PRACTICE AND PROCEDURE ON ADMINISTRATION OF ESTATE UNDER ISLAMIC LAW IN THE NORTHERN STATES OF NIGERIA

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INTRODUCTION

Those that have become actively engaged in and are familiar with the practical administration of estates under Islamic law, know very well that the success of the work does not rest squarely on mastering the fiqh of inheritance and arithmetical calculations only. other factors include those matters which even though do not form the basic knowledge of the distribution of estate under Islamic law, but are closely related to it. There are areas in respect of which materials do not exist in English and which this piece intends to highlight.

What are those related Matters?

Even though list of those related matters may not be necessarily unexhausted, due to the length of the area they covered in the application of law, it is, therefore, proper to discuss them in a separate paper, at appropriate occasion.

For our practical purpose, where, therefore, distribution of estate, which consist of landed and other properties becomes an issue, likely problems which the judge or consultant is to face, or questions which he may ask are, from where and how can I start? Before starting, which materials can I lay my hands to guide me through? Suppose I happen to be confronted with problems regarding errors, how can I confront them?

These are some of the answers which this write up intends to provide to our august leaders. The areas these related matters in respect of which existing materials on practice and procedure have not been covered in English Language, includes, among others, what is learned as al-Qismah (Practice and procedure on distribution of estate under Islaamic Law), the authorities or its legal backing from the Qur'an, the Sunnah and Ijmaa, its nature, categorization, the law dealing with each category, how its conducted, the does and donts on each of these categories, legal effect of errors or irregularity that are likely to be occasioned in the process of distribution, as-Sufqaah or contract of sale of the property to be distributed in the event of disagreement among the parties, etc.

In the cause of writing this piece and where no reference is made to any authority in the translation from the Arabic text to English, such translation is provided by my humble self. I shall, therefore, be held responsible for any error that.

This belief, will illuminate the minds of our readers whose thirst for knowledge needs to be quenched. That, apart, it will expose those areas which pose practical problems in the administration of estate and their technical solutions under Islamic Law.

Al-Qismah

It is to be noted that *al-Q:smah* (identification of Shares of landed property jointly owned by co-owners of real and personal properties) (estate), herein after referred to as *al-Qismah* or distribution of estate is a special area of Islamic Law, which regulates how estate (real and personal properties) are distributed according to Islamic law, among the co-owners. There are, however, many ways by which the co-owners may come about the ownership of their properties. They may, for instance, own the real and pers.onal properties through inheritance, or bequest, or gift or charity, or even purchase it. How the property jointly owned may be divided among the co-owners, so that each of them can get his or her own fractional share from the whole property, through the laid down practice and procedure, is what the law of *al-qismah* stands to achieve and perfect among the co-owners. From this brief high light, the reader can see that the needs for an expert in the administration of estate in Islamic law to acquire this knowledge needs not be emphasized. He or she may become irrelevant when an opportunity to administer estate presents itself, especially where conflicts among the co-owners arise in the process.

Al-Qisma must be distinguished, therefore, from mere allocations and processing of shares, which has been erroneously named or styled as distribution of estate.

Its Origin

The origin and legality of *al-qismah* (identification of shares in the property) among the Arabs, pre-dates Islam and Shariah. It is said that *al-Qismah* was known and practised among the pre-Islamic Arabs, as indicated by a hadith, which runs thus:

> *"I heard the messenger of Allah, may Allah bless him and grant him peace, said 'A house or land that was divided in the Jahiliyya, it is according to the division of the Jahiliyya. A house or land which has not been divided before the coming of islaam is divided according to Islaam."*

In another hadith, the Prophet (SAW) was reported to have undertaken upon himself al-Qismah (division) of a piece of land at a place called al-Khaibar, in which he himself personally divided the piece of land into twelve parts (among the co-owners). The report went on to say that the Prophet (SAW) used to undertake *al-Qismah* of sheep among their co-owners.[1] From these quoted hadiths, one shall learn that at al-Qismah as part of procedural aspects in the distribution of estate, is not restricted to heirs only. It equally applies to any distribution of property to the co-owners, who are not heirs as well.

Categorization of *al-Qismah* (Identification of Shares in the Property)

Upon the adoption of *al-Qismah by* Islam from the pre-Islamic Arabia, the procedural law has been developed to such an extent that it metamorphoses into four different categories, as can be seen in this research. The transformation of the law relating to *al-qismah* from its historical sketch to what it looks today, is by no means, an achievement that can only be attributed to the Muslim jurists, through whose hard work and dedication to the service of Islam has become possible. The four category of *al-Qismah* however, consists of the *Muhaaya'a or tahaayu'un, Qismat, ar-rida wattaqwiim watta'adil,qismat al-qur'ah bi gairi taqwiim watta'adiil and*

[1] As-Sayuutii, A. (n.d.). Tanwiir al-Hawaalik Sharhun Alaa Muwatta'u Maalik, Pub. Mash'had al-Husaini, Vol 2, p. 219. Reference may also be made to al-Haafiz, A. (n.d). Masaa'il ad-Dilaala Fii Sharh Matan ar-Risaalah, Pub. Daar al-Fikir, Beirut Lebanon, at P.330-331, on Baab al-Aqdiyyah Wa ash-Shahaadaah, i.e. a chapter on Judgment and (rendering of evidence through witnesses). See also Ibn Rushd, M.A.(n.d.) Bidaayah al-Mujtahid Wa Nihaayah al-Muqtasid, Pub. Daar Ibn Hazam, Beirut, Lebanon, at P.611.

qismat al-qur 'ah wattaqwiim watta 'adiil, will be discussed briefly, here under. They are;

1. Muhaya'ah (Identification of benefits in the Property)

One of the four methods by which the estate, or an item forming part of the estate for distribution among the co-owners, or joint owners or heirs is known as *muhaaya'a or tahaayu'u.* According to the Muslim jurists, *muhaaya'a* does not aim at the distribution of the corpus *(zaat)* itself. It rather aims at the distribution of benefits being accrued from the corpus to the co-sharers or heirs. Going by this method or procedure, it is the corpus per se that rotates or passes from one hand to another among the joint owners. For a valid condition of operation of this method of distribution, Sharia makes it mandatory to identify a period within which, each of them (co-owners) may make use of the corpus, so that at the end of the period, the corpus can pass to another co-owner, by rotation.[2] In identifying the period within which the co-owner enjoys the corpus, it is not material that the length of the period shall be the same. This means that by consensus among the stakeholders, one or more co -owners may enjoy the use of the corpus for a shorter period, while others may derive benefits for a longer period than others. Another condition stipulated by Sharia for the operation of this method, is that the corpus should not be used by the hairs, in any way for the purpose of generating revenues.[3] Where the corpus happens to be a house, or a farmland, or a grinding machine, it is unlawful for any one of them (heirs) to let it on rent for revenue generating purpose. 'The method is so called *muhaaya'a* because each of the co-owners has been mandated to be in preparation to surrender, or hand over to another co-sharer the corpus of which he is in use, at the expiration of the period stipulated for him or her.[4] This method is treated by the jurists as part of the law relating to *Ijaarah* and that in the event of disputes arising among the parties, a judge

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[2] Ad-Dardiir, A. (n.d.). al – Sharh al-Kabiir Alaa Mukhtasar al-Khaliil, a commentary on a famous book of Maaliki Jurisprudence, Pub. Daar al-Fikir, vol. 3, page 498 -499.the commentator of the book (ash-Sharh al-Kabiir), occupied a special position among the Jurists of the Maaliki School of his time. His full name is Ahmad ibn Muhammad al-Khalwatii (one who belong to al-khalwati Sufii Order or movement in Egypt. He is popularly known as ad-Dardiirii, al-Allaamah and the unique of his time transmitted and rational Sciences. He was Sheikh al-Islaam and a Leader of Maaliki Jurisits in Egypt. He is their Muftii (Juri-Consultant). Nay, he was the ultimate Egyptian Jurist of his time, in all respects. He died in a year 1201 A.H Reference on this type of al-Qismah may also be made to ad-Dasuuqii, M. (n.d.) Haashiyat ad-Dasuuqii Alaa Sharh al – Kabiir, a book of commentary on the commentary of the book titled Mukhtasar al-Khaliil (ash-Sharh al-Kabiir), which was already cited above The commentary (Hashiyat ad-Dasuuqii), was Pub., by Daar al Fikir, Beirut Lebanon, at vol. 3, p. 498-499.

[3] Ibid, (ash-Sharh al-Kabiir and Haashiyat ad-Dasuuqii), at p. 498-499;

[4] Ibid at p. 448-449

is mandated to resort to application of the law relating to *ijaarah* in the disputes. Since this method of distribution is a contract of service, parties thereto are therefore free to consent to it or reject it.[5]

2. Taradii Method (Identification of Shares in the Property)

The second method of governing the distribution of estate is what is called the *taraadii or mardaat* method. As the name suggests, Shariah has given a lot of freedom and concession to the co-owners to sit and discuss among themselves mutually, as to who will take what item in the estate among themselves. Secondly price of each item of the estate so taken by the co-owner shall be properly assessed and costed, so that whatever items the heir agrees to take, has to correspond to the amount of his share in monetary terms. In the event of one or more co-sharers taking more items in the estate than their share, they are mandated to pay up an excess in monetary term. In the same way, where one or more co-owners take items of the estate, whose monetary value costs less than what they suppose to take, they must get a balance, to complete up their actual share. 'Whoever takes more than what he is supposed to take has to pay the balance in cash or in kind. This is acceptable in the eyes of Islamic law. So also is the case with the co-sharer who takes less than his supposed share, may be allocated with one or more items in the estate to balance up his share.[6]

Conditions Governing its Operation

Sharing of assets of the deceased Muslim under this method is subject to two conditions. First of all, the items must be subjected to *taqwiim*. This means that each of the items must be costed, so that their market value or coast is reflected in his share. Secondly, unlike qismat al-qur'ah, which will be discussed at its appropriate place, each co-owner is mandated to take one or more items whose market value or coast corresponds to his share. Procedures followed on how the items are [illegible]ed will be discussed at a later part of this paper. A full title to this method of *al-qismat* reads *al-qismat ar-ridaa bittaqwiim watta adiil,* which means a distribution of estate among the co-owners or heirs that is based on mutual consensus, as to who takes what, after each of the items has been subjected to its market value, having

[5] Al-Tasuulii, A. (n.d.) al-Bahjah Fii Shath at – Tuhfah, Pub. Mustafaa Baabii al-Halbii Wa Aulaaduhuu. Egypt. vol.2, p.132-133. Reference may also be made to at-Taawudii, M. (n.d.). Hulaa al – Ma'aasim Li Bint Fikir Ibn Aasim, here in after refered to as Hulaa al-Ma'aasim;
[6] Ibid (ad-Dardiirii, Haashiyat ad-Dasuuqii, at-Tasuulii and at-Taawudii) at p.498-499 and p.132-133.

been properly assessed, so that each of them can only take one or more items, whose market value tallies with his share.[7]

Wisdom of al-Qismah (Distribution of estate based on this procedure)

In considering who takes what items, the co-owners and a judge or consultant are advised to take into account the competence of each heir in managing the item of the estate that falls into his or her share. Since the stakeholders mostly rely on the competence of the judge or consultants, who has a legal and spiritual duty to advice, he can, therefore, draw their attention on the competence of each heir or co-sharer in this important issue of management. Where the co-owners, for instance, consist of an educationist, and a medical Doctor and items in the estate consists of a private school and a private clinic, for an effective management of these items, they may be advised to agree between themselves that the educationist may take the school, while the clinic goes to the medical doctor.

This is based on *maslahah* (public good or interest). This is how meaningful management of these items can be maintained, safeguarded and guaranteed among the heirs. Apart from the advantages of effective management of the property inherited by the heirs, it clears and exonerates the judge or consultant from partiality in distribution. For example, since most distributions of estate among the beneficiaries end up in open hostility and disputes, that culminate into accusation of favouring or preferring one or more co-owners over others, against the judge, or consultant, al-qisma, as a procedure is a strong shield, which not only protects the judge and consultant, but keeps them off from the dust of the arena of distribution accusation and crisis. He will be seen to be an independent judge who is free from influence of any kind, in the process of distribution. Other advantages in following this practice and procedure are the unity, understanding, and respects it injects in the co-owners. It becomes a unifying factor among the heir, by sending a message to them that the distributor was not influenced in any way in his distribution. Furthermore this procedure demonstrate the extent of knowledge of practice and procedure and certainty of the law that is being enjoyed by the judge or consultant, who posses them, that the distribution, due to its genuineness

[7] Ibid. at p.498-499 and p.132-133;

and impartiality will remain unchallenged and/or undisturbed on the event of appeal to superior courts.[8]

Lastly, in following the procedure, uniformity and universality of the system and its certainty with regard to its application are ensured and guaranteed. This is necessary, since certainty in the application of law is a treasure which learned judges, or consultant, legal practitioners, law lecturers, and their students should posses and master, with accuracy and confidence.

Conditions Governing the Operation of the Method

This method of *al-Qismah* can only operate upon fulfilling the following conditions:

i) That, each item for *ai-qismah* must be subjected to taqwiim (valuation in monetary term),

ii) That, share of each co-owner must be subjected to ta'adiil (his or her exact share),

iii) That, any *qimiyyu* item (items that are not similar to one another, in size or value, such as eggs, oranges, fruits, etc) are not subjected to distribution by costing or valuation. They are, however, procedurally distributed by counting or weighing, or measurement and

iv) That, where one or more co-owners object to this method of *al-qismah,* he or she shall not be forced to undergo or consent to it. This is because; it is bay'un or contract of sale, which parties are free by law, to agree to or reject.[9]

What Are Lawfully Permitted to be Done in the Identification or Division of Properties in this Method

A person who undertakes upon himself the distribution of estate by this method is permitted absolutely to do any one of these or be guided by them. These are:

a) One or more co-owners may lodge a complaint immediately after discovering any defects, or irregularity in the property to the extent of 1/3 of the value of the item, which falls into his share. Any complaint lodged after a year from the date of the distribution, may not be entertained.

[8] Ibid, at p.498-499 and p.132-133;

[9] Ibid, at p.498-499 and p.132-133:

b) It is lawful to combine different items of property, or estate to one or more co-owners. For instance, sheep, or chickens, or iron beds, or cooking pots may be combined to form one or more shares of the co-sharers.
c) More than one shares of different co-owners may be lamped together, and
d) That it is lawful for the co-owner that takes more items than his share to make the difference in cash or in kind to one or more co-owners with a view to balancing up his share, on one hand and their shares on the other hand.[10]

Practical Difficulty Being Experienced in this Method

Among the practical difficulties experienced by the writer, that becomes inherent in this method are:

a) Abuse of the method which is influenced by envy of the co-owners and
b) Inability or deliberate refusal to pay the balance or differences by the co-owners who take more than their share, to others who take less than what they are supposed to take.

It is worthy of note that this method of distribution is treated by the jurists as law that relates to sale. Where for any reason, disputes among the parties arise; provisions relating to the law of sale shall apply to resolve the disputes. Where-therefore-one or more co-owners neglects, or refuse or fails to balance the difference of what he or she takes in excess of his share, those that take less share, are lawfully permitted to apply for execution to be levied in his property. Where application is granted, the judge may order execution to be carried out, in the property of those that take more, but refuse to balance off the excess to those co-heirs, who take less than what they actually deserve.[11]

***Taradii* Method II**

The second *taradii* method of *al-qismah* is the same with the first taraddii method discussed above. However, the only difference in the two methods of distribution is that in the second method, subjecting each item of distribution to the market value and the requirement of adjusting the share

[10] Ibid, (al-Tasuulii, and at-Taawudii), at p. 132-133, respectively.
[11] Ibid, at P.132-133. respectively.

no matter big or small the cost may be, does not arise. In the same way, no co-sharer who opposes to this type of distribution shall be forced to accept it. Some jurists are of the view that this method of distribution is an appendage to the first method of distribution discussed above. They do not see it as an independent method of distribution which stands on its own. In the terminology of Hausa Scholars of Islamic Law, the method is known as the '*Rabon Faskare*'. However, it is a view shared by a section of the jurists that the method is an independent one, which stands on its own, the first method of distribution, discussed earlier.[12]

3. Our'ah Method (Identification of Shares in the Properties Through Balloting)

Administration of estate through a balloting method, in which each item is properly costed and its market price having been properly assessed (*al-taqwiim*), after the share of each of the co-owners, or co-sharer is properly subjected to *ta'adiil*, or adjustments to reflect his or her true share, where he takes less or more than his prescribed share, is the essence of this method. In administering the estate under Islamic law, where the co-owners of the property cannot resolve their conflict of interests, all of them must, according to Islamic law, be subjected to this method of identifying the share. It is the only method of resolving the conflicts that usually arise in the distribution of the shares or estate generally. The superiority and importance of this method comes into play, where clash of interests among the co-owners, in one or more property is noticed. This is happens where each or different groups of the co-shares, advocate for a different method that guarantees his interests, in the distribution. According to law, if this happens, all of them shall be subjected to the balloting method under discussion. Neither the judge nor the consultant undertaking distribution in this method is free to deviate therefrom. The heirs or sharers are not free, either to opt for a method other than this.[13]

[12] Ibid (ad-Dardiirii and ad-Dasuuqii), at p. 500-517. See also P.499-517 respectively.
[13] Details on how this is done practically, reference may also be done to ad-Dardiirii, ad-Dasuuqii, at-Tasuulii and at-Taawudii, p. 511-517 and 133, respectively.

Legal Requirements that Must be Satisfied in distribution of estate or Identification of Shares in the Method

For the consultant on administration of an estate under Islamic law, to be successful in the discharge of his work, he or she must observe these legal requirements. They are:

i) It is very important to know that this method of distribution applies only to *masha* (things in respect of which no shares have been physically identified, from the whole property held jointly. No co-owner can tell precisely, in what part of the property his or her share in the estate falls). Take for instance, where a person dies and is survived by his father and his widow and leaves as his estate, two heads of cows. The widow's fractional share from the two heads of cows is one-quarter ($^1/_4$), while the father is to take whatever remains, that is (3/4). Since the widow nor the father cannot identify his or her share from the whole estate, the estate, which is represented in the two heads of cows is called the *masha*. Identification of the share which each of the heirs or the 'co-owner may become lawfully entitled to by distribution of the estate is only achieved by the *qur'ah* method.

ii) *Masha* properties that are subjected to this method of identification through distribution must, therefore, be of the same kind, through out. Mixing up or lamping together of one kind of *masha* with a different kind is not allowed under this method. Where the estate consists of different items, or chattels, or under wear, such as gowns, or trousers or caps, or turbans, all the items that consists of the gown must be distributed separately, distinct from others, without mixing them up with other items of the estate. If the judge or consultant starts with the trousers, then the caps, then the turbans, he continues in this way until the distribution comes to an end. Where chattels or items of the same kind from the estate are not sufficient to go round in distribution under this method, no distribution of such items can operate. Distribution of other *mash* of the same kind has to proceed if each separate items can go around, among the heirs.

iii) *Masha* must be properly subjected to *taqwiim.*

iv) *Masha* must be properly subjected to ta'*diil.*

v) In identifying shares from *masha* estate, no cost or assessment of values in respect of it is necessary, where it happens to be a plot, or farmland. Instead, the plot or farmland is identified by *misaahah* (measurement), by a rope, or by a tape, or by a chain, whichever is applicable. This means that plots or farm lands are not distributed by cost assessment in monetary terms.

i) It is not permitted to lump together, two or more shares belonging to different heirs, or co-owners in distribution based on this method. The method demands that each share of the heir shall be kept, or appropriated separately from one another.

i) In this method, balancing up in cash or in kind is not acceptable, where the heir or the co-sharer takes more or less than his share.

ii) *Masha* that can be counted, or measured by a bowl measure, such as eggs, or fruits, cannot accept distribution by this method. The law requires them to be counted, or measured by the bowl measure, or be weighed on scales. Things that are of equal size are usually counted. Where however, such item are not of equal size, or some of them are better in quality than others, such as orange, or fruits, they are to be treated as *qimiyyun* property, in which case, they shall be subjected to *taqwiim* and *ta'adiil*.[14]

gs that may be Lawfully done in *Qur'ah* Method

) The heir or co-owner may lodge a complaint immediately upon discovering any defects in his or her share. Before accepting the complaint, he must establish by evidence that some people present at the distribution forum notice the defects.

) Upon discovering an irregularity, it is, therefore, lawful to start a new distribution, with a view to avoiding the irregularity.

New distribution can only be done if circumstances warrant that:

(i) For instance, where name of an heir who would have inherited is forgotten in the distribution,

(ii) The heir who was not known appears and makes a claim to his share, after establishing his claim in the estate, or

(iii)The irregularity may also apply to a situation where one or more legatees or a creditors, whose share of bequest or claim in the estate is forgotten, where the estate happens to be distributed extra-judicially, a review of the distribution may be possible without undue delay. But where the distribution in which the

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I (at-Taawudii and at-Tasuulii), at p.133, respectively.

irregularity is discovered happens to be done judicially, the review of such distribution by same judge cannot be possible. According to Nigerian Legal System, the irregularity can only be regularized by a judge of superior court, other than the court which had earlier conducted the distribution, in which the irregularity is occasioned. The judge of the superior court may put the irregularity aright (i) either through appeal, or (ii) through review that may be reported by a Chief Inspector of Sharia, or Area Courts, who is now designated as the Director of area or Sharia courts, depending on the designation made.

c) Where disagreement arises as to what method out of the four methods of distribution mentioned earlier shall apply among the co-owners, or the heirs, it is, therefore mandatory, for the judge or consultants to subject all the stakeholders to distribution by *qur'ah* (balloting) method, if the estate, or part of it can accept distribution under the method, and .

d) Stakeholders who lack legal capacity and those that are absent at the time of distribution may also be subjected to the method.[15]

How the Method is Applied

It may interest readers to know that there are varieties of ways through which distribution by this method may be legally and effectively achieved. This includes:

i) **Balloting in which only fractional shares are used in distribution**

Where a woman dies for instance, and happens to be survived by her spouse relict (husband), her mother and uterine brother, and has left a farmland as her estate. Going by this method in distribution of their shares, the husband is entitled to one-half ($^1/_2$), the mother to one-third ($^1/_3$), while the uterine brother will be entitled to one-sixth ($^1/_6$) of the estate. This means that the estate, or the *mashaa* represented in the farmland is to be divided into six equal portions, by *misaahah* (measurement by the rope, or the tape, or the chain). Width and length of the farmland shall be taken into account. Having done that, each of these fractional shares of the half ($^1/_2$), one third ($^1/_3$) and one-sixth ($^1/_6$) are written separately on three different pieces of paper. Each one of these pieces of paper will contain one fractional share and shall be securely folded, in such a way that their contents are not seen, or disclosed to any person. The three securely folded pieces of papers may be kept in a pillow case, or in a bag, or any other thing. Having done that, a person other than the stakeholders, will be invited to bring out from the pillow case, or the bag, one piece of paper, one after the other. Each of those pieces of papers are usually opened before the judge, or expert, or court officials or witnesses present and whatever the content discloses will be the first to be settled from the sixth potions, that is to say, where the content of the first piece of paper discloses the fractional share of one-sixth, for the uterine-brother, that portion shall be his legal entitlement in the farmland. Then, another piece of paper if taken out of the pillow case, or the bag by that same or different person, if opened in the same way, as the first one, where the second piece of paper reveals the fractional share of one-half ($^1/_2$), which may consist of portions two, three and four, may belong to another heir with his share. Finally, the last piece of paper if brought out of the bag or the pillow case, by same or different person shall go to the mother if it reads 1/3. Where the fractional shares discloses one-third (1/3), she shall take portions five and six as her fixed shares from the distributed farmland. The interpretation of this method means that only three piece of papers are required for a well-done job of this type to be done.

ii) <u>Balloting in which only Names are Used</u>

Where the experts or judicial officers decide to resort to balloting by which only names are used in lieu of using fractional shares, they are advised to adopt the explanations on balloting, in which fractional shares are used, as discussed above.

iii) <u>Balloting in which only Numbers are Used</u>

Instead of using shares or names of the stakeholders in application of the <u>*qur'ah*</u> method, however, numbers of the portions of the estate so divided among them may also be used. Take for instance, the example cited in number one (i) above, that is balloting in which fractional shares are used, in place of only three pieces of papers, in which the shares are written, Six different pieces of papers, in which numbers are written will be used. It will contain portions one, two, three, four, and six. In this third method, it is the stakeholders that are called one after the other to take the piece of papers from the pillow case, or the bag as the case may be. One of them will be called upon to take a piece of paper. Where it is the husband who takes the first piece of paper, his share will be the first portion out of the six portions of the divided property. Then a second stake holder, the uterine brother will be called upon to take another piece of paper, he may also likely take a sixth portion. A third stakeholder, the mother, when called upon to take a portion, may likely take a second portion. In the second round of the exercise, the husband may take another piece of paper, which may reveal a third portion of the estate, the mother when called upon, may take a piece of paper on which the fifth portion is written. It, therefore, goes without saying that the piece of paper on which the fourth portion is written shall go to the husband. Going by this method, it is not necessary that each stakeholder shall get his determined portion, or share of the estate serially. The number of portions which each of them is to take as his or her share is likely to get mixed up. Take for instance, according to this arrangement, the husband has taken portions one, three and four. On her part, the mother has taken portions two and five. The uterine brother, on his part, has taken portion six.

It is worthy of note that an appeal on the ground that the stakeholder is not favoured by this method of distribution, because he cannot secure his shares serially is bound to fail. It is one of the three methods of distribution approved of by Sharia.[15]

Unless it is for the purpose of disposing the piece of land by sale, qur'ah method of distribution, does not favour assessing the cost of value of the land.

Way out where Heirs with Fixed Shares Compete with Residual Sharers in Balloting *(Our 'ah)* Method

The methods of distribution explained above applies exclusively to a situation where all the heirs happen to be heirs with the specific portion of inheritance. What is, therefore, the method of distribution by balloting where the heirs with specific shares of inheritance inherit along with the residuary heirs?

Where for instance, a person dies and is survived by his widow, his mother, eight sons and one daughter and has left a farmland as his estate. In the allotment of fractional shares to which the heirs may be entitled, the widow

[15] ad-Dardiirii, ad-Dasuuqii, at-Tasuulii and at-Taawudii, at p. 511-517 and 132-133. Reference may be made to Mawaaq, M. (n.d.), Vol.5, p.571-577, al-Laabii, M. (n.d.). Jawaahir al-Ikliil Li Sharh Mukhtasar Sidi Khaliil, here in after refered as Jawaahir Ikliil, Pub. Daar al-Fikir, Beirut, Lebanon, Vol.2, P.509-577. See also at-Taawudii and at-Tasuulii, at P.134-135. Reference may also be made to Ibn Rushd, at P.611-617.

will take one-eight ($^1/_8$), the mother will be entitled to one-sixth, while the children will be entitled to whatever remains in the estate. In order to accommodate the share of each heir, the farmland will be divided into as many portions as twenty four. The widow will be entitled to three portions, the mother will take four portions, while the remaining seventeen portions will go to his male and female children, so that each male child will take two portions while each of the female children will take one portion. This will complete the twenty four parts. Like the widow and the mother, who are both heir with fixed (specific) shares, only the children will also be subjected to distribution of the seventeen parts, ·or portions, from among themselves.

First Round of Distribution

According to this method, three pieces of paper will be needed for the exercise. On the first piece the fractional share of one eight for the widow ($^1/_8$) will be written, then the factional share of one-sixth for the mother will also be written on another piece of paper and the remaining seventeen portions, for the children shall be written on the third piece of paper. If it happens at the first balloting that the piece of paper on which the remaining seventeen portions, or parts for the children appears, then, portion one to seventeen shall be counted for them (children). In the second balloting, if the second ballot paper reveals four parts for the mother, which is her one sixth, this means that, she may be entitled to take portions eighteen, nineteen, twenty and twenty one. Having done this, the last balloting paper will reveal the share of one-eight for the widow, which will be three portions, starting from portion twenty two, twenty three and twenty four of the farmland.

ii) **Second Round of Distribution**

After the conclusion of this, the children shall be subjected to a second round of *qur'ah*, or balloting method among themselves. Here, their names, or their fractional share, or the number may be used for the purpose of balloting, following the same process, until it is finally achieved as explained above.[16]

[16] Ibid. (at-Taawudii and at-Tasuulii), at p. 134-135 respectively.

Distribution of Orchard and economic trees

In the distribution of orchards or economic trees, the experts (consultant), or the judge must consider the followings:

He shall understand that:

(i) economic trees and fruits are distributed separately on one hand, from the bare land, so also the bare land on the other, from the economic trees, and

(ii) however, distribution of the fruits where they are unriped or are not matured for use, shall be deferred. They can only be distributed among the stakeholders when they become matured or ready for use.[17]

How Landed Property is Distributed

Distribution of *mashaa* (landed property) especially, where it happens to be in abundance does not pose any problem. In this case, conflicts among the co-owners do not usually arise. Conflicts, however, usually arise where the property to be distributed is very small in number and the number of the heirs to benefit from the distribution is large when compared with the small number of the estate. Another area of problem encountered in the distribution is the conflicts of interests among the stakeholders in one and same property. A self centred heir may prefer that the subject matter of distribution be sold to an outsider if he himself cannot win it to his side by inheritance. This is one of the problem ridden area, in the field of *al-qismah*. In such situation, Sharia has, however, provided solutions to the problems, in the following ways:

1. Where the item, or estate, or thing to be distributed cannot accept division at all, or
2. That it may accept division with difficulty in the sense that the benefits to be derived from each of the fragments, or parts, or portion of the thing so divided can either be rendered in effective, or its market value, or cost will become diminished, or that its usability if distributed is rendered ineffective, according to the law it shall be

[17] Ibid. at p. 134.135 and 136 respectively.

sold, so that cash realized from the sale is divided among the stakeholders.

3. Additional stipulated conditions for a house to accept divisions among the stakeholder have been added. Accordingly, any division in the house must not deny one, or more co-owners his or her right to appurtenances (*manaafi' ad-Daar*), unless of course if the heirs consent to dispense with that. Appurtenances are defined to include: provisions as to entrance to the house, a room, a court yard, a place to cook, a toilet and a bathroom in the house to be divided.

The practice and procedure that appertains to the distributions of estate and exceptions, thereto, are highlighted here below.[18]

Rule I: where the subject matter to be divided among the co-owners, or any part of it can accept division as explained above, it shall be divided forthwith among the heirs. It is only the division that can relieve each of the co-owners, or stakeholders the inconveniences of co-ownership and multiple ownership in the subject-matter.

Rule II: Where the subject matter cannot accept division, it shall be sold. Money realized be distributed to the co-sharers.

Rule III: Before the subject matter is sold, the judge or the expert shall order that it shall be taken to an opened market, through a vendor or estate agent for bargains to be made only, by interested persons.

Rule IV: Bargains made shall be reported to the judge or expert in the first place, who shall notify the stake holders and invite an interested party to buy the property, at a price slightly higher than the price earlier bargained for.

Rule V: The property shall be sold to an heir who shows interest in buying it, at the slightly higher offer done earlier on, unless, of course, other co-owners concede to the bargain, earlier made by their colleague. In this situation, he need not increase any price.

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[18] Ibid, at p. 142-143. See also Mayyaarah, M. (n.d.). Mayyaarah Fii Sharh at-Tuhfah, here in after refered to as Mayyaarah, Vol.2, P.66-67

Rule VI: Where all the co-sharers refuse to make the bargain when invited to by the judge or expert, it shall be sold to the person who bargains for it in the open market at first instance.

Rule VII: Where some among the co-owners or stakeholders are in favour of the property to be sold by bargains, while others favour the sale by price assessment, it shall be sold based on the bargain.

Rule VIII: Where some of the heirs are not in favour of the property to be sold, but prefer it to be divided among themselves, while others are in support of the sale, it shall be sold. Price realized after the sale be divided among them, and lastly,.

Rule IX: Where the house cannot be distributed due to the lack of appurtenances, but all the heirs insist that it shall be distributed among them then, no heir, however, can reject the distribution at a later date.[19]

After the house which cannot accept division, among the stakeholders, due to lack of appurtenances, is divided to them if their consent, in the view of the writer, whoever causes problems in the social set-up or living in the house, among the heirs shall be paid his portion of the property and shall be ordered by the judge to quit the house. He or she will not be allowed to be the source of the social unrest there in. Other heirs in the house will be entitled to take up his or her share of Shufa'ah (pre-emption). In this case, law of Shufa'ah shall be applied strictly.

Basic Conditions For Distribution of House

Practice and procedure that relate to the distribution of properties which accept division among the co-owners, or heirs are the same with those that apply in rules I-IX, above. See below for the highlight of these practice and procedure;

Rule I: In the distribution of houses among the beneficiaries, where some of the co-sharers of the property demand that it shall be disposed by sale, so that price realised from the sale be distributed among them. While one or some of them do not favour the sale, they rather prefer the property to be

[19] Ibid (at-Tasuulii and at-Taawudii), at p.137-138 respectively.

divided among themselves. If this happens, the expert, or the judge has to put two important things into consideration. First, he has to determine whether the property, or the house can accept division among them, according to criterion set by Shariah. That is, can the house be divided among themselves, so that no one is denied the appurtenances in the house? This means that if the house were to be divided, is it practically feasible for each of the co-owners, or co-sharers to own an entrance, is independent of the other heirs, to enable him gain access into his own portion? Is it feasible for each of them to own a room to live in?[20] Can it be possible for each of them to own a Court yard for himself in the house, exclusively when divided? Can it be possible for each of them to secure a space to enable him cook his food? Finally, can it be practically possible for each of them to own a space for toilet and bath room, in his or her share, or portion, or fragment of the house, when finally divided? Where answers to these questions is in the affirmative, then a second criterion to be taken into consideration is whether the co-sharers, or co-owners acquire ownership of the house through one or same *madkhal?* That is, what makes them the joint owners in the property? Is it sale, or gift, or charity that makes them the joint owners? Or has each of them acquired the joint ownership of the property differently? Such as one or some of them acquire the ownership of the property, through sale, while others through inheritance. If the answer to this question is in affirmative that all of them acquired the ownership through same *madkhal,* then the conflict may be resolved as follows:

a) The fact that the house can accept division among them, with each having his share and all the appurtenances, as stated above, in the event the property is distributed and

b) The fact that they acquired the ownership of the house through one and same *madhkhal,* the house shall be divided among them.[21]

Exception to the Rule

Inspite of the fact that the property can accept division among them, but where fear is entertained that one, or more co-sharers will be economically disadvantaged if it is divided, but will gain if it was to be disposed of by sale, the house shall be disposed of by sale with a view to avoid the economic loss that may be occasioned, when it is eventually divided. Take for instance, where a person dies and is survived by a widow and a son.

[20] Ibid, P.137-138

[21] Ibid, P.137-138

Going by the rule of allotting the fractional share, the widow's share is $^1/_8$ (one-eight), while the son will be entitled to a residue of 7/8 (seven-eight), in the house, the house for instance, if valued at ₦80,000 (eighty thousand) naira. On assumption that the woman's share of **1/8** in the house is ₦I0,000 while the son's share in the house is ₦70,000. If the widow were to dispose of her share by sale and argues that if the house were to be divided, her portion of 1/8 can only be sold at N8,000. But if the whole house is to be sold intact, her share will fetch NI0,000 . The son, on the other hand, objects to the sale, on the ground that it is the only house he has inherited from his late father, which he wants to use for habitation.[22]

Where this dispute becomes evident in the division, one or more co-owners to the house, who opposed the sale, but favours the division, shall be given two options. The expert or the judge must follow the procedure and court practice correctly to resolve the conflict. They are:

i) The heir who opposes the sale shall be given the option to purchase her share of $^1/_8$ in the property and annex it to his share of 7/8. In this way, the whole house will become his. He shall purchase her portion of 1/8 at a cost of ₦10,000, to avoid the anticipated economic lose.

ii) Alternatively, the house is to be divided among them. He shall compensate her ₦2,000, the amount of money she would have lost, if it where to be divided. This is the practice and procedure based on as-*Sufqa* or as-*Safaqa* (contract of sale).

In view of the interwoven nature of succession in Islamic law and other related areas of Islamic law, the judge or expert undertaking distribution of estate, must be very vast in knowledge to cover these areas of the law, which, even though are not succession, but have relevance with it, for his success in the work!

Rule 2

Going by the example cited in Rule I above, assuming that the share of 1/8 which the woman claims as her share in the house was donated to her as a gift, or as a charity, by the owner of the house, before his death, and the house can accept division between them, it shall, therefore, be divided,

[22] Ibid. P.137-138

regardless of whether or not the woman will suffer economic lose. This is because they do not share same, *madkhal*. What, therefore, makes her the co-owner in the property (house), in this last example is the contract of sale in the house. The male child, on his own part becomes the co-owner in the property by virtue of inheritance. This is because they own the house through different *madkhal* (ways). [23]

Rule 3

Where disputes or conflict arise among the co-sharers, as to whether the property is to be sold, so that price realised be divided among them. But one or more co-owners opposed the sale, while it cannot accept division among them based on the criterion explained above. If they share same *madkhal*, it shall be sold and price realised be divided among them.[24]

Rule 4

Where the house can accept division but the co-owners come by it through same *madkhal*, say a donation for the purpose of generating revenues to maintain themselves, for instance. Where disputes on conflict of interests arises as to whether it is to be sold and have the price realised distributed among them, or be divided among them, since it can accept division. The conflict can be resolved by living the house intact for the purpose intended, by the donor. It can neither be sold, nor can it be distributed. The wish of the donor (generation of revenues to the donees) shall be respected. This rule applies to anything donated for the purposing of generating revenues among the co-sharers. However, where the donees unilaterally or collectively consent to the sale of the house, it may be disposed by sale.[25]

Rule 5

Where the property can accept division after it is jointly shared by the co-owners, through same *madkhal* and was donated for the purpose of generating revenue (as explained in Rule 4 above). As long as all the co-owners have complete agreement on its sale, to have the price distributed among them, the conflicts can be resolved by disposing the house by sale

[23] Ibid, P.137-138
[24] Ibid, P.137-138
[25] Ibid, P.137-138

with a view to distributing the proceeds realized from the sale to the beneficiaries.[26]

Rule 6

Where the house cannot accept division, but is owned through same *madkhal*, in a dispute as to whether it is to be divided or sold to distribute the price, it shall be sold and money be distributed among them if the house is only used as a residence, even if it is small in size.[27]

Rule7

Where such house (See Rule 6 above) cannot be distributed and *madkhal* differs, but is used for the purpose of residence by the co-owners, and some of the co-owners favour distribution, while others object to that, the house cannot be sold, nor distributed. It is to be left intact for the purpose of habitation by the co-sharers.[28]

Rule 8

Where the house is such as in Rule 7 above, but one, or more co-owners still insists that the house shall be sold. If they do not appreciate resolution of conflict in Rule 7 above, the conflict shall be further resolved by informing the insisting co-sharers that, it is only their fractional share or portion of the estate which each of them holds that shall be disposed of by sale, so that they vacate the house or farmland. Having done that, they will no longer hold any interest in the property. That they shall be told in black and white that they lack legal competence to sell their shares to an outsider, who is not a co-sharer.[29] Rather, their share in the house shall go to other residuary co-owners, in the property, by way of ash-shuf'ah, and in proportion to a share which each co-owner holds.

Distribution of Plantations

Farm produce or plantations cannot be distributed to the co-owners until they are ripped and harvested. Where they are not riped and harvested, it is only the bare farmland that can be legally divided to co-sharers. The crops and fruits may only be distributed after they are harvested. It is lawful to

[26] Ibid, P.137-138
[27] Ibid, (at-Tasuulii and at-Taawudii), 4 at P.137-139. See also p 165
[28] Ibid, P.137-139;
[29] Ibid, (at-Tasuulii and at-Taawudii), at P.136

distribute dates and grapes on speculative basis (juzaafan) if they are ripe and before harvest.[30]

Distribution of Ornaments

Gold and silver are distributed by weight or their market value. It is possible that other precious stones may be distributed by the same method also.[31]

Distribution of Jointly Owned property by Interest Party

Where a person with defective legal capacity happens to be a co-owner, or co-sharer of *mashaa,* along with his guardian, it is, not lawful for the guardian to undertake upon himself the distribution of such property personally. However, where the guardian himself happens to be one of the co-owners, or co-sharer with a third party in the property with his ward, it is absolutely permitted in law, for the guardian to undertake the distribution of such property; it is also permitted to keep his ward's share with him.[32]

A co-owner with one, who happens to be on journey, cannot undertake upon himself distribution of the property they own jointly. Distribution of such property can only be done by an expert, or a conventional judge. After the conclusion of such distribution, the judge, or expert may request some one to keep such share for either the travelling co-owner, or the infant.[33]

1. Practice and Procedure on Omission of the Heir, or creditor, or Legatee from Getting their due Share.

Where names of the heir, or the creditor, or the legatee is omitted in the distribution list, to the extent of not getting their due, or entitlement. In resolving the conflict, the expert, or the judge must determine whether the distributed estate, or item therein, is a *mithliyyun or qimiyyun.* A property becomes *qimiyyun* where their market value differs in the sense that, some of them are more costly than others. With regard to *qimiyyun* property, their size is not the same with one another. Examples of the *qimiyyun* property are cows, horses, sheep, etc. On the other hand, *mithliyyun* property, or estate are the direct opposite *of qimiyyun.* They are property, or estate of

[30] Ibid, at P.143
[31] Ibid, at P.140-141
[32] Ibid, at P.140-141
[33] Ibid, at P.140-141

similar size, whose market value is the same with one another. Example of *mithliyyun* property is rice, or maize, or orange, or eggs, etc.[34]

In regularizing the occasioned irregularity, distribution must start afresh, where the estate affected happens to be *qimiyyun*. However, where the estate affected by distribution happens to be *mithliyyun* property, then the need to start a new distribution does not arise at all. In this case, what the omitted heir, or creditor, or legatee needs to do is just to get what will ordinarily complete his entitlement from each of the heirs, or co-owners, who benefit from distribution. Where a person dies and is survived by two male children, and has left one big sized bag of rice, which contains forty bowls measure, for instance. In the first round of distribution which the irregularity has been noticed, each of the two male children will be entitled to twenty (20) bowls measure of rice, as his entitlement. With this development (irregularity). the forty bowls measure of rice, when divided into three, will become thirteen bowl measure and one-third (1/3). The omitted beneficiary will now be entitled to take from each of the two male children, six and a half bowls of measure and what will complete one-third, in order to complete his share.[35]

As to the omitted creditor, or legatee, he shall take whatever property from the heirs, which can satisfy whatever amount of money owed to him by the deceased person. Since no distribution of estate can lawfully take place, without satisfying the creditors first, he (the creditor) is entitled to take through the court whatever property from them to satisfy his credit, even if it shall result in the heirs losing all of it. The rule which applies to the creditor is the same rule that applies to legatee. unless the donor directs otherwise, in his bequest. The law is to the effect that there cannot be distribution of estate to heirs, unless ascertained liabilities and funeral expenses are first settled, then followed by ordinary loans owed by the deceased person to others, then *zakkah* and *kaffarah* (compulsory charity and expiation), then execution of bequest, then distribution of estate by inheritance to the heirs. This is the order of claims in the estate, which must be strictly observed and enforced. With regard to the settlement of claims to

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[34] (Mayyaarah), Op cit, at p. 63; see also at-Tasuulii and at-Taawudii at page 140, 141, 142 and 143. Reference may be made to at-Tasuulii, at p.140-143.

[35] Ibn Fuudiyo, S.U. (n.d.) Ihyaa'u as-sunnah Wa Ikhmaad al-Bid'aah, Pub. Alhaji Abdul Lahi Yassaar, Kano Nigeria, at p. 214;

creditors, any distribution of estate so made to the heirs lacks legal justification if creditors are not settled. In order to settle the claim, the distribution so made must be disturbed, regardless of whether the property, or estate is qimiyyun or *mithliyyun*. 'Where, however, the heirs offer to settle the claim, without going to the extent of disturbing the distribution so made, they are legally permitted in law to do that.[36]

Practice and Procedure on Irregularity Where Property That Belongs to a third Party Finds its Way through Miracle, Or Mistake and becomes Distributed to Heirs, Or Co-owners

i) Where an estate that belongs to a third party, or one of the co-owners, happens to be distributed to the heirs or co-owners such distribution has to be set aside and a new distribution to be done excluding that property provided, if the claimant can establish ownership over the property. The heir or co-owner whose property is distributed along with the estate shall be given two options to act on one. If the cost, or price, or value of the item that falls in his share is not more than one third of the whole estate, he has an option to take back his property and in that case, distribution of the estate starts afresh. Secondly, the bonafide owner of the property, may alternatively opt to be compensated by the heirs, or co-owners, for the economic loss he suffers in his property. In this case distribution will remain intact.

ii. Where the market value, or cost of the property distributed in error, is worth one-half of the estate, the question of option to be given to the affected person cannot arise. Fresh distribution must start de novo (afresh), and

iii. Where, however, the price of the item is less than one third ($^1/_3$) of the estate, the affected heir cannot have any option other than to be compensated by the heirs or co-owners, in cash or kind.[37]

[36] Ibid, at p. 214;
[37] Ibid, at p 214;

Where the Heirs or Co-owners Discover Defects in the Share of the Property He Inherits, or Taken As His Share of Distribution

After conclusion of distribution, the heir, or a co-owner who notices one or more defects in his share shall, without delay bring this to the attention of the experts, or the judge who conducted the distribution. The complaint must be lodged within a year in which the defects are noticed. In addition to that, he is required by law to establish his claim by evidence. Upon this discovery of defects, the heir, or co-owner shall hence forth stop using the defective property that falls into his share. Defects here includes al-Jauru (injustice or al-ghibn) [38]

ILLEGAL INNOVATION INTRODUCED INTO SUCCESSION

Deliberate refusal or delaying tactics employed by guardians of bonafide heirs, in distributing estate, has become a practice for centuries, among the Hausa ethnic group, in the Northern states of Nigeria. The practice is described by Shehu Usman Danfodiyo as Satanic innovation (Bid'a ash-*shaytaaniyyah*) that manifests into four ways. Among the innovation is the practice of devouring estates left by the deceased person, by the local leaders, as if they were his bona fide heirs; [39]

The second practice includes a situation, whereby an elderly heir from among the bona fide heirs, or a person who is not a bona fide heir, such as an uncle of bona fide heirs sizes the property or estates and sits tight on it, saying that it is the property or estates of his brothers (and sisters) or nephews. He is in place of their father. He will be dealing with the property or estate. No one has a say in the property, among the heirs. He will be dealing with the property as long as he lives and after his death, another powerful and influential heir takes over the control of the property. This is an innovation, on which all the Muslim jurists agree to its illegality, in Islam. In some cases, the estate becomes devoured by such persons.[40]

The third and illegal innovation introduced, is the inclusion of members of the outer family (*zauul arhaam*), from the relatives of the deceased person,

[38] SCA/CV 93/1962 (Sharia Court of Appeal, Civil case no 93, year 1962), in which Jurist Ulaysh, M.A. was rightly quoted in a book titled Fat'h al-aliyyi al-Maalikii Alaa Maz'hab al-Imaam Maaliki, Volume 2, p. 319, by the late Haliru Binji (as he then was), Ag. Grand Kadi, Abubakar Mahmud, Ag. Deputy Grand Kadi and Kadi Abubakar Zaki.
[39] Ibid
[40] Ibid

among the heirs, in the presence of his bona fide heirs, who are not given anything from the estate. The fourth but not the last illegal innovations extend to denying the widows, their right of succession in the estate (unjustifiably) [41]

This unfortunate state of affairs is very common in Hausa Muslim settlements. It is unfortunate to see that this kind of injustice are not only condoned but are even encouraged by Emirs who claim not only to be leaders of Muslim Ummah but pretend to be those enforcing the Islamic law as well. Take for instance, the case in Iya Maiwaina vs. Mamman Captain, in which the Plaintiff/Appellant, Iya Maiwaina sued Mamman Captain, her brother's son. The Plaintiff/Appellant is Mamman Captain's paternal aunt. She complained to the court of the Emir of Kano (Muhammadu Sanusi) that she was not given her share of the inheritance which was held by the father of the Respondent, one Mallam Dahiru, who was also her brother, the Appellant and the Respondent's father, inherited from their father (Respondent's grand father) a house which the respondent's father retained, which in turn was with the respondent. "When the Emir's Court asked Mamman Captain to explain what he knew about the house he stated that the house was divided among him and his brothers thirty years before and each was occupying his part of the house."[42]

In the inquiry, (*al-bahath*), the Emir's Court referred to an old court record where the judgment was made. The Emir's court discovered that Mamman Captain, the respondent claimed the property of his father-four houses and five farms. The estate had been divided between Muhammadu (the respondent), Idi, Hassan, Dahiru, and Adamu (all these are sons of the deceased, a brother to the Plaintiff/Appellant in this case). The estate was distributed to them on the ninth of July, 1932. The complainant's representative, Alhaji Yusuf was asked by the Emir's Court as to why she had not sought her share of the property since that time. "She was away under marriage", was the reply to the court. The second reason was that the Plaintiff felt that there was no inheritance.[43] The emir's Court ruled that:

[41] Ibid,
[42] Ibid,
[43] Ibid,

1. "because (in view) of the length of time that had elapsed, i.e. 30 years (from the date of the original judgment), the Emir's Court cannot review the matter" and
2. The trial court went on to say that "the parties should go and live peacefully, since Iya did not claim her share when the distribution was made thirty years ago. The court was not prepared to change what had already been done."[44]

Iya disagreed with the judgment and appealed to the Shariah Court of Appeal on the following grounds:

1. "she had reason to believe that the houses and farmlands were the properties of her father who had died,
2. Her share of the houses and farms was not determined,
3. The emir's court deprived her of her share of the property left by her father
4. Her witnesses appear before the trial court but their evidence was not admitted, (and)
5. The only thing Mamman Captain is entitled to is the share of his father.[45]

The Sharia Court of Appeal became satisfied that Iya Maiwaina, the Plaintiff/Appellant proved her case by three credible witnesses who testified for her and whose testimony corroborated what Iya said. The Defendant/Respondent Mamman Captain refused to cross-examine the three witnesses and their evidence was accepted. The four houses and five farms clearly stood to be the property of Adamu (the father of the appellant and the father's father of the respondent).

The Northern Region al Shariah Court of Appeal rightly held as follow:

1. That the Emir's Court was in error when it refused to give the appellant the remedy sought on the ground that the appellant failed to claim this for a period of thirty years from the date of the original trial,
2. The refusal by the emir's Court to admit in evidence the plaintiff's testimony is also an error in law,

[44] Qur'an surah2, Aayah 188;
[45] Qur'an. surah 4, Aayah 29.

3. In Islamic Law, an heir/plaintiff is not legally barred to claim his her share of inheritance even if the period is more than forty years.
4. The Shariah Court of Appeal, therefore, quashed the decisions of the two lower courts.
5. The court determined that the four houses and the farms were actually the property of Adamu, the father of Iya and the father's father of Mamman Captain,
6. The Court ordered that the Chief Alkali's Court, Kano should redistribute the property to Adamu's heirs (Iya Maiwaina and Mamman Captain's father, whose share is to be inherited by his sons, i.e Mamman Captain and his four brothers), and
7. The appeal was allowed.[46]

It is observed from this judgement that an heir in Islamic legal system is not legally barred from claiming his share of inheritance from any one sitting tight on it. One of the aims of Shariah *Maqaasid ash-Shar'i* is to do fairness or *adaalah* to whom it is due. In its decisions, the Shari'ah Court of Appeal relied on vol.2 of Fat'hu al-Aliiyyi al-Maalikii containing a (chapter on *Hiyazah* or taking possession of a thing). In its judgment a relevant portion of the law was quoted by the Court as follow:

"A question has been asked concerning property in dispute between heirs which is being held by part of the heirs only – for example, land which is held for more than forty years.... A complaint brought by a woman or a section of the heirs must be heard, irrespective of the length of time".[47]

The judgment as well as the legal authority relied upon are in strict conformity with the Qur'anic injunction which directs a Muslim to keep off from devouring property that belongs to others, when it says: "Swallow not up your property among yourselves by false means."[48] In another verse, Allah says: "O you who believe devour not your substance among

[46] The Practise of denying the right of succession Persists in Present day Nigeria. It is regrettably that these sad events are not being documented. These are known through contacts, familiarity with victims or through complaints.
[47] Ibid, at p.319
[48] Ibid, at p. 95

yourselves unlawfully, but let it be a trading among you by rituals agreement."[49]

The Muslim scholars have an important role to play in educating Muslim generally, as regards the rights of the Almighty against them on one hand and the mutual rights they owe to one another on the another, with regard to devouring their wealth.[50]

Law against evasion to distribution of estate under Islamic Law

Appreciating man's spiritual weakness generally, but specifically with regard to grasping more and more wealth that belong to others, the following laws, in avoiding evasion to distribution of estate, have been provided. They are:

i. That distribution of estate under Islamic Law, no matter the length of the period of time, as long as the estate or a portion of it is physically present, must be done or effected. This manifested in the case of Iya Maiwanina, cited above. In deciding the case, the Northern Nigerian Sharia Court of Appeal, puts its reliance on volume 2, of the book, titled *FAT'HU al-ALIYYI al- MAALIKII.*[51]

ii. Where a property, whether an estate that is subject to distribution to heirs, or any other property, which is entrusted to another person, is disposed of by sale, or through other means, while co-owners in the property keep silent, they cannot complain later, after the property changes hands. The only relief available to them is to request for the share of cash, realized from the sale within one year, from the date the property was disposed of by sale.

After a period of one year, they cannot complain, unless they have valid reasons, acceptable in sharia.[52]

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[49] Kaafii, M.Y. (n.d). Ihkaam al-Ahkaam Alaa Tuhftat al-Hukkaam, Pub Daar al-Fikir, Beirut Lebanon, at p. 218, where the Arabic text provides, thus: "Wa al-Mudda'ii Li Qismat al-Bataati, Yu'umaru Fii al-Asahhi Bi al-ithbaati". This means that : "whoever claims that distribution in respect of (a particular thing) has been concluded, the onus of proving that lies on him."

[50] Al-Az'harii, S.A.S. (n.d) Jawaahir al-ikliil Sharh Mukhtasar al-Allaamah Khaliil Fill Maz'hab al-Imaam Maalik Imaam Daar at-Tanziil, here in after refered to al-Jawaahir, vol 2, at p. 254; ad-Dasuuqii M. (n.d) haashiyat ad-Dasuugii alaa Sharh al-Kabiir, Pub Daar al-Fikir, Beirut Lebanon, vol. 3, at p. 236; Khattaab, M. (n.d). Mawaahib al-Jaliil Li Sharh Mukhtasar al-Khaliil, Pub Daar al-Fikir, Beirut Lebanon, Beirut Lebanon, Vol. 6, at P. 54 and Ibid (Dassuqii), at p. 236.

[51] (Dasuuqii), Ibid at p. 234. See also the book titled Bahjah Fii Sharh at-Tuhfah, vol. 2, at p. 255 and the book titled Fat'h Aliyyi al-Maalikii, vol. 2, at p. 100.

[52] Ibid at p.

iii. As long as the estate subject to distribution exists or can be identified, Islamic Law presumes that the property is an estate for distribution to heirs under Islamic Law. Whoever asserts that it has been distributed, must prove, by adducing two credible witnesses.[53]

iv. *Hauz* or *hiyaazah* does not operate between a father and son, unless the property is transferred by one of them, with or without consideration, with the knowledge of the other, or the property is undergoing developments, effected by the other, say, through changing the structure of the property, from its original structure, or in case of orchard, the economic trees are up rooted, or planted in the orchard or garden. For prescription to become a valid defence, improvements on the properties, as described above, have to be taking place, for a period of not less than sixty years.[54]

In the absence of improvements, two credible witnesses are sufficient to prove prescription, if the property remains in the control or possession of defendant, for a period of not less than sixty years.

v. If a property or estate that is owned jointly by co-owners happens to be transferred, with the knowledge of the co-owners, who do not protest, cannot later, challenge the transfer. Where, however, it is sold, but one or some of them, stand by watching cash realized from the sale by the co-owners, being squandered, without demanding their share of the sale proceeds, they have no claim to make, in respect of the cash proceeds, realized.

Disputes As to Whether A Particular Thing Has Or Has Not Been Distributed Among the Co-owners or Heirs

Where two or more persons, own a farmland jointly, and each of them uses a portion of the farmland for farming purposes, (diba da kauka). Later, if one of the co-owners requests for the final distribution of the farmland to be made between them. Upon making the request, one of them counters by saying that it (farmland) has formally been distributed to them. And that the fact that it has been distributed is evidenced in the fact that each of them farms a portion he inherited. If the other who asserts that the property has not been distributed, formally, says that each has only been farming a portion of the farm without a formal distribution, which is hoped to be done,

[53] Ibid. Mayyaara, at p. 65-66, see also at-Tasuuli. p. 141 Reference may be made to at-Taawudii, at p. 141.
[54] at-Tasuulii, at p. 134

at a later date and that each one of them farms his portion on loan, pending distribution.

In this case, the presumption of law remains that the farmland has not been distributed legally and formally. Farming of the two portions of the farmland has only been on loan. The burden of proof that it has been distributed between them lays on him, who asserts that. He must prove his claim by evidence of two persons of moral probity. Once he is able to do that, his claim that it has been formally distributed stands, unless of course, if the distribution needs adjustments, for its perfection. This is the law which has been based on the practice and procedure by the judges. Where the party who asserts that the farmland has been distributed fails to produce two witnesses of moral probity to prove his claim, the other party challenging that the farmland has not been distributed has to swear to an oath that it has not been distributed. Having done that the expert, or the judge shall take immediate steps for the farm land to be distributed formally. This last legal opinion is just an academic exercise, and is not the law which applies in the Maalik School of Jurisprudence.

Refusal of Co-owner to Attend to Distribution

Where the co-owners, or co-sharers, or heirs have been duly informed or notified about distribution of their property, taking place at a particular date and place, his or her deliberate refusal or failure to attend to such distribution, cannot be a ground of appeal against the distribution to be set aside.

CONCLUSION AND SUGGESTIONS

My conclusion on this brief paper will also be very brief. It is rather an appeal to the stakeholders (judges, legal practitioners, law lecturers, law students, Muslim Umma [Community or Nation] etc. It is regrettably sad to hear all sorts of allegations that other heirs are favoured unjustly in the distribution of estate at the expense of others, by the judge or consultants. In order to keep off from this dirty arena, it is suggested that the stakeholders should make efforts to acquire the knowledge of procedure in distribution of estate and apply same in appropriate cases and correctly.

Reliance on one's opinion, that is devoid of legal authority, while distributing estate to heirs, in clear violation and in disregard of the stated procedure will rather complicate issues rather than solving them. It is very important for the Muslims to remember the Qur'aanic verse, which cautions the Muslim from expressing opinions, in matters of Sharia, may it be spiritual or legal issues on ignorance. He or she should remember that he will be asked to account on his hearing, his seeing, and how he uses his intellect, in the here after.