and Their Uses*. (Malthouse Press Limited, 2004) 2.
[20] Usman, A.K. *Law and Practice of Trust and Trust* (Lagos: Malthouse Press Ltd,2014)145.
[21] Keeton, G.W. and Sheridan, L.A, *The Law of Trusts,* (Tenth Edition, Professional Books Ltd, 1974) 18.
[22] Manie, L. *The South African Law of Trusts with a view to Legislative Reform*. (LL.D Thesis Faculty of Law University of the Western Cape, 2016)2. Retrieved from: https://uwcscholar.uwc.ac.za:8443/server/api/core/bitstreams/48dcd11a-1809-46ea-9d0d-b3d27eacc91d/content. Accessed on 27/7/2025 at 6:11pm

could not be used to transfer property from a donee or transferee to a successor or beneficiary.[23]

The remedies provided by the *Praetor* were based on an analogy drawn from the remedy provided by the Chancery in the enforcement of Uses or trust.[24]It was therefore argued that *fidei commissum* was introduced into English law from the civil law by foreign ecclesiastics who introduced it to evade the effect of Statutes of Mortmain. However, this theory was been criticized for being purely testamentary and some differences have been identified between Trust and *Fidei Commissum*. In *Abdul Hameed Sitti Khadija v. De Saram,*[25] the Privy Council considered the distinction between Roman *Fidei Commissum* as it existed in the Law of Ceylon (Sri Lanka) and Trust and held as follows: (i)the distinction between the legal and equitable estate is the essence of a trust but not of a *fidei commissum* (ii)In trust, the legal and equitable interests are concurrent and coextensive while in a *fidei commissum*, the ownership of the *fidei commissary* begins where that of the fiduciary ends (iii) In trust, the interest of the beneficiary is '*jus neque in re neque ad rem'* against an innocent purchaser for value without notice; while in *fidei commissum*, the *fidei commissary*, once his interest has vested, has a right which is universal, a right which the fiduciary cannot dispose of by alienation or charge. The aforementioned differences tend to undermine the theory of the origin of trust which links trust to *Fidei Commissum* in Rome.

[23] Pascal, R.A, 'The Trust Concept and Substitution', *Louisiana Law Review,*[1959] (19)(2) 278.
[24] (n, 18)3.
[25] (146) A.C. 208,.217.

A second theory traces the origin of trust to Salman of the early German Law.[26] Under the German law, the *feofee* to uses was in a similar position as the *Salman*.[27] This theory was promoted at the end of 19th Century by Frederic William Maitland and Oliver Wendell Holmes who credited the origin of trust to the *Satic Salmannus* by which property was transferred to a third party to be applied for certain purposes.[28] Historically, Germany had a system of fiduciary relationship known as *Truhand* which is similar to the English Trust.[29]Like a trustee, Salman held the property to the use of the grantor, in grantor's life time, and subsequently to be disposed of after grantor's death, according to grantor's directions.[30]The essence of the relation thus created from this transaction was the *Fiducia* or trust reposed in the *Fidelis Manus* who confirmed his obligation by an Oath or Covenant. The Salman was an executor, and in the early years of uses, there was little or no distinction between executor and *foefee* to use. It was believed that because of the close connection between Anglo-Norman law and Frankish tradition that Uses must have originated from Salman.[31] Holmes stated that "the foundation of this claim is the *fides*, the trust reposed and the obligation of good faith, and that circumstance remains as a mark at once of the teutonic source of the right and the ecclesiastical origin of the jurisdiction. [32] That notwithstanding,

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[26] Gvelesiani,I, 'In-Depth Analysis of the Historical Terms Related to the Common Law "Trust"' A Paper Presented at the 10th International Conference on "Challenges of the Knowledge Society, p.65. Retrieved from: https://www.researchgate.net/publication/303720643_IN-DEPTH_ANALYSIS_OF_THE_HISTORICAL_TERMS_RELATED_TO_THE_COMMON_LAW_TRUST. Accessed on 26/3/2022 at 11:24am

[27] J.B, Ames, 'The Origin of Uses and Trusts', Vol.21(4)(1908) *Harvard Law Review,* 263.

[28] M,M, Gaudiosi, 'The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College', Vol.136 (1988)1242-1243.

[29] Beijer, T.A, 'Trust Law in the Process of Reunifying East and West Germany',Vol.14, (1) (2018) *Utrecht Law Review,* 128.

[30] (n,18) 5.

[31] ibid, p.5

[32] ibid, p.5.

the Salman Theory has been faulted by both scholars of western and Islamic legal history for not showing fundamental similarities between trust and *Salmannus*. For instance, the *Salman* was a mere intermediary for conveyance of property while the *feofee* to use was more of a trustee.[33]

The third theory is a recent theory of the origin of Trust based on the Islamic model of *Waqf*(endowment).*[34]* Proponents of this theory rejected the previous theories and posit that the Islamic model which was introduced by Muslim jurists in the first Three centuries of Islam was used by charitable institutions.[35] They argue that trust was introduced into the English legal system by returning crusaders who observed the institution of Islamic *Waqf* and saw in it an instrument for avoiding incidences of the feudal systems.[36] It has been submitted that at the time the leaders of the crusade invaded the Muslim world between AD1095 and AD1250, the Islamic *Waqf* was as developed as the modern English trust.[37] Thus, it is safe to argue that the crusaders introduced it into England where it was adopted and developed into modern English Trust.[38] It has been posited that the emergence of trust coincided with the time of contiguity between Europe and the Muslim world. Thus, the prevailing socio-political developments influenced the emergence of trust in England.[39]

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[33] (n, 28)1244.

[34] Https://www.google.com/url?esrc=s&q=&rct=j&sa=U&url=https://www.jdsupra.com/post/fileServer.aspx%3FfName%3D2c6a1f87-a2c2-48ec-93ef-80b6a9924a27.pdf&ved=2ahUKEwi0pLTm7-D2AhXEGc0KHaQEBEYQFnoECAMQAg&usg=AOvVaw2nsAvhbBPiRbxLheJ8NLH8. Accessed on 27/07/2025 at 5:55pm.

[35] ibid.

[36] T.A.V,Wynen,'Note on the Origin of Uses and Trusts-Waqfs', *South Western Law Journal,*[2016] Vol.3(2) 163.

[37] Ibid,163.

[38] ibid,.166.

[39] M.M, Gaudiosi, 'The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College', *University of Pennsylvania Law Review* [1988](136) 1244.

It is difficult however, to discredit any of the theories about the historical origin of uses. First, all the theories point to what may be the origin of use; and second there is difficulty of checking the various historical connections with the suggested origins. For instance, it is true that the Roman *Fidei- Commissum* is very much analogous to the feoffee to uses. It is also true that English law generally borrowed much from the Roman system, and that the ecclesiastics who first enforced Uses in the Chancery were very learned in Roman law. Therefore, it is quite possible that these Chancery clerics might have been influenced by the *Fidei-Commissum* of Rome in their enforcement of the Uses in England. Nevertheless, it can be argued that analogy alone is not a sufficient criterion to infer a common origin. Keeton's view that trust is universal is more plausible even though its legal incidents differ considerably from one legal system to another.[40]

Notwithstanding the above theories on the origin of trust, it is to the early Chancellors that the modern Anglo-American law of Trust owes its development. The progenitor of the trust was the *use* (from the latin *ad opus* and French *Oeps*) which was developed as the response of equity to the shortcomings of the common law.[41] The distinction between common law and equity was instrumental and fundamental in the development of Trust.[42]The fusion of law and equity as a result of the Judicature Act, 1873, has not abolished this distinction between legal and equitable ownership. It has merely extended the doctrines of the Chancery to the

[40] (n, 18) 6.

[41] Watt, G, *Trusts and Equity* (Third Edition, Oxford University Press Inc., 2008) 8.

[42] Istvan Sandor, The Legal Institution of the Trust in the Economy ad Law of Eastern European Countries. (2015) *European Scientific Journal*,p.142. Retrieved from: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://eujournal.org/index.php/esj/article/view/5512/5302&ved=2ahUKEwitvIH0-t2OAxUfTUEAHd5SMCwQFnoECBoQAQ&usg=AOvVaw1S1sGNCTbwb6PUs35h3Hhg. Accessed on 27/07/2025 at 9:56am.

Courts of Common law; therefore, equitable ownership did not extinguish or exclude legal ownership.[43]

1.3 Classification of Trusts

The classification of trusts has been a subject of discussion and commentaries by various writers. In fact, it has been argued that there is no generally agreed classification of trust.[44]However, trust may be classified by reference to different considerations. When classified by reference to the beneficiaries of the trust, there are private and public trust, trust of perfect and imperfect obligation; when classified by reference to the station of the beneficiaries' interest, there are fixed and discretionary trusts; when classified with reference to the station of the property subject to the trust, there are completely constituted trust and incompletely constituted and trusts of perfect obligation and trust of imperfect trusts, and when classified with reference to the mode of creating the trust, there are express trust, implied trust, resulting trust, constructive trust, secret and half secret trust. [45] Notwithstanding the classification of trust, right of occupancy is a form of real property in respect of which trust can be created.

1.3.1 Private and Public or Charitable Trusts

A trust is said to be private if it is created for the benefit of an individual or a group or class of individuals or for some other private purposes and not for the benefit of the public at large.[46] An example of this type of trust would be a trust created by a settlor for the benefit of his infant child or children. Private trusts are generally void for lack of a beneficiary because the law is trite that "a gift on trust

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[43] Fitzgerald, P.J, *Salmon on Jurisprudence*, Twelfth Edition (London: Sweet & Maxwell,1966) 256.

[44] *Gerhard Huebner v. Aeronautical Industrial Engineering and Project Management Co. Ltd* (2017) 14 NWLR
Pt.1586 p. 397 at p. 442, para. F.

[45] (n 20) 147.

[46] ibid,149.

must have a *cestui* of the trust," and "there must be somebody in whose favor the court can decree performance".[47] This is the idea that underpins the 'beneficiary principle'.

The underlying aim of the beneficiary principle is to ensure that somebody owns the trust property at all times-that is, to ensure that the benefit of property is transferred effectively from settlor to beneficiary. The essence of the beneficiary principle is to ensure that there is someone able and willing to enforce the trust.[48] There are two basic justifications for the beneficiary principle. The first is that property should always have an owner so that it is capable of being maximally utilised and to contribute to the economy.[49]This is in line with the property right theory of Trust and the right to ownership of property which is guaranteed by the Nigerian Constitution. The second is that the fiduciary office of trustee should not be brought into dispute by the creation of a trusteeship under which there is no effective obligation on the trustee to discharge his trust.[50] This is in consonance with the Obligation Theory of Trust.

However, there are exceptions to the rule against private purpose trust: the erection or maintenance of tombs, graves, or monument, the care and maintenance of specific animals such as a horse[51]; and saying of Roman Catholic masses in private are valid trusts.[52]Gary noted that these exceptions have no basis in logic or principle as they were admitted in the past as 'concessions to human weakness

[47] (n 12) 102.
[48] ibid. 103.
[49] ibid.,103.
[50] ibid.,103.
[51] *Re Dean* (1889) 41 Ch. D, p.552.
[52] The saying of masses in public may be charitable (Re Hetherington (1989)2 All E.R. 129) and if there is a general gift for the saying of masses, raising the possibility that the masses might be said in public or private, the gift will be construed as a charitable gift to be carried out only by the saying of masses in public (Re White (1893) 2 Ch 41, pp.52-53).

or sentiment'.[53] The author contended that not only are they illogical, they are also unenforceable as nobody can bring an action to enforce them.[54] Consequently, the trustees are under no obligation to apply the trust fund for the purposes for which the trust was created.[55] All they are required to do is to make an undertaking not to misapply the funds; the undertaking is obtained by order of court[56] which grants *locus standi* to interested persons (such as persons who will be entitled to the fund if , for instance, the horse dies) to sue if the trustee misapply the fund.

Public or Charitable trust is a trust created for the general public or at least a section of it as beneficiaries. Charitable trust can be created orally in the case of personality but it must be evidenced by some writing signed by the settler or testator where it relates to real property.[57] More so, where the property is devised to charity under a will, certain formalities such as witnesses and writing must be complied with.[58] It is however, impossible to give a satisfactory answer to the question 'what is charity?'[59] However, for a trust to be charitable, its purpose must fall within the spirit and intendment of the preamble to the Charitable Uses Act 1601.[60]Although the *Charitable Uses Act* has been repealed in England, this preamble is classical because of its definition of charitable purposes and has been

[53] (n, 12) 105.
[54] ibid,105.
[55] ibid,105.
[56] The order is called "*Pettingall* order."
[57] Meakin,R. *The Law of Charitable Status: maintenance and Removal* (Cambridge University Press,
2008)15.
[58] Section 4(1) of the Wills Law, Chapter W2, Laws of Lagos State, 1990.
[59] (n 7) 227
[60] *Scottish Burial Reform and Cremation Society ltd. V. Glasgow City Corporation (*1967) 3 All E.R. 215.

incorporated into the common law.[61] The preamble sets out objects or purposes which can be considered as charitable as follows[62]:

> WHEREAS
> lands,tenements,Rents,Annuities,Profits,Hereditaments,Goods,Cha ttels, Money and Stocks of Money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent majesty, and her noble progenitors, as by sundry other well disposed persons; some for Relief of aged, impotent and the poor people, some for maintenance of sick and maimed soldiers and mariners, Schools of learning, Free schools, and scholars in Universities, some for repair of Bridges, ports, Havens, Causeways, Churches, Sea-banks and Highways, some for education and preferment of orphans, some for or towards Relief, stock, or maintenance for House of Correction, some for marriages of poor maids, some for supportation, Aid and help of young Tradesmen, Handicraftsmen and persons decayed, and others for Relief or Redemption of Prisoners or captives, and for Aid or Ease of any poor inhabitants concerning payments of fifteen, setting out of soldiers and other taxes; which lands ,tenements, Goods, chattels, Money and stock of money, nevertheless have not been employed according to the charitable intent of the Givers and founders thereof, by reason of frauds, breaches of trust, and Negligence in those that should pay, deliver and employ the same: for redress and Remedy thereof, Be it enacted by the Authority of this present parliament…

The Preamble consequently explains the charitable objects of which the principal objective of the Charitable Uses Act was to prevent mismanagement of real properties such as land, tenements, and rents which are subject of charitable trusts.[63] Trusts which fall within the words and spirit of the preamble are

[61] https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/what-charitable-uses-act-1601
Accessed on 17/06/2022 at 10:01pm

[62] Riddall, J.G, *Cracknell's Law Students' Companion* (Second Edition, Butterworths, 1974) 111.

[63] Wilson, S. *Textbook on Trust,* Eleventh Edition, (Oxford University Press: United Kingdom,2013) 254;

charitable. Although the Preamble is outdated and was not intended to be an exhaustive list of charities, the legal and adopted definition of charitable trust is that of lord MacNaghten in *Commissioner of Income Tax v. Pemsel*[64] which is as follows.

> Charity in its legal sense comprises four principal divisions: Trusts for the relief of poverty; trusts for the advancement of education; trusts for advancement of religion; trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trust last referred to are not the less charitable in the eyes of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly.

This classification has been very influential on judges and Charity Commissioners ever since, and has exerted a greater influence on modern decisions than the preamble to the 1601 Act.[65]The question whether a trust is charitable or not is one of law to be decided by the Judge in the light of the circumstances in which the institution or trust came into existence, and the testator's opinion as to whether the purpose he has indicated is charitable or not does not affect the judge in reaching a decision.[66] Accordingly, in *Philips & Ors v. Phillips*[67], a bequest whereby the trustees were given discretionary power to utilize rents and proceeds of a house in certain event in a scheme by which the testator's name will be continually kept in remembrance or perpetuated in connection with the work of Lagos Church Mission was held to be valid charitable trust notwithstanding that the testator's motive was the perpetuation of his memory.

Https://vlex.co.uk/vid/charitable-gifts-act-1601-861282310. Accessed on 17/6/2022 at 8:09am

64 (1981) A.C. 531 p.583.

65 *Scottish Burial Reform and Cremation Society ltd. V. Glasgow City Corporation (*1968) AC 138, HL

66 Fabunmi, J.O. *Equity and Trusts in Nigeria* (Obafemi Awolowo University Press Ltd., 2006)251.

67 (1967) 1 All N.L.R. 204

1.3.2 Trust of Perfect and Imperfect Obligation

A trust that has human beneficiaries who can enforce it is called trust of perfect obligation. Conversely, trust of imperfect obligation is a trust that has no human beneficiary or objects which can enforce it.[68] Examples of such trusts are trusts for the maintenance of understanding between nations and the preservation of the independence and integrity of newspapers; trust for pursuing inquiries into a new alphabet.[69]For a trust of imperfect obligation to be valid, it must be limited to the perpetuity period. Perpetuity period is the period of the life of those present at the time of disposition and further period of 21 years after the death of the survivor.[70] Any attempt to create private trust and apply the income of the trust to private purpose in perpetuity will fail.[71] However, such trust can be valid as Charitable trusts because charitable trusts are not trust of imperfect obligation and they are enforceable by the Attorney General.[72]

1.3.3 Fixed and Discretionary Trusts

A trust may provide for terms that are either fixed or discretionary. If the terms of a trust are fixed, this means that the trustees are given very specific instructions as to how and to whom the subject matter of the trust is to be distributed. That means, the trustees do not have any power to vary the amounts given to the different beneficiaries named, or to decide whether or not to benefit one particular beneficiary over the others[73]. A fixed trust might look as follows: 'I give N5, 000,000 to my trustees to divide equally between my children, Jacob and Musa'.

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[68] (n 12)162.
[69] ibid, 162-163.
[70] Taiwo, A. and Akintola, O, *Introduction to Equity and Trusts in Nigeria* (Princeton & Associates Publishing Co. Ltd, 2016) 237-238.
[71] ibid,238.
[72] (n, 12)163.
[73] Available at: https://catalogue.personed.co.uk/assets/hip/gb/hip_gb.../1408224569. Pdf. Accessed on 18/10/2018 at 9:09am

Here, the trustees have no discretion as to how to divide the sum of money; they must divide the money equally. Neither is the trustee given any discretion as to whom the money is to be given. The settlor is clear that that the money is to be divided equally between the beneficiaries, Jacob and Musa.

To give a further example of fixed trust, the following would come within this category: I give N5, 000,000 to my trustees to hold for my children, Jacob and Musa'. Despite the fact that there is no express stipulation as to how the money is to be divided, the trust will be fixed. In the absence of a direction as to how the trustees are to divide the money, the equitable maxim 'equality is equity' applies, and the money will be divided equally between the two children, as with the first example above.

On the other hand, under discretionary trust, the trustees are given discretion, either to decide the shares into which the trust fund will be divided, or to decide who will benefit under the terms of the trust, or sometimes both.[74] An example of discretionary trust is as follows: 'I give N10, 000,000 to my trustees to divide between those of my children they consider most deserving in their absolute discretion'. In this example, the trustees have discretion as to how the money is divided. They also have discretion as to whom the money is given. The settlor has allowed them to choose which of the children they consider most deserving and divide the money between them. No shares are specified, and so the trustees are free to decide in what proportions the money is to be divided.

However, this classification of trusts into fixed and discretionary trust can sometimes be misleading as it gives the impression that all trusts must either be fixed or discretionary. There are trusts that may not fall under this classification such as trust arising from the presumed intention of the settler (implied or resulting trusts), and trusts created to benefit the general public such as a

[74] ibid.

charitable trust. Thus, only express private trust can fit into this classification into fixed and discretionary trust.

1.3.4 Express and Implied Trusts

All trusts are either express trust which are created by act of the parties, or implied trust which are created by operation of law.[75] On one hand, an express trust is created by the act of the owner of the property, either *inter vivos (*during his lifetime) or by will.[76] Thus, Express trust can be created by any of the following methods:[77]

a. Declaration of trust *inter vivos* by the settlor. In such a case, the settlor declares that the property will be held by him on trust for some beneficiaries.
b. Conveyance of Property to trustees *inter vivos*: Here, the property is conveyed on trust to the trustees who are directed to hold the property for beneficiaries. The settlor is required to take all steps within his power to vest the property in the trustees, using the appropriate methods and instruments of transfer. For a freehold, deed of grant must be executed for leasehold, deed of assignment must be executed.[78] It is important to note that the settlor may appoint himself as one of the trustees.
c. Disposition of Property to Trustees by Will: This is a testamentary trust which is provided in a will. Therefore, since a will is ambulatory in nature, the trust will not be operative until after the demise of the testator.

[75] *Cook v. Fountain* (1676) 3 Swanst. P. 591; Hart, W.G. *A Thesis upon the Definition, Classification, Creation & Interpretation of Trusts in English Law* (London: University of London,1957)12.
[76] (n, 2) 210.
[77] Gilbert Kodilinye, *An Introduction to Equity in Nigeria* (Spectrum Books Limited, 1975) 66.
[78] (n, 2) 220

On the other hand, an implied trust is one which is not created by words indicating an intention to create a trust, but by implication of law. Trusts are not always created by a deliberate act on the part of a person; rather, the law in certain circumstances may impute a trust. In other words, title to property may become fragmented by trusts which are imputed or implied by law. Implied trusts can take one of two forms: resulting trusts or constructive trusts. Resulting trusts are said to be implied by law. Unlike express trusts, they are not founded on the express intentions of the person creating the trust, but they are based on the presumed intention of the settlor. The court held in *Oti v. E.F.C.C*[79] that where the settlor has expressly or by necessary implication abandoned any beneficial interest in the trust property, there is no resulting trust. A resulting trust arises because of the transferor's intention but if such a transaction is meant to be held on a resulting trust, the transaction should be qualified by explanations, exceptions or conditions attached at the time of the transaction to qualify as a resulting trust.[80] In other words, there should be no circumstance or factor that will negate the presumed intention of resulting trust. The House of Lords in *Westdetsche v Islington London Borough Council*[81] redefined the basis upon which equity implies resulting trusts. In this case, lord Brown-Wilkinson explained that:[82]

> Under existing law a resulting trust arises in two sets of circumstances: (a) A makes a voluntary payment to B or pays(wholly or partly) for the purchase of property which is vested either in B alone or in joint names of A and B, there is a presumption that A did not intend to make a gift to B; the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in the shares proportionate to their contributions…(b) where A transfers property to B on express trusts, but the trusts declared do not

[79] (2020) 14 NWLR pt.1743 p.48 at pp.100-102, paras. F-G.
[80] ibid,100-102.
[81] (1996) AC 699.
[82] ibid. 708.

> exhaust the whole beneficial interest. Both types of trusts are traditionally regarded as examples of trusts giving effect to the common intention of the parties.

This illustration of resulting trust does not distinguish between presumed and automatic resulting trust; rather, circumstances (a) and (b) above are illustration of trusts giving effect to the common and presumed intention of the parties. Although resulting trusts are divided into presumed and automatic, the underlying theme in both trusts is the same.[83] At the heart of the matter is the fact that a person who does not dispose of his property effectively, that is through gift or bargain that undisposed property remains his own as it does not belong to anyone else. It is a fundamental rule of property law that rights in things should not be simply abandoned but must belong to a person.

Resulting trust which is largely synonymous with an implied trust will arise where one person purchases property in the name of another person. In that situation, there is presumption of resulting trust to the real purchaser. Thus, if A pays for property which is conveyed by him to B, the general rule is that B is presumed to be a trustee of the property for A. Thus, in *Ukatta v. Emembo*[84], the defendant agreed in writing to assign the plaintiff a lease of a plot of land at Aba as soon as he obtained an assignment of it from the crown lessee. In pursuant of the said agreement, the plaintiff paid N1, 000 the full purchase price to the defendant. Later when the lease expired, the plaintiff at the defendant's request paid the renewal fees, which was obtained in the defendant's name. It was held that since the plaintiff had provided the purchase money and paid for the renewal of the lease, a resulting trust arose in his favour and the defendant held the new lease as trustee for the plaintiff.

[84](1963) E.N.L.R 19.

1.3.5 Completely Constituted and Incompletely Constituted Trust

A trust is completely constituted when the necessary steps have been taken to vest the property in the trustees for the benefit of the beneficiaries.[85] Until a trust is completely constituted, it remains incompletely constituted. The distinction between completely constituted trust and incompletely constituted trust is important for two reasons.[86] First, for a completely constituted trust, a beneficiary can enforce the trust even if he has not furnished consideration. Secondly, the beneficiary must have given value before he can enforce an incompletely constituted trust. This is based on the equitable maxim 'equity does not aid the volunteer'. The beneficiary who has not furnished consideration is a volunteer and therefore equity will not help him to enforce an incompletely constituted trust.

1.4 The Requirement of Governor's Consent for the Creation of Trust

Alienation and ownership are not mutually exclusive because the requirement of consent is a focal point of connection in the interplay between ownership and alienation. The requirement of consent is intrinsically linked to the concept of ownership since alienation is one of the incidences of ownership.[87] The Land Use Act having vested all lands in the Governor on trust, the Governor is constituted as a trustee with a legal title. To re-iterate the position of the Governor as a trustee, the Land Use Act has prohibited the alienation of a customary or statutory right of occupancy by way of assignment, Mortgage, transfer of possession or sub-lease without the consent of the Governor.[88]The ownership hitherto enjoyed by individuals and groups have therefore been altered and reduced to right of occupancy. Therefore, the requirement for consent is presupposes that right to alienation of right of occupancy cannot be exercised in such a manner as will

[85] (n, 86) 68.
[86] ibid, 75.
[87] M, Nabiebu and T.O Takim, 'The Consent Provisions under the Nigerian Land Use Act: The Equal and Unequal Scale of Justice,' *International Journal of Law,* [2019](5)(4) (2019) 112.
[88] Section 21 and 22 of the Land Use Act, 1978.

undermine the title vested in the Governor.[89] On the basis of the latin maxim, *nemo dat quod non habet*[90], a person who does not own land cannot alienate same or part of it without the consent of the Governor in whom title has been vested.[91] The Governor's consent is simply an approval to any transactions over land in the state for which consent is required.[92] Consent is considered as part of administrative duties of the Governor which should be discharged in a manner that will protect the right of Nigerians to property.[93] It is also instructive to note that obtaining consent is an acknowledgement of the title vested in the Governor and the supervisory role he plays over all lands in the state.[94]

Land Use Act has made the requirement of consent to be fundamental and therefore, any form of alienation without the Governor's consent will be rendered null and void.[95] This was the decision of the Supreme Court in the case of *Savannah Bank v. Ajilo*[96] where the plaintiff executed a deed of Mortgage in favour of the 1st Defendant. When the 1st defendant sought to sell the property due to plaintiff's default, the latter instituted an action on the basis that the Deed of Mortgage was null and void as the Governor's consent had not been sought and obtained. The Supreme Court held that consent must be obtained before the transaction is concluded otherwise, the transaction will be rendered void. This position of the Supreme Court has been criticized on the basis that it was an *obiter*

89 Adefi M.D. Olong, Land Law in Nigeria (Second Edition, Malthouse Press Ltd 2011) 120.
90 No one can give what they do not have.
91 C.A. Onah, 'Justifying the Requirement of Consent under the Land Use Act: A Historical and Equitable
Perspective' NAUJILJ [2022] (13) (2)113.
92 Chioma O. Nwabachili, 'The Emerging Issues on the Consent Clause in Nigerian Land Transactions: Death
Knell for Savanna Bank v. Ajilo' *African Journal of Law and Human Rights* [2023] (7)(2) 76.
93 N, Iroaganachi, 'Governor's Consent, A Challenge to Land Alienation in Nigeria' Vol.8(4) (2021) *Nnamdi*
Azikiwe University Journal of Commercial and Property Law, 91.
94 (n, 4) 114
95 Section 26 of the Land Use Act, 1978.
96 (1989)1 NWLR (pt.97), 305.

dictum because the issue of what stage consent is to be obtained was not raised before the court.[97] In any case, it was strange that a plaintiff who executed a Deed of Mortgage and derived benefits from it would later argue that the same Deed of Mortgage is void. More so, in *Bulet Int'l (Nig.) Ltd. v. Olamiyi*[98], it was held that by virtue of the provisions of section 26 of the Land Use Act 1978, any transaction or any instrument which purports to confer on or invest in any person any interest or right over land other than in accordance with the provision of the Land Use Act shall be null and void.[99]Thus, every settlor must comply with the provisions of the Act by obtaining consent of the Governor before he can vest the landed property or interest in the land in the trustee.

It has been argued that the grant of consent is a prerogative of the Governor although the power is to be exercised in a fair and honest manner as so ensure access and enjoyment of land by Nigerians as envisaged by the trust concept in section 1 of the Land Use Act.[100] However, execution of a transaction before the consent of the Governor is obtained does not vitiate the transaction if it is intended that the governor's consent will be subsequently secured.[101] Nevertheless, the consent requirement seems to hinder effective transfer of right of occupancy as it has been described as compulsory, cumbersome, time consuming and

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[97] Dorothy E. Nelson, Mortgage of Land as Security under the Land Use Act 1978, *The Nigerian Juridical Review*, [2013] (11), 147.

[98] (2017) 17 NWLR Pt. 1594 P. 260

[99] ibid., 286, paras D-E.

[100] Nneoma Iroaganachi, Governor's Consent, A Challenge to Land Alienation in Nigeria, *Nnamdi Azikiwe University Journal of Commercial and Property Law* [2021] (l8)(4) 91.

[101] Felix C. Amadi and Charles I.G. Agwor, 'Transfer of Interest in Land and Governor's Consent under the Land Use Act: Some Emerging Issues' *Journal of Private and Property Law,* ,[2022] (28(1)108. Retrieved from: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.nigerianjournalsonline.com/index.php/PORTLAW/article/view/3430/0&ved=2ahUKEwj454f5ivmOAxUvT0EAHVcZOjU4ChAWegQIIRAB&usg=AOvVaw0W5U60KC5oFjC40zD5WXnM. Accessed 5/8/25 at 7pm.

costly.[102]Notwithstanding the foregoing, there are instances in which consent of the Governor may not be required. Thus, where the interest sought to be transferred is equitable in nature, the consent of the Governor is not required. Similarly, where consent has been obtained in transfer of an equitable interest such as equitable mortgage, consent will not be necessary in upgrading the mortgage to legal mortgage.[103]

However, the question is whether consent of Governor is required to create trust of real property. The Land Use Act provides that it is not lawful for a holder of Right of Occupancy to alienate his right of occupancy or any part of it by Assignment(sale), mortgage (tendering it as security for loan), lease (transfer of possession for three years or more in exchange for rent) or otherwise without the consent of the Governor.[104] The provisions do not expressly mention trust though consent may be given to an alienation of right of occupancy to a person below 21 years if the grant of the right of occupancy or assignment is made to a trustee appointed for the child.[105] This implies that a trust can be created with the child as beneficiary. But the provisions of sections 21 and 22 of the Act seem to be silent on the alienation by way of trust.

Nwabueze explained that declaration of trust can take two forms; the first form involves conveyance to trustees for the benefit of beneficiary while the second form does not involve conveyance as the settlor merely declares himself as trustee

[102] Peter Ter Ortese and Nsidibe Umoh, The Land Use Act 1978 Viz-A-Vis Secured Credit Transactions in Nigeria: Monster or Mesiah? *Global Journal of Politics and Law Research*, [2022](10)(3), 72. Retrieved from: https://www.eajournals.org/wp-content/uploads/The-Land-Use-Act-1978.pdf. Accessed on 7/08/25 at 7:45pm

[103] Sylvester C. Udemezue, 'Delimiting the Governor's Consent Requirement in Land Transactions in Nigeria in the Light of Current Judicial Interventions over Savannah Bank v. Ajilo', *African Journal of Law and Human Rights*, [2024] (8)(1) 99.

[104] Sections 21, 22, 23 and 26 of the Land Use Act, 1978.

[105] Section 7 of the Land Use Act, 1978.

for the beneficiary.[106] The author posited that declaration of trust in the second form does not alienate or dispose of any interest in land in a manner mentioned in sections 21 and 22 of the Land Use Act and therefore, the consent of the governor is not required.[107] Although the author argued that the beneficiary under a declaration of trust does not necessarily acquire right or interest in the land, the author seem to acknowledge that the beneficiary may obtain right or interest in the land by operation of law.

However, the author does not seem to understand the different modes of creation of trust. This is perhaps the reason why the author argued that declaration of trust by a holder of right of occupancy does not require consent since declaration of trust by a settlor is not alienation as envisaged by section 22 of the Land Use Act.[108]It is also important to note that trust can be constituted in different ways so that a holder of a right of occupancy can make himself along other persons as trustees of the land for some beneficiaries. In such a case, consent of Governor is required. Similarly, if the holder of the right of occupancy wants to appoint a different person as a trustee, the consent will be required because, in both instances, there will be conveyance of the land to trustee(s) other than or in addition to the holder of the right of occupancy. In any case, the requirement of consent constitutes a serious constraint to a settlor who is desirous to create a trust in respect of his right of occupancy over real property. Consent requirement has become a clog in the wheel of economic development.[109] The procedure for obtaining consent has remained difficult and problematic.

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[106] R.N. Nwabueze, 'Alienations Under the Land Use Act and Express Declarations of Trust in Nigeria', *Journal of African Law* [2009](52)(1) 84-85

[107] ibid,86-89.

[108] ibid,85-87

[109] Banire, M, 'Administration of Consent Provision under the Land Use Act: A Curse or Blessing for Development- Case Study of Lagos State', in, Utuama, A.A. (ed) *Critical Issues in Nigerian Property Law,*

1.5 Conclusion

Alienation of right of occupancy over customary land is subject to consent of the local government while alienation of statutory right of occupancy requires consent of the Governor. Requirement of consent before alienation is important as it ensures accountability and security of right of occupancy by ensuring transactions involving alienation of the right are documented and the grantor is actually aware of such transactions. However, the Land Use Act seems to be silent on whether creation of trust is considered as alienation under section 21 and 22 of the Land Use Act. This issue is fundamental because of the provisions of section 26 of the Land Use Act which renders such alienation without the requisite consent invalid. This article has therefore found that the Land Use Act has not expressly mentioned 'trust' as a way of alienation of right of occupancy for which the Governor's consent is required thereby creating ambiguity and uncertainty in the law. More so, it is also found that there is no criterion for determining whether consent is required where a right of occupancy is sought to be alienated by way of trust. It is therefore recommended that sections 21 and 22 of the Land Use Act should be amended to provide for trust as one of the modes of alienation of right of occupancy, and there should also provision for situations in which consent will not be required for creation of trust. In this regard, it is suggested that in determining whether consent is required for creation of trust, the criterion should be based on substance rather than the form of the transaction. This is in accordance with the equitable maxim 'equity looks at the intent rather than the form.' Thus, while consent should be required where creation of trust involves conveyance of legal interest from the holder to different person(s) as trustee, trust of an equitable interest or declaration of trust by the holder does not require consent because it does not constitute alienation of right of occupancy.

(Malthouse Press Limited, 2016)115.