TOWARDS THE EFFECTIVE LEGAL REGULATION OF *WAQF* IN NIGERIA: PROBLEMS AND PROSPECTS

Umar A. Oseni

Abstract

The importance and need to exploit the economic benefits of waqf cannot be overemphasized in the current global economic meltdown. In order to become part of the global move towards the revival of awqāf, Nigeria, a country predominantly dominated by Muslims, needs to enact laws to regulate the management of awqāf properties. This paper examines the current state of waqf in Nigeria, issues affecting the institution of waqf and the extent of its regulation with an appraisal of the existing laws. It is argued that the provision of the Constitution of Nigeria 1999 subjecting waqf to the jurisdiction of the Sharī'ah Court of Appeal without any further regulation in form of an Act does not really cater for the needs of Nigerian Muslims and the economy of the country. In fact, the so-called Muslim states in the country are still groping in the darkness of colonial laws of trusts. The paper concludes that the economic benefits of awqāf can only be harnessed when there is effective legal regulation in the country, and by that, the economic benefits of the institution will be felt by all.

Keywords: *waqf*, endowment, legal regulation, Maliki, Sharī'ah courts, Nigeria.

1. Introduction

The lingering global economic meltdown necessitates some sort of introspection on the part of policy-makers in developing countries in the modern world. The need for an effective legal regulation and management of *awqāf* properties in Nigeria cannot be overstated in the present age considering the growing nature of *awqāf* properties

scattered around the country. In many situations, some of the *waqf* properties donated for the sake of Allah and for the benefit of the generality of people are transformed to inherited properties after the demise of the donor. These aberrant and woolly practices are becoming prevalent in many Muslim societies across the country.

Meanwhile, provision of public goods through this religious endowment helps in the infrastructural development of the state in many ways. The ideological foundations of *waqf* in the Sharī'ah is premised on the prime sources of law –Qur'an and Sunnah. Though *waqf* is commonly translated as "Islamic trust", it is important to point out that the institution of *waqf* in Islam goes beyond the ordinary understanding of the western concept of trusts. Though there may be some similarities between the two concepts; *waqf* is spiritually-oriented than trusts.

Waqf has played a major role in the economies of many developing countries across the world. It stands as one of the mechanisms for ensuring social security for the citizens of a state whether Muslims or non-Muslims. In most cases, *awqāf* are created for both charitable and religious purposes which had spurred educational and economic development in many Muslim communities where they are properly managed and regulated. Without doubt, the development and proper management of the *awqāf* properties through proper legal framework will promote them as indispensable assets of the Muslim Ummah.

This paper begins with an examination of the existing legal framework for *waqf* properties in Nigeria where issues such as the Maliki view on ownership of *waqf* property, basis of Islamic personal law in Nigeria, *waqf* and waves of colonization, and the jurisdiction of Sharī'ah Court of Appeal on *waqf* matters are closely considered. The next section of the paper discusses the factors militating against formidable *waqf* institutions in Nigeria. Furthermore, the penultimate section examines prospects of a Nigerian *waqf* law where it is argued that such a law should not be based on the Maliki School alone but a hybrid of best practices in the four major schools recognized in Islamic jurisprudence with the consideration of the practicability of such laws in the modern Nigerian society.

Nigeria may have to borrow a leaf from countries like India, Pakistan, Bangladesh and even Indonesia, to properly regulate *waqf* properties across the

country because of its religious importance as well as economic benefits. Though it is not intended to advocate for total institutionalization of *waqf*, there is need for proper legal regulation and management of same in the country.

2. The Legal Framework of *Waqf* in Nigeria

It is important to state at the onset that there is no existing law in Nigeria that provides for the management and administration of *waqf*; not even in the Muslim states in the northern part of the country. In other words, there is no *waqf* legislation in Nigeria of today. What is available in the Constitution of the Federal Republic of Nigeria 1999 ("Constitution") is the reference to issues pertaining to *waqf* which fall under the jurisdiction of the Sharī'ah Court of Appeal. For a proper understanding of the existing legal framework of *waqf* in Nigeria, it is apposite to consider certain issues in separating headings. Since the Islamic personal law practiced in Nigeria from the time Islam got to the shores of the country is based on the interpretation of the Maliki School, we shall start with a brief examination of ownership of *waqf* from the Maliki School of thought.

2.1 Maliki View on Ownership of *Waqf* Property

The institution of *waqf* flourished during the formative and blooming years of the first Islamic State established by the Prophet Muhammad (P.B.U.H.) in Madīnah. This splendid concept of endowment was rightly upheld and tenaciously practiced by the succeeding generations in the Islamic empire over the years.[1] However, with the emergence of the four major schools of thought in Islamic jurisprudence, the understanding of the law and practice of *waqf* was based on the geographical settings of Muslims and their adoptions of the any of the schools of thoughts respectively.[2] In

[1] See generally, Muhammad 'Ubayd Al-Kabisi, *al-Waqf fi al-Shariah al-Islamiyyah,* (Lebanon: Al-Maktabah al-Hadithah, n.d.); Abubakar Ahmad Ibn 'Amr al-Khassaf, *Kitab Ahkam al-Awqaf*, (Cairo: Diwan 'Umum al-Awqaf al-Misriyyah, 1904); and Tauqir Mohammad Khan (ed.), *Law of Waqf in Islam*, (New Delhi: Pentagon Press, 2007).

[2] There are four major schools of thought in Islamic jurisprudence. The schools are based on the different understanding of the sources of law within the general ambit of Islamic law. Their differences are not bothering on Islamic creed and do not touch on the fundamentals of religion. The differences are mainly on minor issues which are occasioned by on different interpretations as understood by the great jurists. Besides, these schools are fundamentally the same. The popular four schools are Maliki School which is premised on the works of Imam Malik ibn Anas (predominant in the North and West Africa), Hanafi School founded by Imam Abu Hanifa an-Nu'man (predominant in northern Egypt,

West Africa generally, the prevalent understanding of Islamic law since the time Islam got to the shores of the sub-continent is based on the Maliki School. Hence, the need to examine the Maliki view on ownership of *waqf* properties and appraise its influence on the modern practice of *waqf* in Nigeria.[3]

In classical Islamic jurisprudence, *waqf* is considered a socio-religious duty that guarantees social security for the members of the society. The conceptual development of *waqf* is premised on the hadith of 'Umar which was in form of an advice from the Prophet Muhammad (P.B.O.H.) for 'Umar on the latter's land in Khaybar called "*Samagh*".[4] "In the Islamic tradition the deed is presented as a unitary document in which 'Umar specifies the charitable purposes of his *waqf* and then stipulates a mechanism for the transfer of the property to subsequent generations."[5] There are three versions of the Hadīth.[6] This variation in the three narrations is

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the Indian subcontinent, Iraq, Turkey, Balkans and in many western countries), the Shafi'i School founded by Imam Muhammad ibn Idris al-Shafi`i (prevalent in Egypt, Somalia, Indonesia, Thailand, Singapore, Brunei, Malaysia, among Kurds and The Philippines), and the Hanbali School which is based on the works of Imam Ahmad ibn Hanbal (predominant in the Arabian Peninsula).

[3] For a detailed analysis of the jurisprudential issues involved in *waqf* in the Maliki School, see Abdul Rahim El Alami, "Al-Ijtihādāt al-Fiqhiyyah fi nawāzil al-waqf 'inda al-mālikiyyah", *Awqāf*, No. 12, Year 7 (May 2007) pp. 37-59.

[4] See Muhammad Kamal al-Din Imam, *Al-Wasāyāh wa al-Awqāf fi al-fiqhi al-Islāmī*, (Beirut: Mu'assasah al-Jami'iyah, 1996), p. 161.

[5] Peter C. Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafī Legal Discourse*, (Leiden: Brill, 2004), p. 157.

[6] The three variations of the Hadīth are:

1. 'Umar acquired some land in Khaybar. He came to the Prophet and said: "I have received land like which I never had any property before. What is your command about it?" "He (the Prophet) said: "If you wish you may detain it and give in charity its usufruct".
'Umar endowed it for the poor and the needy, for his relatives, for the manumission of slaves, in the way of Allah, for the guests and for the travellers, subject to the condition that the property would not be transferred by sale or gift, nor would it be inherited. There was no harm if the person managing it ate from it in the approved way or fed his friend but it (the usufruct) would, in no case, be hoarded.
2. 'Umar acquired some property in Khaybar. He came to the Prophet and informed him about it. He said: "If you like you may give it in charity". He, therefore, endowed it for being spent on the poor, the indigent, the relatives, and the guests.
3. 'Umar had endowed during the period of the Prophet some property which was an orchard, and was known as *Samagh*. 'Umar said, "O Messenger of Allah! I have acquired property, which in my view, is excellent. I intend to give it in charity". The Prophet said: "Give it in charity on condition that it would neither be sold, nor gifted, nor inherited, only its fruits would be utilized". 'Umar endowed it on the same conditions. The endowment was in the way of Allah and was for the manumission of slaves, and for the benefit of the indigent, the guests, the travellers and the relatives. There was no harm if the person managing it ate from it in the approved manner or fed his friend with it provided it was not hoarded.

undoubtedly responsible for the difference of opinion among the jurists on this charitable duty. This accounts for the variation in the growth of *waqf* jurisprudence in the different schools within the general ambit of Islamic jurisprudence. Without entering the arena of controversy revolving round the legality, nature, scope and ownership of *waqf*, this section is intended for a brief insight into the Maliki view on *waqf* due to the geographical-cum-jurisprudential background of the country under consideration.

According to the Maliki School, *waqf* is a recommended duty in Islam which is at best considered as Sunnah.[7] When discussing the question of ownership of *waqf*, we shall focus on the distinction between the legal ownership and beneficial ownership in the *waqf* property. The position of the Maliki school is that the legal interest in the *waqf* property remains in the *wāqif* (endower) while the beneficial interest lies on the *mawquf alayhim* (the beneficiaries or *cestuis que trust*). Against this backdrop, the *wāqif* cannot, in any way, transfer the *waqf* property nor utilize any income derived from it; what is vested in him is just the legal ownership.[8]

The summary of the Maliki view on ownership of *waqf* property is that a *waqf* deed is revocable. This means a temporary *waqf* can be created. In this situation, the reversion of the corpus, after the completion of the object of the *waqf*, to the *wāqif* or his legal heirs is permitted.[9] This is contrary to the opinion of the majority of jurists who allow for perpetuity of *waqf*, and the ownership of such property absolutely vests in Allah.[10]

2.2 The Basis of Islamic Personal Law in Nigeria

See Muhammad Muhsin Khan, *Sahih Al-Bukhari*, (Arabic-English), (Madīnah: Al-Maktabat al-Salafiat, n.d.), vol. IV, Hadith Nos. 33, 34, 38, pp. 27-28.

[7] Ahmad al-Dirdir, *Aqrab al-Masalik*, (Khartoum: Dar al-Sudaniyyah Li al-Kutub, 1994), p. 150

[8] Sh. Aftab Husain, "Classification and Condition of Auqaf", *Hamdard Islamicus*, 12, No.3 (Autumn 1989), p. 13.

[9] *Id.,* p. 14.

[10] See Abdul-Wadud Al-Sarītī, *Al-Wasāyāh wa al-Awqāf wa al-Mawārith*, (Beirut: Dar al-Nahdah al-ʻArabiyyah, 1997), p. 201. Also see, Mohammad Yusuf, "Foundations of Waqf Foundations : A Critical Study of Origin and Development of Waqf in the Shari`ah and the Law", (Ph.D. Thesis: Nagpur University, Nagpur, 2002), p. 21.

Islamic law as a major component of the Nigerian legal system has generated a lot of controversy since the period of British colonialists.[11] The first approach was to classify Islamic law as customary law.[12] With this, the validity tests were applied to Islamic law. This allowed them to re-structure the application of Islamic law in the country.[13] Without narrating the historical development of Islamic law in Nigeria, it is apt to observe that the final restriction of the application of Islamic law in the country to Islamic personal matters (*al-akhwāl al-shaksiyyah*) was orchestrated through legislation.[14] This led to a negative transformation in the communities where the full scale Islamic law was being applied for centuries. The gradual replacement of the Islamic legal system with the British law in the northern part of Nigeria dealt a great blow to social and moral values in the communities. It is unfortunate "that in Hausaland the incidents of crimes, notably, theft, murder, robbery and burglary had grown worse instead of better since the British occupation".[15] This negative transformation of the society continued till recent times when there was the re-emergence of the Sharī'ah in a number of northern states in the country. However, Nigeria, being a federal state, the Constitution only recognizes aspects of Islamic personal law matters while the State Legislatures are empowered to enact laws "for

[11] There has been a lot of controversy since the colonial period especially when English courts were established in the Northern part of Nigeria to replace the existing Islamic adjudicatory system. Muslims were forced to submit to these courts in the name of customary courts. This ground plan was orchestrated in three phases as identified by Yadudu: the accommodation phase, the domination and control phase, and the living under the shadow phase. See A. H. Yadudu, "We Need a New Legal System", in Ibrahim Suleiman and Siraj Abdulkarim (eds), *On the Future of Nigeria*, (Zaria, Nigeria: Hudahuda Publishing Co., 1988), pp. 4-5.

[12] This has been a controversial issue for quite some time. However, the whole dust raised by this classification as bequeathed by the colonialists was contained in the landmark dicta of Justice Wali in *Alhaji Ila Alkamawa v. Alhaji Hassan Bello and Alhaji Malami Yaro* [1998] 6 SCNJ 127, where his Lordship observed in the concluding part of a judgment on *Shuf'ah* (pre-emption): "Islamic Law is not the same as customary Law as it does not belong to any particular tribe. It is a complete system of universal Law, more certain and permanent and more universal than the English Common Law. See generally, A. A. Oba, "Islamic Law as Customary Law: The Changing Perspective in Nigeria", *ICLQ*, vol. 51, October 2002, pp. 817-850; Y.K. Saadu, "Islamic Law is NOT Customary Law", *Kwara Law Review,* (1997), vol. 6, pp. 136-150; and L.A. Kelani, "Islamic Law and the Customary Law/Native Law: A Line of Distinction", *Unilorin Sharia Journal*, vol. 1 (Dec. 2000), pp. 43-55.

[13] See M. Tabiu, "The Impact of the Repugnancy Test on the Application of Islamic Law in Nigeria, *Journal of Islamic and Comparative Law*, vol. 18 (1991), pp. 53-76; and Abdulmalik Bappa Mahmud, *A Brief History of Sharī'ah in the Defunct Northern Nigeria*, (Jos, Nigeria: Jos University Press, 1988), p. 14.

[14] See Section 11 of the Sharia Court of Appeal Law, cap. 122, Laws of Northern Nigeria, 1963.

[15] Palmer quoted in Ahmed Beita Yusuf, *Nigerian Legal System: Pluralism and Conflict of law in the Northern States,* (New Delhi: National, 1982), p. 212.

the peace, order and good government of the State…"[16] Despite this, the jurisdiction of the Sharī'ah Court of Appeal, which is a superior court of record, is determined in the Constitution as provided for in Section 262(1). Basically, the jurisdiction of the court which is saddled with the responsibility of handling *waqf* matters is limited to appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.

2.3 *Waqf* and Waves of Colonization in Nigeria

Before the arrival of the British colonialists, Islamic law was widely practiced in Nigeria particularly in the northern part of the country and both the civil and criminal aspects were in vogue. Ibrahim Umar rightly observed:

> Before 1900, almost two third of Nigeria or to be precise all the Northern part of Nigeria was governed by Shari'ah. But when the colonial rulers came, they imposed their own legal system on us relegating the Shari'ah to the background (terming it as a customary law).[17]

Though the law and practice of *waqf* was not so developed during the early stage of Islam in Nigeria, there are evidences to support the fact that during the flourishing period of the Sokoto Caliphate, the elite slaves (*mamlūk*) were saddled with the responsibility of administering the *waqf* lands.[18] This proves the existence of *waqf* lands in the Muslim-controlled territories in the pre-colonial Nigeria. When discussing customary land tenure in Nigeria, a "third variant of land category, whether occupied or unoccupied land, is the waqf or common land, which an Emir can declare such land as common or public land."[19]

The intrusion of the colonial laws limited or totally excluded the law and practice of *waqf* in the day-to-day affairs of the Muslims in Nigeria. With these waves of colonization which was experienced in some other parts of the Muslim world, a

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[16] See Section 4(7) of the Constitution of the Federal Republic of Nigeria, 1999.
[17] Ibrahim Umar, "Shari'ah as a Means to Solve Modern Problems", in Syed Khalid Rashid (ed.), *Sharī'ah, Social Change & Indiscipline in Nigeria,* (Sokoto, Nigeria: University of Sokoto Press, 1987), p. 220.
[18] Sean Stilwell, "The Development of '*Mamlūk*' Slavery in the Sokoto Caliphate", in Paul E. Lovejoy (ed.), *Slavery on the Frontiers of Islam,* (Princeton, New Jersey: Markus Wiener Publishers, 2004), p. 100; Murray Last, *The Sokoto Caliphate*, (New York: Humanities Press, 1967), p. 103; and Steven Pierce, *Farmers and the State in Colonial Kano: Land Tenure and the Legal Imagination*, (Bloomington: Indiana University Press, 2005), p. 97.
[19] Pre-Colonial Land Management Practices, *Online Nigeria Daily News*, available at http://www.onlinenigeria.com/land/?blurb=527

gradual decline was experienced in the regulation and practice of *waqf*. The burning flames of colonization greatly affected the pristine legal framework as laid down in the golden era of Islam with the promulgation of English laws of Trusts in the colonized Muslim Countries.

2.4 The Jurisdiction of Sharī'ah Court of Appeal on *Waqf* Matters

It goes without saying that the present jurisdiction of the Sharī'ah Court of Appeal as provided in the Constitution in relation to *waqf* will create some problems when eventually the court is faced with such questions. Before we proceed with the reasons for these myriad of problems, it is important to digest fully the relevant provisions of the Constitution which provides for the jurisdiction of the Sharī'ah Court of Appeal. Section 272 (2) provides:

> For the purposes of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide -
> (a) any question of Islamic personal Law regarding a marriage concluded in accordance with that Law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
> (b) where all the parties to the proceedings are Muslims, any question of Islamic personal Law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guarding of an infant;
> (c) ***any question of Islamic personal Law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim***;
> (d) any question of Islamic personal Law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or
> (e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.
> (Emphasis added).[20]

The emphasis added clearly highlights the jurisdiction of the court in relation to any question regarding *waqf* where the endower is a Muslim. From the historical legal perspective, most objects of *waqf* in the Muslim-dominated areas in Nigeria have been land. This can be likened to the legal precedent laid down by the Prophet on Umar's *waqf* whose subject matter was a land in Khaybar.

[20] "*Waqf*" is written as "*wakf*" in the Constitution.

Section 39(1) of the Land Use Act of Nigeria gives the High Court exclusive original jurisdiction in respect of any proceedings relating to land which is the subject of a statutory right of occupancy, and in proceedings to determine the persons entitled to compensation payable for improvements on such land.[21] Therefore, when the question before the court relates to the endowment of a land or landed property, which court has the jurisdiction to competently hear such a case in Nigeria? Can a statutory land be given away as *waqf*? If "yes", which court has jurisdiction to hear any proceedings relating to such endowed land? These are issues which need to be addressed through dedicated legislation on *waqf*.

Another issue regarding the current jurisdiction of the courts on *waqf* matters relates to giving out a customary or family land as *waqf* land. According to the provisions of Section 41 of the Land Use Act, the Area courts, Customary courts or any other competent court of equivalent jurisdiction in a State shall have jurisdiction in such matters. The hierarchical structure of the Nigerian courts provides that an appeal from a lower court which relates to the issues enumerated in Section 277(2) of the Constitution lies at the Sharī'ah Court of Appeal. However, an appeal on a customary right of occupancy to a land or any other matter relating to land lies at the High Court of a State and not the Sharī'ah Court of Appeal. This was the position of the Court of Appeal in *Alhaji Saidu Maje v. Da'u Dillalin Shanu*[22], where it was held:

> It is crystal clear, that the subject matter of the claim before the trial Sharia Court instituted by the appellant (as plaintiff) which found its ways on appeal through the Upper Sharia Court (intermediate Court) and later to the lower court, purely pertained to dispute on land or to put it in another way, it related to title to land (house). It in no way relates to Islamic Personal law at all....[23]

The learned justices concluded:

[21] See Section 39(1) of the Land Use Act, Cap. 202, LFN 1990.
[22] Court of Appeal, Appeal No. CA/K/142/S/2005. See a similar decision of the Court of Appeal in *Alhaji Amadu Rufai v. Alhaji Abdul-Rahman*, Appeal No: CA/K/120/S/97.
[23] Ibid.

> The appellant is at liberty to take his appeal to the Katsina State High Court of Justice if he so wishes which is the proper and appropriate court having jurisdiction....[24]

This is an anomaly; especially when the matter relates to a land given out as *waqf*. From the foregoing, it is clear that the relics of the legal regulation of *waqf* in Nigeria are found in a sub-section in the Constitution where the jurisdiction of the Sharī'ah Court of Appeal is outlined. So, the jurisdiction of the Sharī'ah Court of Appeal to hear matters involving *waqf* depends on the subject matter of the *waqf* itself.

3. Factors Militating Against Formidable *Waqf* Institution in Nigeria

As it has been briefly discussed, *waqf* institution was under the office of the Emir in the pre-colonial Nigeria. With the replacement of the *waqf* law and practice with modern law of trusts, the flourishing era of *waqf* institution in the country became a forgotten issue. Though *waqf* practices take place almost every day in the country, there is no proper management and regulation through legislation. The factors militating against formidable *waqf* institutions in Nigeria are briefly explained thus:

3.1.1 The Jurisprudential Issues

The Maliki law of *waqf* and the jurisprudential issues involved has been briefly explained. A comparative jurisprudential study of *waqf* reveals that on the question of ownership of *waqf*, the ownership remains with the *wāqif*. The legal ownership of the property is still vested in him despite the *waqf* deed. However, the beneficial interest of such endowed property is vested in the *mawqūf 'alayhim* and the right of transfer on the part of the *wāqif* and the right to utilize the income derived from such property are taken away from him either completely or for the duration of the *waqf*.

The element of legal interest still vested in the *wāqif* portends that there is no absolute *waqf* according to the Maliki School. To this end, properties given out as *waqf* may be revoked at any time since the general belief is that *waqf* is revocable. This has emerged as a stumbling block for the development of *waqf* institutions in Nigeria since there is no permanent endowment which may truly benefit the people.

[24] Ibid. Also, see Per Ogundare JSC in *H. Ahmadu Usman v. Sidi Umaru* (1992) 7 NWLR (Pt 254) 377 at 400; and *Safiya Korau v. Balai Korau* (1998)4 NWLR (Pt.545) 212 at 222.

The revocability of *waqf* is definitely creating a setback for the development of *waqf* institutions in the country. There are cases where a person has given out a particular mosque or land as *waqf* and the succeeding generation takes over the property as an inherited estate. Islamic law transcends Maliki School. So, a holistic understanding of the law of *waqf* from the classical sources and as understood in the four major schools of Islamic jurisprudence is necessary for a *waqf* legislation in Nigeria.

3.1.2 Legal Impediments in the Resolution of *Waqf* Issues

For the proper management of *waqf* institutions and properties, it is expedient to have in place a proper legal framework for the resolution of disputes. A situation whereby a complicated or controversial system is created, as earlier explained, will definitely hinder the development of *waqf* institutions in the country. Mere subjection of *waqf* matters to the jurisdiction of the Sharī‘ah Court of Appeal while stripping off the court of the jurisdiction on land matters which sometimes relate to *waqf* land makes nonsense of the application of Islamic law in Nigeria. This has definitely hindered the growth of *waqf* institutions in the country. There are unreported *waqf* lands in the country that have been subjected to the rigours of the High Court where common law of trusts has been applied. Such cases are considered as land matters which, according to the existing laws in the country, have nothing to do with the Sharī‘ah Court of Appeal. This appalling situation needs to be addressed to remove the bottlenecks affecting the proper adjudication of *waqf* disputes in Nigeria. This can only be achieved through a dedicated legislation on *waqf* which will confer jurisdiction on the Sharī‘ah Court of Appeal when the matter relates to *waqf* property whether landed or movable.

3.1.3 Lack of a Dedicated Legislation on *Waqf*

From the previous discussion, it is clear that there is no legislation on *waqf* in Nigeria; not even the Northern states of the country which introduced the criminal aspects of the Sharī‘ah in the wake of the return to democratic governance in the country. This move towards the introduction of the criminal aspects of Islamic law (*hudūd*) in the States backed with state enactments is commendable; however, there are prerequisites to that. Social security is an important element of governance in Islamic law of

governance. Legislations for the proper implementation and administration of *zakāt*, *waqf*, and other social security mechanisms must precede the introduction of the *hudūd* in states that have been crippled by economic instability.

3.1.4 Lackadaisical Attitude of the Muslim Leaders

Despite the current state of affairs in Nigeria, the Muslim leaders particularly those who have acquired political power have failed to initiate reforms in the system. Some feel *waqf* is not so important in the administration of the state. This has been proven wrong with the increasing economic benefit of *waqf* in many economies of the Muslim world. The great potential of *waqf* in poverty alleviation is a well-known issue in many developing countries such as India, Pakistan, Kuwait, Bangladesh, Indonesia, Malaysia and some others. The development of *waqf* has been extended to areas like commercialization of *waqf* property to increase the benefit of same. The lackadaisical attitude paid to issues of *waqf* in the socio-economic betterment of the people in Muslim communities has contributed to the increasing level of poverty in those communities. The Muslim leaders should not just keep quiet as if all is well. They must be proactive in initiating appropriate legislations that will suit the interest of the people.

4. Towards a Nigerian *Waqf* Law: Some Reflections

Having established the current state of affairs in relation to *waqf* properties and the existing legal framework, it is important to propose an all-embracing legislation for Nigeria. Proper legal mechanism through legislation will ensure appropriate management and regulation of *waqf* properties across the country. It is important to quickly add that such a *waqf* law may be not easily passed at the Federal level – Nigeria being a Federal state. However, the Constitution of the country provides for state enactments. This can easily be exploited to enact proper legislations in the states particularly in the Northern part of the country where there is an overwhelming majority of Muslims. It may be surprising to observe that there are many *waqf* properties lying fallow in these Muslim communities. If such properties are well managed and their hidden potentials are unlocked, poverty will be alleviated drastically.

In order to avoid jurisprudential issues, it is important to constitute a high-power committee consisting of learned scholars, who should be saddled with the responsibility of preparing an outline of the *waqf* law based on best practices from the four major schools of thoughts in Islamic jurisprudence and the applicability of such rules in the modern Nigeria society without prejudice to the Qur'an and Sunnah. The establishment of a statutory body such as Waqf Development Commission to supervise and manage the development of *waqf* properties should form part of such legislation for proper management and accountability.[25]

The legislation on *waqf* must contain explicit definition of what *waqf* is and what is not according to Islamic jurisprudence. It must also contain the nature of *waqf* created –testamentary *waqf* or *inter-vivos*. Other important issues that should be covered in the legislation include the creation of *waqf*, subject matter of *waqf*, valid objects of *waqf*, the contents of a *waqf* deed and the proof of the creation of *waqf*, the development of *waqf* properties, and the application of *waqf* income in objects as near as possible as the original object.

The disputes arising from *waqf* properties should fall under the jurisdiction of the Sharī'ah Court of Appeal while an original jurisdiction is conferred on the Sharī'ah Courts. However, it is important to create court-connected dispute resolution mechanisms within the Sharī'ah court system itself. Such may include *sulh*-oriented policies within the court system as prerequisites to court adjudication. This policy will enhance the development of *waqf* properties in the country because court adjudication may cause unnecessary delays which may be counter-productive in the final analysis. This will reduce the number of *waqf*-related disputes going for protracted adjudication.

As a preliminary step in the evaluation and development of *waqf* properties in the country, the legislation should provide for survey of *awqāf* properties which are worthy of development.[26] "Survey of *awqāf* is essential to gather definitive

[25] This suggestion was first made by Syed Khalid Rashid in Syed Khald Rashid, "Issues Inherent in the Development of *Waqf* Properties*"*, paper presented at the International Conference on Developing Waqf Institution for Sustainable Community Development & Poverty Eradication (Shari'ah, Legal & Regulatory Perspectives), Cape Town, South Africa, August, 17-19, 2007, pp. 1-2.

[26] See Ibid. Also see generally, Syed Khalid Rashid, *Protection, Maintenance and Development of Awqaf in India (With Special Reference to Rajasthan),* (New Delhi: Institute of Objective Studies, 2005).

information about their number, nature, valuation, income, management and history, which may be useful in the formulation of any strategy for the development of such *awqāf* in any country which are suitable for development."[27] The proposed Waqf Development Commission should have a department saddled with such a herculean task. If such is properly managed, the income that will accrue within a short period of 5 years is enormous. Syed Khalid Rashid gives empirical evidence to corroborate this point:

> Studies of developed waqf properties in India, the Middle East and Sudan show that a minimum of 20% is the annual rate of return on the developed waqf properties. That is, whatever is invested on developing a waqf property stands recouped in 5 years, after which the total income is available for social welfare schemes.[28]

Another important issue to be covered in the legislation is the utilization of the income of developed *waqf* properties. The Director of the Waqf Development Commission should be empowered to issue guidelines on the prioritization of the services that are channeled toward the betterment of the community. We must add a *caveat* here. In no circumstance should *waqf* income be expended on usurious transactions or interest-bearing deals. In the calculation of all expenses incurred in the development of a *waqf* property, any expenses incurred by the Commission or any other statutory body saddled with the responsibility of developing such properties should be deducted from such income. However, no accruing interest should be calculated nor paid to anybody as this contradicts the fundamentals of Islamic finance. These cautionary words are important because a country like India which, relatively, has a standard law regulating *waqf* properties, failed to address this issue of interest accruing from the expenses incurred in the development of the properties.[29]

5. Conclusion

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[27] Syed Khalid Rashid, "Development of Waqf properties for Poverty Alleviation Particularly in Malaysia", paper presented at the International Conference on "Poverty Alleviation: Challenges for the Islamic World", organized by The Centre For Poverty & Development Studies, Faculty of Economics and Administration, University of Malaya, 2-3 August, 2007, p. 4.

[28] *Id*, p. 2.

[29] See Section 32 (5) of the (Indian) Waqf Act 1995. Syed Khalid Rashid cautioned that "[T]he Indian Act is unmindful of the fact that interest or *riba* is considered *harām* in *Shari'ah*. Any country which decides to adopt this provision may have to do necessary amendment." See Syed Khalid Rashid in Syed Khald Rashid, "Issues Inherent in the Development of *Waqf* Properties*"*, *supra*, p. 7.

From the foregoing, it has been established that there is an urgent need to streamline the legal framework for *waqf* in Nigeria through proper legislation. This may partly lead to the institutionalization of *waqf* in the country, there should be some allowances for private initiative in this regards. The proposed legislation on *waqf* should only contain general guidelines for the regulation and management of *waqf* properties and *waqf*-related issues in the country. So, in order to revitalise *awqāf* in the country, there is need for a proper legal infrastructure, and more importantly, professional management techniques as fundamental prerequisites. With the independence of Nigeria forty-nine years ago, there is an urgent need to return to the golden age of the Islamic empire where the institution of *waqf* flourished well as a state-powered phenomenon to build the community especially in areas where social amenities are needed. The economic potentials of such *awqāf* property is beyond doubt.

In formulating a viewpoint about this fundamental problem in the operation, regulation, and management of *waqf* in Nigeria, it is apposite to submit that this charitable concept needs to be given a free-hand to operate as a charitable phenomenon to assist the less privileged. Dedicated legislation must be made to codify the timeless charitable rules and regulations as contained in the pristine law of *waqf* based on the best practices in all the four schools of thought in Islamic jurisprudence. The modern practice of Islamic law has crystallised. Gone are the days where one must still stick to a particular school of thought (*taqlīd*). This *waqf*-initiative will go a long way in assisting the needy. There are perhaps too many issues for a detailed discussion in relation to *waqf* law and practice in the Nigerian legal milieu. The foregoing discussion is not exhaustive and is only intended to serve as a launching pad for further research in this area.