



A NEW GUIDE TO THE PRINCIPLES AND PRACTICE OF MĪRĀTH IN NIGERIA

**A Compendium of Course Materials for Al-Hikmah University
Professional Certificate in Islamic Estate Distribution (PCIED)**

Edited by
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Centre for Islamic Heritage, Al-Hikmah University, Ilorin

IN MEMORY OF
LATE HON. JUSTICE ABDULKADIR ORIRE (RTD), CON
The Pioneer Grand Kadi, Kwara State Shari'ah Court of Appeal
and the First Sarkin Mallami of Ilorin Emirate



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AND PRACTICE OF MĪRĀTH IN NIGERIA

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A NEW GUIDE TO THE PRINCIPLES
AND PRACTICE OF *MĪRĀTH* IN NIGERIA

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Professional Certificate in Islamic Estate Distribution (PCIED)

DEDICATED TO
LATE HON. JUSTICE ABDULKADIR ORIRE



PROFILE OF HON. JUSTICE ABDULKADIR ORIRE, CON

Justice Abdulkadir Orire was born on the 28th day of December, 1934 at Obaninsunwa in Ilorin, Kwara State. He had his primary and secondary education between 1943 and 1951 in Ilorin, after which he attended Kano Islamic Law School from 1951-1955. He always came first in class in all subjects. That is why when he was leaving secondary school, the head teacher wrote in his certificate: "All-round pupil of very good character and one of the best in the class".

After his completion of secondary school, he went to the School of Arabic Studies in Kano after which he was appointed to teach at Baboko Primary School, Ilorin. He later got scholarship through Mayflower to study at the School of Oriental and African Studies (SOAS), London where he studied Language and Law and obtained a Diploma from the School in 1961, and a Bachelor of Arts degree from the University of London in 1964. He came back to Nigeria and took up a teaching post in one of the special schools in Zaria, Kaduna State, known as Barewa College, where he taught for about four years before his transfer of service to Sokoto as vice principal and later rose to become the Principal in Sokoto Arabic Teachers College.

Some of his students include the present Chief Justice of Nigeria, Justice Ibrahim Tanko Mohammed (GCON), former Governor of Niger State, Babangida Aliyu, Justices Ahmad Belgore, S. O. Muhammed, Abdulkadir Jega, Mas'ood Oredola and host of others. He was the Secretary General to the Jama'atu Nasril Islām (JNT) Nigeria during whose tenure the new secretariat was built when the old secretariat was burnt down during the ZangonKataf crisis. He was also the Pioneer Grand Kadi of the Shariah Court of Appeal, Kwara State, where he initiated the building of the present Shariah Court of Appeal complex. He was also the one who initiated the building of the Shariah Court of Lokoja, Kogi State capital.

He served for 30 years in the position of Grand Kadi of Kwara State. Among his achievements as a Grand Kadi was making the *Shari'ah* law practice and procedure popular in North Central of Nigeria. He was the Chairman, *Jama'atu Nasril Islām*, Kwara State Branch 1973-2000; Member Advisory Judicial Council of Nigeria; Chairman



Council of Ulama of Nigeria, Chairman Board of Trustees Ilorin Jumaat Mosque; President General, Islamic Missionaries Association of Nigeria [IMAN]; Vice President, Nigeria Da'wah Coordination Council [NDCC]; Chairman, *National Hijrah Ummatu'Islāmiyyah* from its inception until 2021; Former Vice-president Ilorin Descendants Progressive Union (IDPU) till 1971; one time resource person, Institute of Advanced Legal Studies; member, Nigeria Constitution Review Committee, 1987; member, Constitutional Conference, 1988-1989; member, 2005 Confab, Secretary General Jama'atu Nasrillslām of Nigeria and member, Nigeria Inter-Religious Council [NIREC].

The late jurist was a member of Law Development and International Criminal Review Committee which was among several committees on which he served. He was instrumental to the establishment of the University of Ilorin in conjunction with other prominent Ilorin indigenes. He was the Chairman, Board of Trustees to the Muslim Students' Society of Nigeria (MSSN). In 2003, the Federal Government of Nigeria found him worthy of being recognised and deserving of a prestigious National Honour. Hence, was conferred with the title of Commander of the Order of Niger (CON). He held the chieftaincy titles of '*Marafa and Sarkin Malamai Ilori*' conferred on him by His Royal Highness, Alh (Dr) Ibrahim Sulu-Gambari CFR, the Emir of Ilorin in 2006. He was blessed with many children and grandchildren.

May Allāh forgive him, reward him and grant him *Al-Jannah Firdaus*. Amin.

ACKNOWLEDGEMENTS

All praise is due to Allāh Who has not only inspired the compilation of this work but has also made it possible to see the limelight. We are indeed grateful for His countless favours on us!

Special appreciation goes to the Emir of Ilorin and Chairman, Kwara State Council of Emirs, Obas and Chiefs, His Royal Highness, Alh (Dr) Ibrahim Sulu-Gambari, CFR for giving consent and support to the public presentation of this work in memory of his former ally and a leading Muslim scholar in Ilorin Emirate. We also sincerely appreciate the support of the Founder of Al-Hikmah University, Alh Chief (Dr) AbdulRaheem Oladimeji OFR, FNAEAP, fSPSP, the Asiwaju & Jagunmolu of Igbominaland, Arogundade of Lagos and Baba Oba of Offa Kingdom. May Allāh increase him in wealth and health.

The success of this work owes much to the passionate interest of the Vice-Chancellor of Al-Hikmah University, Prof. Noah Yusuf, Fspsp who did not only support its proposition but made all resources required for its accomplishment available. We pray Allāh to increase His mercy on him. Other members of the Management of Al-Hikmah University also deserve appreciation for adding their voice to the publication and public presentation of this work.

The Coordinator of the Professional Certificate in Islamic Estate Distribution (PCIED) and Certificate in *Dāwah* and Imamship Practice (CDIP) under the Centre for Islamic Heritage, Dr Nafiu Ahmad Arikewuyo, deserves commendation for his commitment and dedication towards the realisation of this project. The former and pioneer Director of the Centre, Prof. Ibrahim Jamiu Otuyo, is also appreciated for laying a solid foundation upon which the Centre thrives. The Dean of Faculty of Humanities and Social Sciences, Prof. Lateef Folorunsho Oladimeji is also well appreciated for his usual support and cooperation.

The family and children of late Hon. Justice Abdulkadir Orire, with special reference to Barrister Musa Orire, Dr Maimunat and Dr Ismail Oloyede Orire, are all appreciated for their cooperation and support. We appreciate the Grand Kadi of Kwara State, Hon.



Justice Abdullateef Kamaldeen and other Kadis of the Kwara State Shari'ah Court of Appeal for their unflinching support to this project. The following personalities are acknowledged for proof-reading and making suggestions that further enriched the quality of this work: Prof. M.T Yahya, Dr Hamzah Abduraheem, Mr I.T Ishola, Mallam Waliyullah Adeyemi and Dr Abdul-Hameed Badmas Yusuf. Finally, we thank all the editors and contributors for their scholarly input and submissions.

Prof. Shuayb Ologele Assayuti

*Director, Centre for Islamic Heritage
Al-Hikmah University, Ilorin*

1st Ramadan 1443AH/ 2nd April 2022CE

FOREWORD

I, Hon. Justice Abdullateef Kamaldeen (Ag. Grand Kadi of Kwara State), felt honoured to write a foreword for this humble book. The book, titled **"A NEW GUIDE TO THE PRINCIPLES AND PRACTICE OF MIRATH IN NIGERIA"**, is edited by Nafiu Ahmad Arikewuyo, Abdullahi Saliu Ishola and Waliyullah Adeyemi, and published by Centre for Islamic Heritage, Al-Hikmah University, Ilorin in memory of Hon. Justice Abdulkadir Orire, (Rtd). This is not the first effort aimed at enlightening the public about the Islamic heritage and its preservation by the Centre. All the writers/contributors in this work are highly endowed with the requisite knowledge of the topic discussed herein. These scholars have authored books of different topics through which they have been distinguished among their contemporaries.

The Science of Inheritance is largely discussed because of its essence, usefulness and areas that it covers in Islamic Jurisprudence. This area of specialisation is one of the apparently rare ones that many writers find tedious to discuss because of its complexity and intricacy. What makes this work unique is its comprehensiveness in terms of terminologies/ phraseology and the tabular form applied to simplify its understanding even for the non-specialists. It is note-worthy that this work does not capture only the introduction of inheritance but it is explicit on how the real estate distribution takes place.

When I critically went through this work, I discovered that the scholars have worked and lessened our struggles especially by translating all the words of Arabic origin to the accurate meaning in English. It is also pertinent to commend the thought of honouring Hon. Justice Abdulkadir Orire of the blessed memory (the pioneer Grand Kadi of Kwara state) with this notable work. He had laboured tirelessly for the establishment and stability of Shariah Court of Appeal here in Ilorin before Allah crowned his efforts with success. Therefore, the selfless efforts of Justice Orire cannot



be quantified. I hereby pray Allah to benefit all the readers, knowledge seekers and the entirety of the Muslim *ummah* with this book.

Hon. Justice Abdullateef Kamaldeen

The Grand Kadi of Kwara State
29 Shā'bān 1443/ 1 April 2022

PREFACE

Al-Hikmah University was established by the approval of operating License 010 of the Federal Government of Nigeria and presented to the AbdulRaheem Oladimeji Islamic Foundation (AROIF) on the 7th January, 2005. As a faith-based privately owned University, part of the mandate of this citadel of learning is to operate as a conventional university, imbued with the spirit of Islām as its salient ambition. No wonder, therefore, its motto is "*Learning for Wisdom and Morality*". Aside running seven (7) academic faculties as well as a Postgraduate School and 51 academic programmes, the University established ten (10) centres for the purpose of meeting its "Town and Gown" programmes. One of such centres is the Centre for Islamic Heritage established for the purpose of pursuing, among other things, the promotion of Islamic culture, traditions and heritage.

Consequently, the Centre designed two certificate programmes, namely, Professional Certificate in Islamic Estate Distribution (PCIED) and Certificate in *Dafwah* and Imamship Practice (CDIP). Having passed through the necessary stages of academic programme developments such as the Departmental and Faculty Academic Boards, the Academic Programme Planning Committee (APPC), through the Directorate of Academic Planning (DAP), these programmes have successfully taken off. For each of these two programmes, the Centre has developed course materials. Thus, *A New Guide to the Principles and Practice of Mirāth in Nigeria* was designed and developed for participants in Professional Certificate in Islamic Estate Distribution (PCIED).

The book contains five chapters. The first chapter written by Isa Olawale Solahudeen, is on Practice of *Sharīah* in Nigeria. It details the status of *Sharīah* generally and the Muslim Inheritance Law, particularly in the Nigerian law. The second chapter entitled: Principles and Practice of *Mirāth* in Nigeria by Abdullah Saliu Ishola, focuses on the limitations, unexplored opportunities and roles of practitioners of Islamic Inheritance in Nigeria. The third chapter with the title: Theoretical Aspects of *Mirāth* written by Nafiu Ahmad Arikewuyo and Idris Abdur-Rahman, provides a comprehensive account of the major theories and workings in the field of Inheritance. The fourth and the fifth chapters,



also written by Nafiu Ahmad Arikewuyo, focus on the Practical Aspects of *Mirāth* and Literature of *Mirāth* respectively.

It is our expectation that participants, in the PCIED in particular and students of Law and Islamic studies in general, would derive immense benefits from the contents of this book. As the Muslim Inheritance Law is fast attaining a professional garb in the contemporary time, this work, hopefully, would serve as a companion and guide for the teeming aspiring professionals in the field.

Finally, we commend the Centre for Islamic Heritage under the auspices of Prof. Shuaib O. Assayouti and the University Management under the able leadership of the Vice-Chancellor, Professor Noah Yusuf, *Fspsp* for this valuable document. This book is dedicated to the pioneer Grand Kadi of the Kwara State Shari'ah Court of Appeal and the first *Sarkin Malami* of Ilorin, Late Hon. Justice Abdulkadir Orire, CON in recognition of his immense contribution to the administration of *Shari'ah* in Nigeria. May Allāh be merciful with his gentle soul. Āmin!

Thank you.

Dr Nafiu Ahmad Arikewuyo

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15 Sha'bān 1443/ 16 March 2022

NOTES ON EDITORS

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2. **Abdullahi Saliu Ishola** is a Senior Lecturer in the Department of Islamic Law, Faculty of Law, Kwara State University, Malete. He obtained his PhD from International Islamic University Malaysia. Both his Master and Bachelor degrees (LLM and LLB) were obtained from University of Ilorin, Nigeria. He is the Chief Consultant at Al-Mubeen Shari'ah Consultancy Services which is a firm involved in Islamic inheritance services. He has engaged in the distribution of several Muslim estates and handled many cases in court involving Islamic Inheritance.
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TABLE OF CONTENTS

Dedication	iii
Profile of Hon. Justice Abdulkadir Orire	iv
Acknowledgements	vi
Foreword	viii
Preface	x
Notes on Editors	xii
List of Contributors	xiii
Chapter One: Practice of <i>Sharāh</i> in Nigeria	1
Chapter Two: Practice of <i>Mirāth</i> in Nigeria	29
Chapter Three: Theoretical Aspects of <i>Mirāth</i>	46
Chapter Four: Practical Aspects of <i>Mirāth</i>	97
Chapter Five: Literature on <i>Mirāth</i>	122



CHAPTER TWO

PRACTICE OF *MĪRĀTH* IN NIGERIA

By

Abdullahi Saliu Ishola

Objectives

At the end of this course, students should be able to:

- i. explain the legal terrain under which *mīrāth* (Islamic Inheritance) operates in Nigeria;
- ii. assimilate what is required to practice *mīrāth* in Nigeria;
- iii. familiarize with the career opportunities in the practice of *mīrāth* in Nigeria;
- iv. discuss legal constraints and limitations in the practice of *mīrāth* in Nigeria;
- v. identify the roles of *mīrāth* practitioners within the law in Nigeria.

Introduction

Islamic Law is one of the three major sources of law in Nigeria, in addition to the received English Law (otherwise called Common Law) and Customary Law (A. O. Obilade, 2011; Tobi, 1996). Islamic law, like other two major sources of law in the country, enjoys an express constitutional recognition. Thus, there is a special constitutional recognition for Islamic personal law matters, which include matters of marriage, divorce, custody, *waqf*, gift, *mīrāth* and *waṣiyyah* (Constitution of the Federal Republic of Nigeria, 1999a, secs. 266, 277). Based on this, some aspects of Islamic law seem to enjoy more recognition under the law in the country than others. They are specially termed as "Islamic Personal Law Matters". Incidentally, *mīrāth* (inheritance) is one of those Islamic personal law matters (Constitution of the Federal Republic of Nigeria, 1999a, secs. 266(2)(c), 277(2)(c)). Islamic law can also be practised professionally with the attendant income and prestige. This has been referred to as *Shar'ah* Legal Practice [SLP] (i.e. Islamic Legal Practice) (Ajetunmobi, 2017)

However, Islamic personal law matters are mostly seen as a free service-oriented aspect of Islamic law except for lawyers who will charge professional fees when their services are engaged. Islamic Legal Practice seems not yet officially integrated into the legal profession in the country to the exclusive practice of legal practitioners (lawyers) alone. The implication of this is that both lawyers and non-lawyers who have expertise in the field can validly engage in the SLP.

Based on the foregoing, this course shall generally expose students to the principles and practice of Islamic Inheritance (*mīrāth*) in the Nigerian context. This is necessary because what obtains under the Nigerian law as principles under whose guide the *mīrāth* operates may not be the same with what obtains in other countries.

Summary of the Course Coverage

Students will understand relevant concepts which shall include "Principle"; "Law"; "Practice"; "Procedure"; "Inheritance". Following this, they will be introduced to an overview of the Nigerian Law, covering its meaning, sources, scope and features. Nature of Islamic Law in Nigeria as a source of law, its erroneous conception as customary law

AND PRACTICE OF MİRĀTH IN NIGERIA (PCIED)

(examining the case of *Alkamawa v. Bello*); its legislative location (Federal v State v LGA) will also be clarified. Then, *mīrāth* as an Islamic Personal Law matter would be discussed, clarifying the concept of Islamic personal law; implications within the Nigerian law; judicial approach to determination of personal law and effects on Islamic inheritance (case studies: *Ajibaye v Ajibaye*; *Giwa-Osagie v Giwa-Osagie*; *Yunusa v Adesubekan*; *Adua-Hasaan v Probate Registrar*). This course will take the students through the Personal law of Muslims and the binding nature of Islamic Inheritance on Muslims in Nigeria; dissecting the conflict of law issues involved in the nation. Then, the Legal Bases and Requirements for professional practice of *mīrāth* in Nigeria would be examined; looking at the educational qualifications; professional qualifications; and lawful career opportunities for *mīrāth* professionals under the Nigerian Law (understanding the need for *mīrāth* Chambers; *Wasiyah* Chambers; etc.). The registration procedures to establish a professional outlet for practice would also be taught. Essential Nigerian legal tools for *Mīrāth* Practitioners (i.e. the Constitution; Wills Laws; Courts Laws and Rules; Administration of Estates Law) would be highlighted. Documentation, Safe Keep and Enforcement of *Mirath* and *Wasiyyah* duly executed by professionals would be addressed (Role of the Shari'ah Experts and Firms; Roles of Shariah Court; *Mīrāth* Certificate). To conclude, this course also introduces students to Courts with Jurisdiction in *mīrāth* disputes (examining the North and the South Dichotomy).

Conceptual Clarifications

For the purpose of this course, the following terms must be clarified and understood by the students. They are:

- ❖ **Principle:** This means a law, rule or a theory upon which something is based (A. S. Hornby, 2000)
- ❖ **Law:** This means a body of binding rules regulating the actions and inactions of a man in his personal and inter-relations and interactions.
- ❖ **Practice:** It connotes the structure put in place for the application of the law.
- ❖ **Procedure:** This is the step-by-step process for the execution of the law and rights.
- ❖ **Inheritance:** It is the taking over of the property (and liability, if any) of a dead person by another person recognised as the lawful heirs or inheritors.



- ❖ **Wills:** The expression of one's intents, wish and decision on how one's affairs should be handled after one's demise in relation to one's corpse, burial, properties (estates), family, children, etc.

Nigerian Law and the Nature of Islamic Law in Nigeria

Nigerian Law is otherwise called the Nigerian Legal System. There are two meanings ascribed to the term "Legal System". These are as stated below.

Meaning of a Legal System

A legal system is generally defined as the system of law applicable in a particular society, community, nation, country or enclave distinctly applicable to the inhabitants of such community with territorial limitations (e.g. Nigerian Law). (Ishola, 2013) Also, it is a system of law applicable to a set of people based on their religious, cultural or colonial affiliation or colonial experience which applies without territorial limitations (e.g. Islamic Law; Common Law; African Law) (Cruz, 1999). These definitions led to the classification of a Legal System into two. These are as discussed below

Classifications of a Legal System

Premised on the above connotations of a legal system, two classes of a legal system have been identified, namely:

- i. Domestic or Municipal Legal System;
- ii. Universal/Global/Worldwide/Family Legal System.

A Domestic Legal System is territorially limited in its application while a Global Legal System applies without border restrictions. Three main factors usually determine application or relevance of a Global Legal System to any part of the world, since they can apply regardless of the territory. These are:

1. **Colonial Heritage/Contact:** It is common knowledge that colonialists usually introduce their legal system wherever they colonise (T. Olawale Elias, 1963). When they left the colonised territory, their legal system would still be applied by the colonised people, which might have been integrated into the legal system of



the colonised. This can be seen in the application of Common Law and Civil Law. All former colonies of the Britain have Common Law jurisdictions based on this factor. (Cruz, 1999).

2. **Religious Affiliation/Contact:** When a legal system applies by reason of religious affiliation, such a legal system will apply to the faithful of the religion. This can be seen in the application of Islamic Law; Hindu Law; Jewish Law (Abdulkadir Orire, 2001; Oladosu, 2015; Syed H. A. Malik, 2001).
3. **Racial/Tribal/Cultural Affiliation:** It is the legal system that applies by reason of the customary affiliation of a person. This can be seen in the application of African Law which is specifically called Customary Law (J. O. Ajibola, 1982; A A Oba, 2002; Abdulmumini A Oba, 2011; A. Obilade, 1973).

Meaning of Nigerian Law

Following the foregoing, it can be seen that Nigerian Law is a form of a Municipal Legal System. However, Islamic Law is a form of a Universal Legal System. By definition, Nigerian law can be described as the system of law applicable within the Nigerian territory to the Nigerian inhabitants (both Citizens and Non-Citizens). It is the "totality of the laws or legal rules and the legal machinery which obtains within Nigeria as a sovereign and independent African country" (Asein, 2005: 1). Islamic law applies in Nigeria because of the religious affiliation of the country to Islām as a religion informed by the existence of Muslim citizens in the country. This would be better appreciated when we look at the sources of law in the country.

Sources of Law in Nigeria

Sources of law in Nigeria can be grouped into Primary Sources; Secondary Sources and Tertiary Sources (Asein, 2005).

Primary Sources: Primary sources of the Nigerian law consist of the following:

1. **1999 Constitution of the Federal Republic of Nigeria (as altered) [Nigerian Constitution]:** There are two ways in which the Constitution constitutes a source of the Nigerian Law. First, every law in the country derives its legal authenticity from the Constitution (Constitution of the Federal Republic of Nigeria, 1999b,

sec. 1(1)). This implies that no law applies except it enjoys such constitutional sanction. Second, the Constitution itself contains express provisions of declaratory laws. This can be seen in the declaration made by the Constitution in the permission for any State of the Federation that desires the Shariah Court of Appeal to establish it (Ishola, 2014; Constitution of the Federal Republic of Nigeria, 1999b, sec. 277).

2. **Received English Law:** This consists of the Common Law, Doctrines of Equity and Statutes of General Application in force as at 1900 (O. Asein, 2005; A. O. Obilade, 2011; T. Olawale Elias, 1963; Tobi, 1996). Common Law is the law that is common to the whole territory of England and Wales. Doctrines of Equity are principles developed in the Chancery Courts in England. They are expressed in maxims similar to what is called *Qawā'idul Fiqhiyyah* in Islamic Law.
3. **Case Law:** This refers to the decided judgments of courts with high authority such as those of the Supreme Court and the Court of Appeal. Case Law is otherwise called Judicial Precedent (Ishola, 2013). Originally, case law connotes principles of common law and doctrines of equity (Tobi, 1996: 77). For effective operation of the Case Law, hierarchy of courts becomes imperative. This has to do with the ranking of the courts in terms of status. Thus, we have superior courts and inferior courts. The Constitution expressly designates some courts specifically as the Superior Courts of Record (Constitution of the Federal Republic of Nigeria, 1999b, sec. 6(5)) Sharia Court of Appeal is a Superior Court according to the Constitution.

In the hierarchy of courts, the Supreme Court of Nigeria (SCN) is on top followed by the Court of Appeal (CA); followed by the Shariah Court of Appeal; National Industrial Court; High Court (State and Federal) and Customary Court of Appeal (All of these courts are of the same legal status). Thus, based on the same hierarchy consideration, courts are divided into three in one dimension and two in another dimension.

In the First Dimension, there are (1) Courts of Superior Jurisdiction; (2) Courts of Coordinate Jurisdiction; and, (3) Courts of Inferior Jurisdiction. The Supreme Court is a Court of Superior Jurisdiction to the Court of Appeal and all other



Courts in Nigeria. Shariah Court of Appeal, Customary Court of Appeal, National Industrial Court and High Courts (State and Federal) are courts of coordinate jurisdiction just as Magistrate Courts, Area Courts, Shariah Courts and Customary Courts are equally of the same coordinate jurisdiction on their own part (O. Asein, 2005; A. O. Obilade, 2011; Tobi, 1996).

In the Second Dimension, there are (1) Courts of Original Jurisdiction; (2) Courts of Appellate Jurisdiction; and (3) Courts of Mixed Jurisdiction. Courts of Original Jurisdiction are otherwise called trial courts. They are courts with jurisdiction to determine a case in the first moment of the case coming to court. They are the courts where cases can originally be filed when initiating adjudication. Courts of Appellate Jurisdiction are courts which are empowered to hear cases appealed against from the trial courts. The Shariah Court of Appeal is believed to be a Court of Appellate Jurisdiction just like the Customary Court of Appeal. This, has however, been contended as the Shariah Court of Appeal is arguably capable of exercising trial jurisdiction (Abdulummini Adebayo Oba, 2004). Courts of Mixed Jurisdiction are conferred with both trial and appellate jurisdiction. Most courts in the country fall into this category including the Supreme Court; the Court of Appeal; High Courts.

4. **Customary Law:** This is the law that is traditionally and customarily applied among the people of various customs and tribes in the country. "It is a body of customs accepted by members of a community as binding on them" (Ese Malemi, 2012b, p. 65). Notable customary laws in Nigeria include Igbo Customary Law; Benin Customary Law; and Yoruba Customary Law. There are circumstances when a Customary Law will conflict with another source of law in Nigeria This can be seen in some conflicts between Islamic law and some customary laws in the area of inheritance law and practices (*Giwa Osagie v. Giwa Osagie*, 2009; Abdulummini A Oba, 2013).

5. **Islamic Law:** Islamic law is premised on the principles of Islām which are derivable primarily from the Quran and the Sunnah. In Nigeria, the applicable Islamic law is according to the interpretations of the Maliki School of Law (Abdul Kader & Ishola, 2017; Ishola et al., 2016; *Abdulsalam v. Salawu*, 2002).



6. Legislation: This is the law made by a constituted legislative authority either at the federal or state level. It is either called an Act or Law depending on whether it is made by the federal legislative body known as the National Assembly or by the state legislative body known as the House of Assembly. The Law made by the National Assembly is called "Act" while the one made by the State House of Assembly is called "Law" (Ese Malemi, 2012a).

The legislative powers in Nigeria are divided into three, namely; Exclusive Legislative Power (ELP); Concurrent Legislative Power (CLP); and Residual Legislative Power (RLP) (Abikan, 2009). The ELP is exercised by the National Assembly alone and matters under this are listed in Part I, Second Schedule of the Constitution. The CLP is shared by both the National Assembly and the State House of Assembly. This implies that matters considered as CLP can be legislated upon by both the Federal and the State, but to the extent to which each is so empowered. Also, when the Federal has comprehensively legislated on any matter under the CLP, the State would be precluded from still legislating on the same issue especially in a way that will contradict what the Federal has provided for in its own legislation. This is called the doctrine of *Covering the Field* in constitutional law (Ese Malemi, 2012a; Richard O. Akinjide, 1980). Items relating to the CLP are contained under Part II of the Second Schedule of these Constitutions.

The RLP refers to matters that are neither on the ELP list nor on that of the CLP. Such matters are within the legislative powers of the State. Such matters do not concern the federal legislative body which is the National Assembly. It is informing that matters of Islamic Inheritance and Wills are within the RCP. Therefore, it is a matter that concerns the State alone (Ahmad, 2016; Ahmad et al., 2015).

Secondary and Tertiary Sources

These are essentially aids to understanding the law. They include textbooks; journal articles; etc. Law can also be derived from other sources which are neither primary nor secondary. This includes expert opinions, etc.



Scope and Features of the Nigerian Legal System

Nigerian Legal System covers a variety of areas and it has some unique features. Thus, its scope extends to Public Law, Private Law, Commercial Law, Family Law, Civil and Criminal Law, etc (Ese Malemi, 2012b). Its unique features include Legal Pluralism (State/Federal legal systems, English Law, Islamic Law and Customary Law), Judicial Precedent (*Stare Decisis*), etc (Asein, 2005).

Nature of Islamic Law in Nigeria

It would be noted from the foregoing that the Islamic law is a distinct source of law in Nigeria. This is because of its unique nature in the country. It is erroneous to conceive of Islamic law as a customary law in the country (Oba, 2002). Legislative location of matters relating to Islamic personal law is found within the State legislative powers (Ishola, 2019). In view of this, Islamic law has been divided into two in the country namely; Islamic Personal Law and Islamic non-Personal Law such as Islamic Finance Law (Ishola et al., 2016). While all Islamic personal law matters are within the State legislative powers, legislative powers over non-personal law matters are shared between the Federal and the State respectively. Matters of commercial Islamic finance such as Islamic banking, Islamic insurance, Islamic pension, and Islamic microfinance are within the Federal legislative powers while other non-personal matter like Islamic cooperative; *zakah* and Islamic transactions are within the State legislative powers (Ahmad et al., 2015).

Also, by its nature, Islamic law in Nigeria does not yet enjoy professional recognition for its practice (Ajetunmobi, 2017). Based on this, there is no official regulatory body for the Islamic Inheritance practitioners, among other aspects of Islamic Legal Practice. This may be seen either of positive benefits or negative disadvantages, depending on one's purview. It can be considered as negative because it subjects Islamic Law Practice into a form of inferior status compared with the Common Law Practice whose practice constitutes the primary legal profession in the country except with regard to Islamic Personal Law matters dispute (Oba, 2007). On the other hand, could be positive because it opens a wider opportunities for different experts in various fields of Islamic law to

practice it without restrictions. Thus, lawyers can practise as *Mirāth* practitioners, non-lawyers can equally do. Accordingly, Islamic inheritance, as an Islamic personal law matter, must be well appreciated.

The Concept of Personal Law has been approached in two ways to determine what constitutes a person's personal law. This has culminated in the development of the theories of "Freedom of Choice" and "Consequence of Choice", respectively (Ishola, 2018). By Freedom of Choice Theory, an individual is free to make a choice of his personal law while by the Consequence of Choice, the choice made by an individual of his religious affiliation either to be a Muslim or non-Muslim will determine his personal law. This is because of the Fundamental Human Right to Freedom of Religion (Nigeria Constitution: s.38). Thus, every person has a right to either be a Muslim or not, but once the choice is made for Islām, the consequence of that choice is that Islamic Law becomes his Personal Law without rooms for further freedom of choice of personal law except if Islām is denounced (Ishola, 2018).

When a person is dead, disputes do arise to determine his personal law. When the court is approached, certain techniques are usually employed to resolve the issue. These techniques can be termed as Judicial Approach. The approach has some implications for Islamic Inheritance as the decision arrived at will determine if Islamic inheritance will apply to the estates of the deceased Muslims concerned. The judicial approach to determining the personal law is influenced by certain considerations as it affects the deceased. These are: (1) nature of the Marriage conducted in his or her life; (2) his Way of Life; (3) the *Lex Situs*; and, (4) the *Lex Domicile* of the deceased.

If the deceased contracted a statutory Marriage, it would be concluded that his personal law is the Common Law, thus, provisions of Wills Law or Administration of Estates Law would apply to his estates. Also, the court could use his way of life to determine his personal law by looking at the tribal way of life he lived. The law applicable in the location of the property (*Lex Situs*) would also be considered as the personal law of the deceased (*Giwa-Osagie v Giwa-Osagie*) and this would be considered in respect of immovable property like real estate; or the law of the place in which the deceased was



domiciled before his death (*Lex Domicile*) and this would be in respect of movable properties (Oba, 2013; Powers, 1993).

In Northern Nigeria, Wills Law and Administration of Estates Law are not applicable to the estates of deceased Muslims (Abdulumuni A Oba, 2008). Consequently, Letters of Administration is not legally relevant to the estates of deceased Muslims (Oseni, 2012). Premised on all these judicial authorities, it is contended that in determining the personal law of a deceased, the first consideration should be the religious affiliation of the deceased. Accordingly, once the deceased is found to be a Muslim, Islamic law should follow as the law to be considered as his personal law. As argued by Oba, "the law in Nigeria today is that, a Muslim is subject to Islamic personal law so long he or she professes Islām, even if he or she is not diligent in following some of the injunctions of the religion". Similarly, in the case of *Shittu v. Shittu*, per Oredola (Kadi, as he then was, now JCA), the Kwara State Shariah Court of Appeal, which has the last says on the matters of Islamic law in Kwara State (though subject to right of further appeals), also gave judicial endorsement to Islamic law as the personal law of Muslims in Nigeria when it declared as follows:

The point to be made is that a Muslim and as long as he or she professes Islām, he has no option or choice regarding the application of Islamic law – personal or otherwise onto his person. Having voluntarily assumed the status of a Muslim, he or she is disentitled from accepting or rejecting according to his or her whims and caprices. He cannot back out therefrom and he must not allow anybody to either encourage or discourage him therefrom. There cannot be a superimposition or juxtaposition of customary. There cannot be a superimposition or juxtaposition of customary law over Islamic law. It cannot be done. It is never done.

Also, in the case of *Ajibaiye v. Ajibaiye*, per Sankey JCA, the Court of Appeal, while equally emphasizing that Muslims are the persons who are subject to Islamic Law, acknowledged the fact that: "it is Muslims, (as opposed to adherents of other religions), who are subject to Islamic Law". Finally, in the case of *Alhaji Agbebu v. Shehu Bawa* the point was equally made that;

Once a person is born into Islām or converted into same when he merely has to believe LAILAHA ILLA ALLAH MUHAMMED



RASULULAH (meaning "I accept the oneness of Allah and the Prophethood of Muhammed (SAW)") he is a Muslim and Islamic Law becomes the personal law of the person.

Islamic Views on Notable Customary Inheritance Practices in Nigeria

There are some notable inheritance practices in Nigeria which deserve Islamic law views on them to be clarified. These are *Igiogbe*, *Oriojori* and *Idi-Igi*. The *Igiogbe* inheritance system applies in Benin and some other parts of Edo in Edo State (Uchendu, 2010). It is a customary inheritance by which the eldest son of the deceased will inherit his last place of abode after performing requisite final burial rites while '*Ori ojori*' and the '*Idi-Igi*' inheritance principles are applicable among the Yoruba. They are inheritance systems by which estates of the deceased are shared pro-rata per child excluding the widow(s) [*Oriojori*] or by sharing the inheritance equally among the widows without allotting any share to the children except to attach their benefits to the shares allotted to their respective mothers (*Idi-Igi*). It is glaring that these inheritance practices are contrary to the Islamic inheritance principles (An-Nisāu: 7-14).

Statutory Estates Administration System and Islamic Inheritance Law

The administration of estates in Nigeria, other than Islamic law and customary system, is regulated by legislation otherwise called statutes. Relevant statutory instruments are Wills Law and Administration of Estates Law. The Wills Law applies to those who married under the Act and left a Will and can also apply to whoever makes a Will according to the stipulations in the Law. Administration of Estates Law applies where a person died without leaving a Will behind. While a person who left a Will after death is considered as having died testate (Testacy), the deceased who does leave a Will is referred to as having died intestate (Intestacy). These terms are not applicable to the Islamic inheritance system. A Muslim does not and cannot die intestate (Orire; Ambali; Oba; Oniye; Ishola). As an Islamic inheritance practitioner, this term must be embraced.

It is also significant to state that the process called Probate by which the estates of a deceased would be submitted to the supervision of the High Court and obtain authorisation, referred to as Letter of Administration before dealing with the same, is also not relevant to Islamic inheritance practices in Nigeria (*Adua-Hassan v Probate*



Registrar). Similarly, appointment of Executor or Administrator through a Letter of Administration is also not relevant.

Legal Bases and Requirements for Professional Practice of *Mirāth* in Nigeria

As earlier observed, there is no official regulatory body for the practice of Islamic Inheritance. Therefore, no official educational qualification or professional qualification is spelt out for it. Attaining a professional status and recognition in the field remains till now a self-made effort. This should however not be a yardstick for not living up to the standard and expectation in terms of both educational qualification and professional competence. This cannot be compromised given the wide lawful career opportunities which can be explored in the field by the professionals under the Nigerian Law. Thus, such professionals can open *Mirāth* Chambers; *Wasiyah* Chambers; Training Centre; etc. This can be achieved legally by registering with the Corporate Affairs Commission (CAC) either as a Business Name or limited liability company. To effectively practice as professionals, the *Mirāth* Practitioners must be familiar and study certain Nigerian legal tools. These involve the Constitution; Wills Laws; Courts Laws and Rules; and Administration of Estates Law.

Measures for Resolution of *Mirāth* Disputes under the Nigerian Law

When disputes arise in respect of any *Mirāth* and the disputes cannot be resolved amicably among the heirs, the next option is for them to approach the court. This necessitates the need for a '*Mirāth*' Practitioner to understand the appropriate court to be approached. It must be noted that the Practitioner may be involved in the court case either as a party or as a witness depending on how the dispute concerns the estates he has distributed. Therefore, courts with jurisdiction (adjudicatory powers) in *Mirāth* disputes must be understood. As earlier noted, this would only concern State Courts. Courts with jurisdiction in Islamic inheritance vary from one State to another and especially differ from the North and the South (Chiroma, 1993; Oseni, 2012; Salisu, n.d.).

In Northern part, Area Courts and *Shari'ah* Court are the trial courts while the appellate courts are the *Shari'ah* Court of Appeal, then the Court of Appeal and then the Supreme Court. In the Southern part, there is a Private Pseudo-Judicial Scheme known as



Independent *Sharī'ah* Panel (Lagos, Osun, Oyo, Ikire). Recently in Lagos State, the State judiciary has dedicated a specific customary court that would attend to the adjudication over Islamic personal law matters and this would include the Islamic inheritance. Even though Muslims see this as a good development for administration of Islamic law in the State, the Constitutionality of this arrangement remains debatable.