The Fiduciary Obligation:
A Proposal for the Sudanese Courts and Legislature

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Abstract

This paper discusses the different aspects of the fiduciary obligation with specific emphasis on the position of Sudan. The historical aspects that connect the fiduciary obligation with Sudan and the Sudanese legal system are explored to build up a realistic scheme of proposals for the future

The fiduciary obligation originated in equity under the old English legal system. Originally, there were two separate streams of courts in England which were, common law courts and equity courts. This continued until the two systems of courts were merged by the Judicature Act 1873. The main function of equity courts was to do justice to cases where the rigid rules (writs of actions) of common law fail to do so.

In Sudan we have a history of the formula of Justice, Equity, and Good Conscience, brought to our courts by the British with the purpose of filling up the gaps in the law at that time. It was aimed at encouraging judges to think of the best approach to decide cases when no clear legal rule can be found to cover the particular situation. On this basis, the concept of the fiduciary obligation as a product of equity, has a solid historical foundation in the Sudanese legal system. The analysis will provide clear evidence of the relevance of fiduciary concept to Sudanese law[1]. We will discuss the origin of the concept, its definition, scope and the constituent duties it embraces[2].

Full understanding shall be the cornerstone in causing the fiduciary concept to be applied in a conscious and intended way by the Sudanese courts, and cause

[1] We will follow the historical background of the Sudanese jurisprudence in the fiduciary law, to help us build on that to provide realistic proposals for the future.

[2] The fiduciary obligation is a broad concept that embodies a number of subordinate duties, reference to the fiduciary obligation is reference to the concept or principle, whereas reference to the fiduciary obligations or fiduciary duties refers to the group of subordinate duties.

Sudanese writers to give it more attention. We will arrive at certain suggestions and recommendations that will rely on our legal heritage and previous practices and explain how they can be enhanced and employed to further support the application of the fiduciary obligation in Sudan.

Keywords: *Trust, Conflict of Interest, Unjust Enrichment, Equity, Secret Profits, Fiduciary Duties.*

Introduction

Many aspects of the fiduciary law remain obscure. This is the case even in leading common law countries. In this paper we will, first, throw some lights on the essential aspects of the fiduciary obligation as applied by the common law.

The common law system was highly technical as the remedies it provided depended on specific writs of action, which were limited and sometimes unjust for some of the cases. We will explore the wisdom behind the fiduciary obligation in order to grasp the underlying benefits of its application. Knowing the background of the concept will certainly help in connecting it with the specific types of cases in which it is applied. We will offer most of our attention to the aspects that should prompt the application of the fiduciary obligation by the Sudanese courts. We will also analyze the relevant legislative provisions in Sudanese law that can be enhanced to allow for the application of the fiduciary duties by courts of the Sudan[3]. Attention will also be given to the enhancement of the courts understanding and performance, and building capacity for judges to deal with the fiduciary duties.

[3] Our focus will be on three laws, the Companies Act, 2015, the Law on Combating Illicit and Suspected Enrichment, 1989, and the Civil Transactions Act, 1984.

1. What is fiduciary law? Definition, origin and scope

We will provide some basic information on which we can build the arguments to follow, and which will help to grasp the foundations of these arguments. This will include a brief account on the definition, origin and scope of the fiduciary law.

1.1 Definition of the fiduciary law and fiduciary duties:

It has always been mentioned by legal writers and scholars that legal concepts are difficult to define, or are not eligible for a precise definition. This is because they, from a philosophical point of view, don't prefer to have limited confines to what they are handling. Our approach is, however, to make it simple; to provide an identification to what we mean by the fiduciary law and fiduciary obligation.

The fiduciary law is a branch of law that deals with the relationship between two parties, one is the beneficiary who is to be served, or taken care of, in a way or another, by the other party who is the fiduciary. The fiduciary must place the beneficiary's interest before his own interest (Weinrib, E. J,1975,pp1-22). In this sense, fiduciary law is different from law of contract in that, parties to a contract are not usually required to subordinate their interests to the interests of another person. They are required to comply with the terms of the contract, and entitled to serve their own interests. Fiduciary obligation is also different from tort law in that, reasonable care required in tort law doesn't go to the extent of putting the interests of another person first (Weinrib, E. J,1975,p2).It should be noted that the fiduciary law didn't develop as a separate branch of law such as the law of contract or tort law but existed to supplement the rules pertaining to preserve certain relationships in which a high degree of trust and confidence should prevail. This is further explained by McLachlin J in *Norberg v Wynrib;*

> *in negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest.....the essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other...the fiduciary relationship has trust, not self-interest at its core.4..*

Examples of fiduciary relationships is the trust relationship, partnership, directors and the company, and the agency relationship, to name a few. The purpose is to enforce some types of duties, mainly by the fiduciary towards the beneficiary, which are outside the four corners of any contract between them. The fiduciary law was first applied and enforced by the Court of Chancery (Waters D.W., 1986).

[4](1992) 2 SCR 226 at 272-4, see also *Canson Enterprises Ltd v Boughton & co (1991) 3 SCR at 543.*

That was the court which was responsible for applying extensive remedies to do justice when the specific common law writs are not sufficient.

The 19th century was the truly formative period of the fiduciary obligation under common law system (Finn P.D,2016). As a result of consistent and repeated cases, rules pertaining to fiduciary obligation began to crystallize and applied to a wide range of relationships of a trust-like nature. The most pivotal development was when the equity and common law streams were merged by the Exchequer Act as a result, common law courts and equity courts were merged together and there was one system of courts in England as a result. Both the common law and the equity rules are now applied by the same court.

Vigilant trust v deferential trust:

Some writers classified the fiduciary obligations in terms of the type of trust it reflects (Flannigan R, 1989, pp.285-322). They identified two types of trust, vigilant trust and deferential trust. Vigilant trust arises in relationships where the beneficiary is usually aware and knowledgeable of the task being exercised on his behalf by the fiduciary. Vulnerability of the beneficiary in these cases arises from the fact that he/she can't interfere at the suitable time in case of any breach from the fiduciary. He is vulnerable for being absent from the scene, bot for his technical ignorance, cases of these relationships are the agent-principal, partners vi-sa-vi one another, director and the company.

On the other hand, deferential trust arises from cases where the beneficiary is totally at the mercy of the fiduciary because he is totally ignorant of the tasks. These include professional services such as the patient and doctor, lawyer and client[5]. There is another type of relationships where there is an element of undue influence such as the father and child, teacher and student relationships.

1.2 Origin and scope of the fiduciary obligation:

The fiduciary law under English law originated in equity (Finn P.D,2016,p67). The truly formative period of the fiduciary obligation was the 19th century. Initially, there used to be one system of law which was the common law. Practice revealed that the common law system alone can't do justice in all cases, so there were some thoughts of a parallel system that can go further than common law in providing justice to particular cases. These are the cases in which the common law remedies proved to be unsatisfactory. Common law remedies were confined to only the

[5] Actually the typical trust relationship which is the source of the fiduciary obligation possesses this aspect of "vulnerability" that renders the beneficiary entirely at the mercy of the trustee.

award of damage, i.e monetary compensation. By the application of fiduciary obligation many other remedies can be applied such as injunctions and specific performance, and restitution in cases of unjust enrichment. A complainant who wished to be granted specific performance had to seek this remedy in the Court of Chancery (Waters D.W, 1986), even if his case was originally raised before a common law court.

The relationship of trust between the trustee, beneficiary and the settler, constituted the basic fiduciary relationship. The fiduciary/trustee has legal ownership of the property and controls the assets held for the benefit of the beneficiary. He must make decisions that are in the best interest of the beneficiary who hold equitable title to the property. Other status fiduciary relationships followed such as the agency relationship, partnership, company directors, and employees especially those with wide array of discretion. All these are characterized with the possession of wide discretion by the fiduciary to make decisions that affect the legal and practical position of the beneficiary. This should be practiced in total disregard of any personal interest of the fiduciary or any other interest that conflict with the ultimate interest of the beneficiary.

The simple inference is that the fiduciary obligation exists when there is an access to assets by a person for a limited and defined purpose (Flannigan R, 1990, p45). This person is the fiduciary. This situation explains the traditional theory (Flannigan R, 1990, p46). There is a possibility that the fiduciary may abuse this access and employ the assets in a way that is not aligned with the proper purpose for which access is given. Confidential information that consists of valuable technical and financial information is one of the famous assets. Access to confidential information may be given by a party to another for the purpose of evaluating an intended venture. Recipient of the confidential information is obliged to use the information for the limited and defined purpose for which it is given. The recipient stands in a fiduciary position visa-vi the owner of the information. If the recipient uses the confidential information for other purposes, he will be in breach of confidence, which is turn a mode in which the fiduciary obligation is breached. The factual situation that necessitates the application of the fiduciary obligation in this case is that, the recipient always possesses the proximity or ability to divert the assets, which is the confidential information, away to his own benefit and thus abusing the trust reposed in him by the owner of information. We should always bear in mind that the effect of the fiduciary rule is prophylactic, no excuse is accepted for the breach or justification for the improper conduct (E.J. Weinrib, 1976, p334).

There is a modern theory which may be considered as derived from the traditional theory; this is the power and discretion theory. It is the most popular among the

recent academic writings (Shepherd L.S, 1981). The discretion which is given to the fiduciary for a limited or defined purpose makes the trust vulnerable to abuse.

It might be more convenient to employ and intermediary in many of the transactions between individuals. The intermediary is granted some degree of discretion in relation to the task to be performed[6]. Beneficiary's interests can be largely affected by the manner in which the fiduciary uses the discretion to perform the delegated tasks. The fiduciary obligation is the law's blunt tool for the control of this discretion, therefore, the two elements, under the power and discretion theory, which delineate the frontiers of the fiduciary obligation are, first, the fiduciary must have a scope for the exercise of discretion and, second, this discretion must be capable of affecting the legal position of the principal/beneficiary. The need to control discretion has been a justification for the imposition of the harsh rule concerning the fiduciaries.

In the civil law system, the fundamental principles of the fiduciary obligation can be traced back through the Code of Napoleon of 1803[7] to the institutes of Justinian enacted in the sixth century, and from there to the Twelve Tables of Rome of 450 B.C which imposed stringent obligations on the guardian of an infant Institutes of Justinian (Institutes of Justinian, 1912, pp37-38)

It is evident that, under the civil law system, the fiduciary obligation was motivated by the Christian believes which dominated the continent. Most probably cases of undue influence were the dominating cases in those days. They were primarily based on protection of infants; they impose on the guardian of an infant an obligation not to exploit his position to divert money away from the infant for his own benefit.

2. Application of the Fiduciary Obligation in Sudan

Until recently, Sudan used to be a purely common law country (Mustafa, Zaki, 1971). The historical origin of common law in Sudan was when the country was under the condominium rule of the British and the Egyptian. The British were the real active player. They introduced common law as this was the law that they were aware of and can handle in their different colonies. It should be noted that common law was not imposed directly, as the British were not willing to do so, but left it for the judges to find what is suitable to the circumstances of the Sudan

[6]Supra note 13, at p. 14

[7]Code of Napoleon, Article 1596 which renders void any purchase by a guardian, agent, or public official if the purchase if the sale in within the scope of his authority.

through the formula of Justice, Equity and Good Conscience[8]. Actually the British got into the dilemma of how they can reflect that they respect the country, its people and traditions. For this reason they opted to give a wide discretion for the judges to choose from many local and foreign law as long as they are aligned with justice, equity and good conscience.

Sudan's legal system nowadays reflects a hybrid between the inherited common law structures, Sharia law, and customary traditions. The invocation of justice, equity, and good conscience acted as a bridging principle to navigate gaps and tensions between these sources. In contemporary contexts, the Sudanese legal system is affected by political, religious and social forces.

As a mixed system influenced by Islamic law, English common law, and civil law, the Sudanese legal system is a natural fit for the reception and application of the fiduciary obligation in the current era.

We will explore the relevance of the fiduciary obligation under each of the three types of legal systems that apply in the Sudan.

2.1. Islamic principles and fiduciary obligation:

The fundamental principles of honesty and morality, which are the cornerstone of the fiduciary obligation, are deeply rooted in Islamic teachings. This makes a strong interrelation between Islamic jurisprudence and the fiduciary obligation. Both are founded upon good faith dealings, especially in business relations. Many concepts under Islamic jurisprudence can be spotted as relating to the fiduciary obligation, these are:

1. The concept of **Amanah (trust/faithfulness),** which simply means that the fiduciary should not betray confidence[9]. In this regard the Islamic heritage tells us that Prophet Mohamed (Gods peace and prayer upon him) was the first one who taught Muslims how to adhere to these standards. When he joined his first wife Khadija in a business partnership, prophet Mohamed was an example of honesty that he used to be called "The Honest" among his people ". Under the Islamic teachings, what prophet Mohamed did, and how he behaved in conducting the business becomes a *Sunna* which is one source of Islamic jurisprudence after the holy Quraan. It is obligatory for all Muslims to follow these teachings in similar dealings throughout their lives.

[8]See the Civil Justice Ordinance 1900 Article 4, reenacted in the Civil Justice Ordinance 1929, Article 9, which stated that "in cases not provided for by any provision of this law or any other law, the court shall decide the case according to the requirements of justice, equity, and good conscience"

[9] See, from Holy Quran, Surah An-Nisa 4:58, and Surah Al-Tawbah 9:119.

2. The concept of **Daman**

One concept that is deeply rooted in Islamic jurisprudence and closely connected with the fiduciary obligation is the concept of Daman. This concept corresponds to the constructive trust in common law. It obligates any person who is in control of property that is entrusted to him for a particular purpose to compensate for or make good any damage or loss that occur to such property as a result of his act. The entrusted party is not allowed to act negligently, without due regard to the interests of the entrusting party when dealing with property. The concept of daman applies in all business relations when one party manages the business on behalf of another. Examples include, the Islamic business relationship of *Mudaraba* where one party "the mudarib" is responsible for the management, and consequently for any loss that might be sustained as a result of a breach of his duties to the capital provider. Also in the agency relationship under Islamic business law, we find all the strict obligations applicable to agents under common law. The agent is regarded, under the concept of daman as a constructive trustee for all losses sustained by the principal as a result of his act. The agent also has the duty to account for any additional discounts or profits made by him. If he succeeded to obtain a better deal than expected, he has to account to the principal all the benefits of the better deal. He is not allowed to keep all or part of the benefit to himself, unless by the informed consent of the principal. Duties of the agent to account for secret profits and extra discounts, and his duty to make good any losses sustained by the principal because of his negligence are the main applications of the concept of daman in the Islamic financial and commercial relationships.

3. The concept of **Hisbah (accountability/oversight)** also refers to a well- known fiduciary duty. It means that a person in a fiduciary position should adhere to the strictest standards imposed by such duty. The *Hisbah* under Islamic jurisprudence aims at monitoring the performance of duties by certain fiduciaries, mainly government officials, to ensure that they abide by the avoidance of conflict of interest, non- competition and not to make secret profits employing assets or information owned by the business or government entity. The purpose is ensuring integrity in delegated authority which should be used for the appropriate purpose for which it is provided.

4.Prohibition of unjust enrichment (**gharar prohibition**):

This mainly refers to the prohibition against secret profits (Al Darir, Al Siddiq, 1990). Gharar in Islamic Sharia refers to excessive uncertainty, ambiguity, or risk in a contract, especially when the outcome or the fundamental terms of the agreement are unknown or unclear to one of the parties. It is a key concept in Islamic financial law. Transactions involving a significant gharar are prohibited

as they lead to injustice that will lead to disputes. In this sense, gharar will lead to unjust enrichment by one contracting party to the detriment of the other party. Prohibition under Islam is called **haram.**

Although well founded in the teachings of Islam, the fiduciary obligation did not attract the attention of modern Muslim jurists. The basic foundations of the concept being western, it has no real existence in the legal practice of Islamic communities. Morality, good faith and loyalty, all are require formal legal mechanism for their proper enforcement. Any unscrupulous behavior should be forbidden by law, especially we have secular laws in most of the Muslim countries. Implementation of moral values should be channeled through the fiduciary obligation. This is not the case in Islamic countries including Sudan. The fiduciary obligation as a default scheme of regulation can play a leading role in our countries and can be provided for expressly as a concept of reference side by side with the contractual and tortious liability.

2.2 Attitude of Sudanese courts:

The notion of trust was clearly crystallized in the decisions of courts pertaining to land law in the Sudan. In the case of Bakheita Yousif Hassan v Burrie Mohamed Dafalla (SLJR, 1968, pp65-73). The issue was resulting or implied trust. The Court of Appeal decided that, the principle of implied trust is a general principle of equity which is reasonable and fair, therefore it should be applied by Sudanese courts in appropriate cases. The rule clearly stated by Osman El Tayeb J, seems to be that, where a house in dispute belongs to a family but registered in the name of one of the sons to enable him to obtain a loan, the son holds the house as a trustee on behalf of the other family members. The son becomes a trustee incumbent with all the obligations that are imposed by virtue of the trust. It should be noted that the resulting trust is a presumption drawn by the court in the circumstances of the case and is rebuttable upon proof by the defendant of the fact that he took the house for valuable consideration.

It is worth mentioning at this point that the Sudanese courts in receiving English statute or common law, were to scrutinize the contents of that law, and make sure that they suit the economic and social conditions of the Sudan (Natale Olwak, 1968, pp230-235). The courts, however, were to apply English law and should not apply any other law unless English law is contrary to Justice, Equity and Good Conscience.

The fiduciary issue was discussed by the Sudanese courts in the husband-and-wife relationship. The case of Mukhtar Ahmed Abdel Rahim and other v. Fatima Hussein Ai illustrates this (SLJR, 1958, pp82-124). The case related to the heirs of the wife claiming the house of the husband to be registered in the name of the wife. They relied on a verbal promise of the husband that he will register the

house in her name if she paid money towards the construction of the house. The court founded that there was evidence that the wife paid some money but there was no proof that it was her own money.

The issue of a fiduciary relationship was raised when the defence for the husband (Appellant) alleged that the case was statute barred, as the limitation period for bringing up the case was five years and this period had been exceeded. Respondent claimed that the Prescription and Limitation Ordinance, 1928[10] is not applicable because the relationship between Respondent and her husband was a fiduciary relationship within the meaning of section 12 of the Ordinance.

As to the existence of the fiduciary relationship, the Appeal Court referred to the English case of Howes v. Bishop[11], where it was said that, "there is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relationship of husband and wife".

The court decided that, this must be the law in Sudan where both personal and customary law confer upon the wife a degree of independence which English law had attained only after a series of reforms.

As appeared. The issue of the fiduciary obligation and fiduciary relationship was a crucial issue that was considered by the court for deciding the case. The action was dismissed because, in the opinion of the court, there was no fiduciary relationship between the husband and the wife, so the ten years extension for raising the action under the Prescription and Limitation Ordinance, 1928 did not apply. The limitation period for raising the case was only five years which already had expired.

The Sudanese courts used to follow the steps of English courts where they can find a clear guidance in the accumulated heritage of these courts. This was due to the fact that, most of the judges, especially in commercial matters, were British. English law was well known to them, and it was easy for them to grasp the jurisprudential foundations of what the English courts apply, so they had more confidence in applying English law without neglecting the effect of the economic and social differences.

Partnership is one of the most popular business vehicles that used to exist in Sudan. It followed exactly the pattern of English common law in its structure, scope, and, most importantly, the underlying duties among the partners and between them and third parties.

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[10] This was a law governing land in Sudan that dealt with the acquisition and other rights in land through long possession or use of property, and the period within which a cause of action can be raised to challenge ownership. This was replaced by the current comprehensive law of Civil Transactions Act, 1984.

[11] (1909) 2 K.B. 390

It is a known fact under common law that the relationship between partners is a fiduciary one. Partnership is one of the status fiduciary relationships which imposed stringent duties upon partners such as they are not to make secret profits in exclusion of the other partners, duty of disclosure of any personal interest, duty not to employ partnership assets for any purpose other than the partnership, and duty to provide accurate accounts especially for managing partners. All these duties were received and applied in Sudan by the courts to the fullest extent with which they were applied by English courts. An example is the case of Mohamed Hassanein Abul Ela and others (Appellant) v. Joseph Tabet (Respondent) (SLJR, 1956, pp11-27). Different issues relating to partnership were raised. The Court of Appeal decided, after applying the known criteria, that a partnership existed as between the parties, although it was of the opinion that the land was not a partnership property. According to the partnership agreement, the parties were entitled to share in profits and losses and the Respondent didn't share in the value of the land. He had the share of 1/3 in losses and profits.

One of the issues discussed in the case was the fiduciary duty of Appellants to produce proper and regular accounts to the Respondent. Although Appellants admitted their liability to submit accounts, evidence produced before the court showed that they failed to do so despite frequent requests by the Respondent. Accordingly, the court concluded that, Appellants were in breach of their agreement with the Respondent. Such agreement obliged the parties to bring into account all profits derived from any transaction in the land, and none of the parties have the rights to make agreements, brokerage, or any benefit other than the benefit to be derived of the partnership.

The court went on to decide that, "the Appellants, being responsible for management, were acting as implied trustees for the Respondent. The duty to produce proper accounts is the most notable consequence of this trust".

The decision of the case seemed to be ultimately based upon breach of the fiduciary obligation. The court reviewed the evidence showing the continued quarrelling that precluded all reasonable hopes of reconciliation and friendly cooperation. In this regard the court referred to Lindley on Partnership page 691[12]. It was decided in that case, in order for the court to interfere, it is enough to show that it is impossible for the partners to place confidence in each other, and that such impossibility has not been caused by the person seeking to take advantage of it.

The court was of the opinion that, the Appellants were in breach of their duty to keep proper accounts, on the other hand Respondent did not take prompt steps to protect his interests (delay defeats equity). Failure of the Appellants to submit

[12] Citing the case of Re yenidji Tobacco Co. Ltd. [1916] 2, Ch.426.

accounts was regarded by the court as a very serious matter, but the Respondent was not regarded by the court to have come with clean hands.

Finally, the Court of Appeal decided to terminate the relationship. Lack of mutual confidence between the partners brought the relationship to a deadlock. The court therefore, "has an inherent jurisdiction to terminate the relationship, if it is just and equitable to do so"[13]. The court was of the opinion that, both parties did not seem to be prepared to go on with the relationship and it is clear that the relationship ought to be ended.

As a close association of persons acting in common for profit purposes, a partnership requires a high degree of confidence and good faith for its continuation. If the court is of the opinion that this mutual confidence is not to that high standard, it should decide that it is impossible for the parties to continue as one firm.

Decisions of Sudanese courts on cases involving the bank-customer relationships shows the readiness of the courts to accept the fiduciary obligation and be mindful for its application. In the case of Sudan Government v. Fayez Ghali Girgis & Wannis Michael (SLJR , 1957, pp74-76) though a criminal case, highlighted the true nature of the bank-customer relationship. It was decided in the case, that a bank accountant who fraudulently debits customer's account and credits the money to his own, was held guilty of criminal breach of trust under sec.347 of Sudan Penal Code, 1925.

M.A. Abu Rannat C.J, in denying the allegations made by the accused in appeal, stressed the trust nature of the bank-customer relationship. He stated that:

Although principally the relationship is a debtor-creditor relationship, but it has a confidential aspect under which the bank should not, in ordinary situations, disclose information relating to his customer's affairs. Also the customer may rely on the bank for a specialized advice, thus creating an element of "dependency" in the relationship.

The court referred to "control" over property as the basis of the bank's responsibility. Though not strictly a fiduciary position, this, of course, typically corresponds to the breach by the fiduciary of his duty of good faith by acting inconsistently with the terms of his fiduciary office.

This decision shows that the Sudan courts were open to discussing and analyzing the nature of the fiduciary obligation.

The idea of good faith and honesty appeared in the Sudanese courts decisions in cases relating to government authority and power. These authorities must exercise their powers in good faith. Governments and their organs, whether local or

[13] This is a discretion for the court to exercise after analyzing the relationship of the parties.

central, are vested with certain powers and authorities which assist them in discharging responsibilities on people's behalf and for their benefit.

In the case of the Building Authority of Khartoum v. Evangellos Evangellidis (SLJR, 1958, pp16-44), the issue of the exercise of government authority was discussed beside other issues. The main issue related to the exercise of the building authority of the power to order a demolition of a building. The High Court issued a decision restraining the Building Authority from demolishing the premises in question. The Building Authority appealed against the decree. One of the issues in appeal was that the court was acting ultra vires in reviewing the administrative decision of the building authority. In deciding on the appeal, the Court of Appeal asserted that courts had jurisdiction to review the act of an administrative authority when the latter is vested with a legal authority to determine questions affecting the rights of subjects, and exceeds the legal authority so conferred. Sudan courts have authority to grant relief within the limits in which an English court can review administrative decisions. The court then proceeded to explain the basis of the authority of review of English courts.

The Court of Appeal quoted the observations made by Atkin L.J in the case of R.V. Electricity Commissioners [1924] 1.K.B. at page 205. This case extended the ambit of the operation of writs (certiorari and prohibition) to proceedings of bodies other than courts of justice. Anybody having legal authority to determine matters that affect the rights of subjects is subject to the jurisdiction of the competent court.

In the present case, the court regarded the Building Authority as having legal authority. The issue of determining demolition was falling within the ambit of the wide powers specified by the legislation.[14] The Building Authority also had jurisdiction to determine questions affecting rights of subjects whose property it seeks to demolish in pursuance of that power. The power given to the Building Authority should be exercised bona fide for the purpose for which it was given. If the power was exceeded, or exercised in an improper way, judicial intervention becomes necessary and the decision of the Building Authority will be quashed for wrongful exercise of government powers.

The case clearly shows that, government must act *bona fide* in the exercise of its powers. Though the acts of government are lawful, they might be accomplished through improper means, or for wrong purpose. Such a situation was not tolerated by courts, and acts of this nature were quashed for the wrongful exercise of government powers.

The prevalent argument about persons occupying government positions in the public authorities' is that they are not fiduciary but share some characteristics of

[14] Local Government (Municipality) Ordinance 1937.

fiduciary duties such as the prohibition on private profit by the holder of a power (Seth Davis,2014) (Timothy Endicott, 2016). This is an attempt to narrow the scope of the fiduciary duties. Prohibition against private profit is a fiduciary duty, how can it be true to say that a person is subject to a fiduciary duty but he is not a fiduciary? The undertaking to serve public interests is there, it starts from the moment such person starts the public position. It is not required that he should enter a separate undertaking with each individual in order for a fiduciary relationship to be established.

2.3 Fiduciary Obligation under Sudanese Laws:

The fiduciary obligation was reflected in some of the laws of the Sudan. There used to be rules scattered in the different laws which relate to the fiduciary obligation in various instances. The fiduciary obligation comes occasionally in some of the laws and constitutes a pivotal aspect in other laws, such as the Law Combating Illicit Enrichment, 1989. The application of these laws, however, was not given the appropriate scope to fully serve the interests for which the law were issued.

2.3.1 The Civil Transactions Act, 1984:

In 1984, the Civil Transactions Act, 1984 (CTA) was promulgated in Sudan as a comprehensive law which embodies all branches of law pertaining to civil transactions. These laws used to be modeled after English law, and under the new law they turned to be based upon Civil law.

There are basic similarities between Common and Civil law both in the approach and in theory. Upon the promulgation of the Civil Transactions Act many laws, such as the law of contract, sale of good, and agency law, were abolished as they were combined in the Civil Transactions Act.

The Civil Transactions Act, 1984, specifies some of the duties of managers of business organizations in general terms. These duties are mainly based upon the Islamic principle of **Daman** referred **t**o earlier. Under the principle of Daman an implied, or constructive trust arises against the party responsible for the misuse of assets or information. That party is asked to make good any losses sustained as a result of his wrongful act in dealing with the business property, whether intentional or negligent.

Section 250 (1) of the Civil Transactions Act, 1984, provides that, unless there is a provision of agreement to the contrary, there subsists a mutual agency between

the members of the company.[15]According to section 250 (2), as a result of the mutual agency between the members, a mutual trust on the property also arises. The scope of the trust corresponds with the scope of the agency subsisting within the association. If all members have the right of management, then each is regarded a trustee who is responsible before the others for any losses sustained as a result of misuse of the firm's property that is placed under his disposal for business purposes. Members may agree, however, to authorize only one of them to carry out managerial functions. In this case the manager will alone be responsible for representing the company, and will also have exclusive discretion to deal with its property for the benefit of all the members. This is provided for in subsection 3, which also goes on to state that the selected manager will be burdened with all the necessary consequences of his agency. As the manager has a discretion to deal in the property of the firm and to take decisions affecting other members' interests, he has to bear the consequences of this discretion. The application of the concept of Daman through the imposition of a trust on the manager is the blunt tool used to make that manager responsible for the losses sustained as a result of misuse of the firm's assets.

The CTA also includes the relationship of **Mudaraba.** This is an unincorporated company, codified in sections 266-276 of the CTA.[16] It is a contract whereby one person provides the capital and another (the Mudarib) undertakes to employ that capital for profit. It may be either restricted or unrestricted Mudaraba. In the first type the capital provider lays down any legitimate restrictions on the Mudarib. In the second, the capital provider gives the money to the Mudarib without placing any restrictions on his freedom to invest it the way he likes, and in any kind of project.

Mudaraba is one of the most important Islamic modes of investment financing, resorted to by banks in Sudan. The underlying factual structure of that relationship provides a typical example of a situation that gives rise to the fiduciary obligation. In Islam, traditional loans are not acceptable. Money can't be a commodity by itself; there should be a specific commodity for which the loan is extended.

Section 267 of the CTA provides that, the capital provider and the Mudarib must have the capacity to act as principal and agent. The Mudarib is an agent to the capital provider in the management of the business. He has a share in profits also, which makes him similar to the managing partner.

[15] Company here means partnership under common law. Sudanese jurisprudence still keeps the companies law as a separate law.
[16] See the Sudan Civil Transactions Act, 1984 at page 90.

The most important factor that justifies the application of the fiduciary obligation in the Islamic Mudaraba outside the scope of banking operations is the element of vulnerability on the part of the capital provider. The capital provider usually is not of experience in business matters, so he entrusts another person to invest his money on his behalf. The relationship is not between able and experienced businessmen as the case in partnership and other business associations. The capital provider places much confidence on the Mudarib as a person of knowledge in business matters.

It is different when the capital provider is a bank. The bank has the capabilities to monitor the Mudarib and detect any abuse of trust at the right time. There is only a "vigilant" type of trust and no deference is involved.

The fiduciary obligation is an essential factor for preserving the integrity of the Mudaraba relationship. The duties pronounced by the fiduciary obligation in this relationship are, 1. A special account should be kept for the purpose of the Mudaraba operations, 2. The Mudarib has to keep proper and updated accounts supported by invoices. The capital provider has the right to review these accounts, either personally or through an auditor, 3. The Mudarib should keep the Mudaraba capital separate from his own money and should not give it to others by way of Mudaraba unless by consent of the capital provider.

The capital provider is responsible alone for any losses that arise in the usual course of business without the fault of the Mudarib (Siraj Eldin, and A.A. Alla,1993). The concept of Daman is applied when the loss results from any mismanagement, negligence, or misuse of capital by the Mudarib. In these cases the Mudarib will be asked to account for the losses sustained and to settle the accounts in full.

We should acknowledge that, whatever precautions are taken, they will not be sufficient to prevent all deviations from the part of the Mudarib. The possibility of abuse is inherent in the factual structure of the relationship. This is where the fiduciary obligation should be imposed to safeguard the integrity of the relationship and treat any abuse with the strictest measures.

The **Musharaka** relationship is another type of a joint association in Islamic jurisprudence introduced by the CTA. It's the most flexible mode of investment financing employed by banks. The relationship is based upon participation between the bank and customer in capital, management, and profits and losses. Again, it is an Islamic finance mode that avoids the prohibitions in the traditional finance.

As in case of Mudaraba, management is carried out by one of the parties and a percentage of profits is paid for management. The fiduciary obligation is imposed on the managing partner as a trustee for funds and assets. He is under a duty to employ these for the business of the association and the benefit of all the parties. Contrary to Mudaraba, losses sustained in the usual course of business without the wrongful act of any party are divided among the parties in proportion to their capital participation.

2.3.2 Sudanese Companies Act, 2015:

This is the main law organizing the business of companies in Sudan. This law was issued after a fairly long time of its predecessor of 1925. It includes several sections that directly or indirectly address fiduciary obligations. The Act requires directors of a company to disclose any personal interest they have in a proposed or existing contract with the company. This is the cornerstone of fiduciary accountability and is provided for in Sections 151 to 154 of the Act.[17] Prohibition of the use of assets and opportunities of the company for personal gain is also prohibited unless expressly approved by the shareholders or the board as the case may be. The good faith duty is implied in these duties as their gist is to act in the best interest of the company not just their own interest or those of a particular shareholder group.

Enforcement is an essential aspects. While we find satisfactory mention to the fiduciary duties in the Act but enforcement depends heavily on the courts and the extent to which judges are willing to give the true scope for the enforcement. This willingness is not reflected in the Sudanese judicial precedents so far. We don't find on record cases such as Regal (Hastings) Ltd v. Gulliver[18], a landmark English decision by the House of Lords on the fiduciary duties of company directors. It is related to a situation where directors profit from their position without proper disclosure or consent. The decision is a clear example of how stringent the fiduciary obligation is. The directors were liable even though the company could not have taken the opportunity itself, and even if they acted in goo faith and intended to benefit the company. The rule is very strict that, no profit can be made by a fiduciary out of the trust reposed in him except with the informed consent of the beneficiary. The other example of cases which we don't find among Sudanese courts' decisions is the decision on Canadian Aero Service Ltd. V. O'Malley[19], a landmark Canadian case. In this case it was decided that senior officers who resigned from a company to take for themselves a business

[17] This mirrors Section 177 of the UK 2006 Companies Act
[18] [1942] UKHL 1
[19] [1974] S.C.R. 592 (Supreme Court of Canada).

opportunity that they were negotiating on behalf of their former company, were in breach of their fiduciary obligation.

2.3.3 Law on Fighting Illicit and Suspected Enrichment, 1989:

The purpose of this law is to prohibit and punish illicit and suspicious enrichment. Typical application of this law is on persons who occupy fiduciary positions such as public officials who have a duty not to profit from their office, and company directors, especially in private sector, who handles public funds and assets. Illicit and suspicious enrichment means a disproportionate increase in a person's assets that can't be explained by lawful income. Article 6 defines Illicit Enrichment as any assets obtained without consideration or against the laws and regulations that regulate conduct of those occupying public office, exploiting the authority of his position to further his own wealth in contradiction to the legitimate purposes or public interest, or accepting a gift or loan of a high value not acceptable by normal traditions or good conscience.

Article 7 defines Suspected Enrichment as any wealth that appears to be gained by a person which no legitimate means can be identified for its gain.

Both the illicit and suspicious enrichment give the authority the powers to investigate, freeze, and recover the assets which are the subject of the illicit or suspected enrichment.

There is an obligation under Article 9(1) on a wide group of occupiers of constitutional positions and leading public servants to submit yearly declarations of their wealth. They should also submit a final declaration within 3 months of the date of termination of employment.[20] There is a committee for the review of the declaration headed by the Attorney General, and if the declaration concerns the Attorney General himself, the Chief Justice shall preside the committee.[21]

The law has certain features that attribute to the fiduciary obligation analysis. First, it uses a substantive test; the offence is triggered when wealth is unexpectedly occur to a person and no lawful means can be shown for their acquisition. The factual disparity is exactly the kind of evidence that can show a fiduciary has profited improperly from his position. Second, there is an evidential pressure that reverse the burden of proof. Once a disproportion is shown, the person is often required to account for the source; it is enough to trigger enforcement and then the person must explain. That evidential pressure aligns with how a claim of breach of the fiduciary obligation is proved i.e, unexplained

[20] This is according to Article 9(2)(c) of the Illicit Enrichment Law.
[21] Ibid, Article 10.

gains by a fiduciary create a strong inference of breach. Third, the law imposes a duty of disclosure. A person who enriched himself (or his spouse/minor children) to explain the enrichment at any stage before criminal prosecution. Conviction can be avoided if assets are returned or satisfactorily explained. This is an important part for remedies and practical negotiation in fiduciary disputes.

Sudan's 1989 illicit enrichment law is a powerful evidentiary and recovery tool that complements fiduciary duty claims. Unexplained wealth is treated as an offence creating a strong evidence of fiduciary breach, while the Act shape remedies through administrative and self- disclosure mechanisms.

There are some downsides that accompanied the application of the Illicit Enrichment law. Enforcement was uneven and politically motivated. There is an unfortunate selectivity in the application of this crucial law; it is used as a weapon against political opponents. This renders legal risk an existing reality and the law didn't fulfill the purposes for which it was made. Also it's said that the law overlaps with anti-money laundering and financing of terrorism law and regulations

3. Observations and theoretical analysis

Although laws in Sudan started and continued to conform to common law for long years, the fiduciary concept did not play the same role it played in leading common law countries. In these countries, the fiduciary obligation is recognized as an independent cause of action. The concept was not really understood or properly received in Sudan; we find only scant mention of it in Sudanese courts litigations or rulings. This created a noticed vacuum in our legal system as a whole. Many cases were lost, or not directed the right way, because of the unawareness from the part of the litigants, lawyers, and courts, of the benefits of instituting a suit on the basis of breach of the fiduciary obligation. The concept did not receive a serious consideration as a basis of litigation the same as contractual and tortious actions. In countries applying common law we find considerable attention to the fiduciary obligation and a realization of its importance. It constitutes an integral part of the legal literature such as writings of scholars and researchers and judicial precedents. Part of the law reform in these countries is prompted by a desire to give more effect to the application of the fiduciary obligation.

Instituting a case on the basis of the breach of fiduciary obligation has many advantages. The most important of these is that, it gives more rewarding benefits (in terms of remedies) than instituting a case on the basis of tort or contract. This is bearing in mind that each has a realm of application that may be intertwined in

some cases. The plaintiff, in fiduciary cases, doesn't gain only an estimation of losses in the form of damages, but also the defendant is asked to forgo all the benefits which were received by him as a result of the breach. The burden of proof is also much easier than in contract or tort cases. The plaintiff has to prove that there is a fiduciary relationship between him and the defendant. This is considered a light burden of proof, contrary to contract and tort cases where the plaintiff is burdened with the duty of providing detailed and exhaustive evidence for his case. At the same time it is a heavy burden on the defendant to rebut the evidence provided by the plaintiff.

Since many years ago, laws of Sudan progressed towards being in conformity with Islamic or sharia laws. This reached its peak in 1984 by the promulgation of the Civil Transactions Act, 1984 (CTA) referred to earlier. The moral values and obligations of honesty and fidelity are fundamental in Islamic teachings. Application of the CTA necessarily involves adherence to these values. As we have seen in our discussion of the Islamic business models, they are types of relationships largely dependent upon the principles of honesty and good faith mutually extended by one party to the other. The CTA embodies explicit principles influenced by sharia which are relevant to honesty (amana), good faith, and unjust enrichment. If we are really keen to give the Islamic business relations their real scope of applicability, we must find a way to preserve the integrity of these relationships. The way to do this is to create more awareness of the fiduciary obligation as a default scheme of regulations. This is only natural as it is in conformity with the letter and spirit of Islamic teachings, and hence the CTA. The tool for attaining this is through the courts; judges should be more open to educate themselves with what the fiduciary obligation mean and how it is related to the laws they are applying, to achieve justice to many of the cases that spill between their fingers unintentionally. This can only be achieved by the enforcement of the moral obligations by identifiable legal principles such as the fiduciary obligation

As we have seen from the discussion, Sudan legal system has every reason to be influenced by and to apply the fiduciary obligation, both in theory and practice. The call for the application of the fiduciary obligation is not without strong foundations and justifications. We will explore the weaknesses in the relevant laws that render them short of satisfying the purpose of clearly identifying legislative guidelines.

We first have to analyze the laws of Sudan that are closely related to the fiduciary obligation. The purpose is to determine the extent to which they adequately cover the requirements or there is a need for review.

The Sudanese Companies Act, 1925 was criticized as outdated and patchy on director disclosure and conflict of interest regulation, in addition to corporate governance. In addition to outdated provisions that are not suitable for modern corporate activity. Although this law was modeled on English law, it didn't cope with the many developments that took place in English law. This had the effect of compromising investors' confidence and accountability (John A.Brierley and Hussein Elnafabi, 2002, pp113-116). Any reform should fit within Sudan's broader investment and regulatory framework (existing investment Act and related corporate rules).

The Sudanese Companies Act, 2015, was passed with the purpose of modernizing corporate regulations and attract investments. The law is a break through on governance, company types, and some disclosure obligations. For example, there is a recognition of more company forms and structures, and more modern framework for company registration and management. In the fiduciary context, the law added some provisions requiring disclosure of directors' interests.

There are still some remaining gaps. The first gap is the Act doesn't fully codify and define fiduciary duties such as duty of loyalty, duty to avoid conflict of interest, duty of confidentiality, and their subordinate duties. Courts must still rely on common law precedents from England or general equitable principles. Also, the conflict-of-interest framework is inadequate.

The second gap is, there is a mention of disclosure but: 1. no details on how disclosure should be made, e.g. oral, written, or recorded. 2. There are no clear rules for refusal or independent approval of conflicted transactions. 3. There is no provision for keeping a register of directors' interests, which is a key element.

A third gap is the lack of appropriate enforcement mechanisms. There is no authority and resources to investigate and enforce fiduciary duties on the part of the Registrar of Companies, and no specialized corporate governance regulator exists. Even when breaches are detected, penalties are too low to deter misconduct.

A fourth gap is that there are no appropriate provisions for a derivative action. Minority shareholders face obstacles in challenging directors' actions and decisions. This gives directors absolute control in situations where this should not be the case.

A fifth gap is the absence of a link with other relevant laws such as the Illicit and Suspected Wealth Act, 1989, and the AML laws. The companies Act should strongly linked to these laws to prevent hidden beneficial ownership or abuse by politically exposed persons (PEP).

The Illicit and Suspected Enrichment Act, 1989, is a cornerstone of Sudan's anti-corruption framework. It was enacted to combat illegal wealth gained by public officials and others in positions of trust. However, it has many weaknesses in both substance and enforcement, especially when measured against international standards such as the UN Convention against Corruption (UNCAC). The main criticism to the Act is that it is much outdated in definition and scope.

The first weakness is that the law focuses only on public officials. This doesn't cope with modern trends that include private sector actors colluding with officials, professional intermediaries such as lawyers, accountants, brokers, and politically exposed persons (PEPs) operating through relatives or shell companies.

The second weakness is that "enrichment" is not clearly defined, leaving interpretation gaps for the courts to fill and may struggle with.

The third weakness is that it doesn't address corporate vehicles, beneficial ownership, or modern forms of asset hiding, such as crypto currencies or offshore trusts.

The fourth weakness is that the Act is not adequately linked to the Companies Cat, 2015, and AML laws. There is no mechanism to track enrichment through company structure, making it easy to hide illicit wealth behind private companies. Also there is no direct cross referencing of directors' disclosure duties under the companies' Act.

4. Suggestions and Recommendations for the Future of the Fiduciary Obligation in Sudan

After conducting the above discussion, supported by the observation and analysis we go on to conclude with the suggestions and recommendations trying to make them precise and direct to the point.

4.1 Legislative Reform:

Legislative reform is the cornerstone for any development and improvement in the application of the fiduciary obligation. Based on our discussion we recommend the following in this regard.

- **1st** to insert explicit statutory fiduciary duties in the Companies Act 2015, in the .appropriate details. These should include loyalty, good faith, and avoidance of conflict of interest. Each of these should be defined in the law, and the subordinated duties should be mentioned in clear provisions. This will make Sudan more attractive to foreign investors and international financial institutions. Also it will result in more certainty to courts as they will have explicit statutory duties to rely on in their decisions.

- **2nd** to focus more on the duty of disclosure by providing details on the requirements of disclosure, such as a written disclosure, the time of giving disclosure, the process of dealing with it by other directors/shareholders as the case may be, and the approval or refusal of disclosure. This focus on disclosure will encourage transparency and better business practices.
- **3rd** to enhance the powers of the Registrar of Companies on investigation and sanction of breaches involving fiduciary duties. There should be clear penalties for each breach, and to build capacity within the Registrar to deal with the different situations. This will help combat insider dealing, state owned enterprise abuse, and politically exposed persons hiding assets..
- **4th** there must be a scheme of remedies and enforcement for breach of the fiduciary obligation, such as damages, injunction, restitution, and disgorgement of profits made.
- **5th** there should be a simplified process for minority suits against directors (derivative action).
- **6th** to link company disclosure to beneficial ownership registers and AML reporting. This will enhance enforcement of the Law on Fighting Illicit and Suspected Wealth, 2019.
- **7th** to update the definition of Illicit Enrichment in the Law on Fighting Illicit and Suspected Wealth 1989, to cover indirect enrichment through family members or associates, corporate entities, and modern financial assets.
- **8th**Explicity include state- owned companies directors, senior officers and directors to the definition of Public Servant in the Illicit Enrichment law.
- **9th** there must be a mechanism to harmonize the Companies Act, 2015 and the Law on Fighting Illicit and Suspected Wealth, 1989, by creating a strong mechanism to track enrichment through company structures to prevent illicit wealth behind private companies. Also through a direct cross referencing of directors' disclosure duties under the Companies Act, by requiring companies to report suspicious enrichment by directors or executives.
- **10th** the Companies Law, 2015, law should treat abuse of corporate office (breach of the fiduciary duties) as illicit enrichment.

4.2 Recommendations for Judicial Improvements:

Beside legislative reform, we have to pay good attention to judicial improvement and enhancement. Even with strong statutory amendments, the real test is whether the courts can enforce fiduciary obligations effectively. Narrow and inconsistent judicial interpretation have been historical weaknesses in Sudan. The suggestions to enhance courts performance are as follows:

- **1st** establish appropriate commercial and corporate courts with judges trained in company law and corporate governance.
- **2nd** continuous judicial education by regular workshops for judges on fiduciary law, drawing on comparative case law in UK, Kenya, South Africa, and India.
- **3rd** training on how fiduciary duties align with trust obligation in Sharia (amanah, daman, maslaha, no unjust enrichment), and the inherent traditions of justice, equity, and good conscience deeply rooted in Sudanese legal system.
- **4th** encourage courts to rely on persuasive precedents such as Regal (Hastings) Ltd v. Gulliver [1942], and Canadian Aero Service v. O'Malley [1974]
- **5th** ensure systematic publication of corporate cases so fiduciary principles become visible and predictable.
- **6th** the Supreme Court to issue interpretive guidance on directors' duties similar to Kenya's Practice Directions in corporate disputes.
- **7th** empower courts to impose disqualification orders, restitution, and even refer cases to criminal enrichment investigation.
- **8th** courts must interpret the 2015 Act in light of fiduciary principles as protective norms, not mere technicalities.

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