

Unclaimed Inheritance: The Need to Strengthen the Process and Amend the Federal Constitution

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ABSTRACT

Due to British colonization, Islamic inheritance laws dealing with lineage of inheritors and death with or without a will were placed in the State List of the Federal Constitution. Non-uniformity exists between these laws and also in the administration of the Syariah Courts in all states. Syariah Courts are authorized to issue Faraid certificates and endorse a will but do not have the jurisdiction to distribute Islamic inheritance. Thus, Muslims have to claim rights to Islamic inheritance at other respective institutions, namely Amanah Raya Berhad (ARB), Civil High Courts and Office of Land and Mines (Land Offices). Submission of claims can only be made in the state wherein most of the assets are located. The above limitations have over the years caused Muslims time and money before they are able to realize their rights on any Islamic inheritance. Would amending the constitution or enacting new state laws be the best solution at present to minimize time and money incurred by clients?

Keywords: *Syariah-compliant, Faraid, inheritance laws, amendment, Federal Constitution*

INTRODUCTION

This paper is part of an on-going research on issues and challenges that clients have to deal with when claiming rights to Islamic inheritance in Malaysia. Due to the effects of British colonization on the legal system of Malaysia, four institutions were set up to manage Islamic inheritance. They are Amanah Raya Berhad (ARB), Civil High Courts, Syariah Courts and Office of Land and Mines (Land Office) (2006). The jurisdiction of the Syariah Courts has also been restricted. Because of this, clients who wish to process their claims to distribute Islamic inheritance will face great difficulties in terms of money and time.

The focus for this paper will be the class of Islamic inheritance called Small Estates. At present, clients can claim their rights to Small Estates by submitting completed forms to the Land Office. They can self-apply, or they can contract the services of lawyers or apply through ARB (M. F. Abdul Rahman, 2008; Lee, 2008; Mahamood, 2006; W. A. H. Wan Harun, 2009).

At present, there is a huge volume of unclaimed inheritance worth RM72 million and this value will increase to RM38 billion, if the assets are converted to liquidities (BERNAMA, 2010; *Dewan Rakyat Parlimen Kedua Belas Penggal Ketiga Mesyuarat Pertama Bil. 11*, 2010). Some of the title deeds are still in the name of the deceased (Salam, 2006). The present trend movement indicates that the number of unsettled inheritance cases have been on the rise beginning 2005 (Ahmad & Laluddin, 2010). This paper acknowledges that there is a need to address this serious problem.

There are a few basic premises that must be fulfilled in order to tackle this problem. Firstly, the Muslims clients would like to be assured of a Syariah-compliant Islamic distribution. Thus, there is a need to understand the principles upon which the administration and distribution process should be built. Secondly, there is a need to look back at history to understand the impact of British colonization on the legal system of Malaysia. These changes have also affected the administration and distribution process of Islamic inheritance.

At present, the limitations of the legal system and the need to abide by Syariah-compliant principles put together have not been able to produce one single complete system that can handle the whole management and distribution process of Islamic inheritance. Would amending the legal system be a practical and tangible solution to minimizing time and money spent by clients to claim rights to inheritance?

To answer this question, this paper will proceed in the following manner: 1) *Syariah*-Compliant Principles for inheritance management and distribution, 2) Impact of history on administration and distribution of Islamic inheritance, and 3) Issues and problems related to the rise in volume of unclaimed inheritance. After that, in the discussion and conclusion section, the paper stands to establish that there must be amendments made to the constitution and State Laws. However, the paper wishes to emphasize that constitutional amendments may not be the most tangible and practical solution to the current inheritance distribution problem that involves expensive cost and lengthy process time.

SYARIAH-COMPLIANT PRINCIPLES FOR INHERITANCE MANAGEMENT AND DISTRIBUTION

To ensure *Syariah*-compliance in the administration and distribution process of Islamic inheritance, a client has to complete two processes before submitting a completed claim form to any institution. In particular, if it involves Small Estates, then the submission should be done at the Land Office. The first process involves settling funeral expenses that cover costs for bathing, shrouding and burying the deceased person, paying unpaid debts and executing a will, if one is present (Abdul Hai 'Arifi, 2000; Awang, 2008; Bakar, 2006; Zuhaili & Ali Shabuni, 2010).

The second process involves activities where clients validate three (3) types of documents (W.A.H. Wan Harun, 2011). These documents include documents to certify death of the deceased, a list of legal heirs and sharers, and documents to certify the existence of inheritance. This is done in order to comply to the principles of *al-mauruth*, *al-warith* and *al-muwarrith*, respectively (M. F. Abdul Rahman, 2008; Awang, 2008; Zuhaili & Ali Shabuni, 2010). Unfortunately, over the years, these processes have proved to be difficult to majority of clients. They have to incur spending lots of time and money before their claims are realized (M. F. Abdul Rahman, 2008; Bakar, 2006; W.A.H. Wan Harun, 2011; Yaacob, 2006).

IMPACT OF HISTORY ON THE ADMINISTRATION AND DISTRIBUTION OF ISLAMIC INHERITANCE

Islamic inheritance distribution relies very much on the legal system. This section will detail out the changes that took place after independence. It will also describe how these changes have affected the heirs of Islamic inheritance.

Before independence, there were efforts by the British to displace Islamic laws and marginalize the *Syariah* Courts. After independence, the effects of such efforts led to the inheritance of a dual system of Courts. The larger portion of the constitution falls within the jurisdiction of civil Courts. All Malaysians are subject to this jurisdiction. On the other hand, *Syariah* Courts only have authority over all Muslims (Mohamed Ibrahim, 2000; Z. Zakaria, 2006). However, in cases involving testate deaths, Muslims have to apply for the probate and letters of administration from the High Court (Marican, 2004). Thus, a case may be handled by both courts.

In the present legal system, the *Federal Constitution* comprises of three lists: Federal List, State List and Concurrent List. Amendments to the Federal and State Lists can only be passed by the Parliament and the Legislative Assembly respectively. The Concurrent List, however, can be amended by both Parliament and the Legislative Assembly (*Rakyat Guides* 3, 2010).

British colonization has caused the Islamic Laws on inheritance to be placed in the State List (Ahmad Bustami, 2007; Buang, 2006b; Federal Constitution, 2009; Mohamed Ibrahim, 2000; Sulaiman, 2006). Only Legislative Assemblies can draft and then enact State laws to amend these Islamic Laws. This will help to expand the authority of the *Syariah* Courts (Buang, 2006a, 2006c; Shuaib, 2007; Sulaiman, 2006).

At present, *Syariah* Courts are not conferred enough jurisdiction by the legislature to adjudicate on some issues such as those involving probate and letters of administration (Marican, 2004). That does imply the need to expand the jurisdiction of the *Syariah* Courts (Ahmad Bustami, 2007; Buang, 2006a, 2006c). This paper tends to agree with the opinion that judges should read more into the legislative intent behind the provisions and be able to address central issues placed before them that are within the jurisdiction of the *Syariah* Courts. Unfortunately, this did not quite take place in the *Jumaaton vs Raja Hizaruddin* case (Ahmad Bustami, 2007; Marican, 2004; Mohamad, 2008; Shuaib, 2003).

In addition, Islamic Laws are not uniformly similar in all states (Buang, 2006a, 2006c; Sulaiman, 2006). Consequently, there is also no uniformity in the administration of the *Syariah* Courts in all states. Because of this, inheritance claim is confined within the state in which the asset is located. If there are many assets, the claim can be made in the state with the larger number of assets (Mahamood, 2006). It would be taxing on a client in terms of money and time to have to claim his inheritance outside the boundaries of the state within which he resides. Thus, this calls for efforts by the *Syariah* Judiciary Department to push for better uniformity in the administration of the Islamic Laws across the states.

It is important to note that there were initially four institutions set up to manage Islamic inheritance in order to overcome the limitations of the legal system. These institutions are ARB, Civil High Courts, *Syariah* Courts and Land Office. *Syariah* Courts command a limited jurisdiction, hence are only able to issue *Faraid* certificates to confirm the list of legal heirs and sharers of an inheritance and their proportionate allocations to the inheritance and to certify a will, if one is present. However, they do not have the jurisdiction to issue an Order for Distribution (M. F. Abdul Rahman, 2008; Buang, 2006b; *Federal Constitution*, 2009; Mahamood, 2006). This further limited the legal system. Hence, clients can only claim to distribute inheritance at the other three institutions (Mahamood, 2006; W. A. H. Wan Harun, 2009). In particular, clients claiming rights to Small Estates have to submit their claim forms at the Land Offices (M. F. Abdul Rahman, 2008; Mahamood, 2006; *Pembahagian Harta Pusaka Kecil*, n.d.; W. A. H. Wan Harun, 2009).

This paper will continue by taking a look at the Small Estates (Distribution) Act 1955 which has undergone many changes since its inception. The amendment to this act proposed a redefinition of the term “Small Estates” by substituting the words “six hundred thousand ringgit” in Subsection 3(2) of the principal Act with the words “two million ringgit.” Thus, the current definition of the term “Small Estates” includes all assets worth not more than RM2 million (Sittamparam, 2009; W. A. H. Wan Harun, 2009).

The amendment took effect on September 1, 2009. Migration of cases fitting the definition from the High Courts to the Land Offices took place, causing a 30% increase in the number of claims to Land Offices (“Redistribution of small estates made easier,” 2010). Thus, majority of cases are now handled by Land Offices (Sittamparam, 2009). This, however, has not managed to lessen the number of backlogs in the system.

Although 87% of all cases submitted as of December 31 2009 were resolved, Land Office was only able to process and settle about 40% of all first-time cases and only about 30% of follow-up cases submitted in the Fourth Quarter of 2010 (*Pencapaian Piagam Pelanggan bagi suku tahun ke Empat 2010 (Oktober – Disember)*, n.d.). Can this achievement indicate that constitutional amendment has helped lessen the number of backlogs in the system? Is this achievement a sign that the system has managed to minimize the lengthy time and costly expenses a client goes through to process a claim?

ISSUES AND PROBLEMS RELATED TO THE ACCUMULATING VOLUME OF UNCLAIMED INHERITANCE

Wan Harun (2011) reported statistics for the year 2007 of number of applications to claim inheritance at the Land Offices in Perak. The statistics indicated that the percentage volume of cases claimed was still very small. This paper observed that only about 21% of claims were made in the year of death and this percentage dropped to 18% in the second year after death, and dropped further to 6% in the seventh year after death. However, the percentage increased to 19% twenty years after death but decreased back to 2% and 1% for deaths that took place fifty and seventy years back, respectively. Interestingly, there were still cases involving deaths in the 1950's and deaths that took place more than 70 years ago (W.A.H. Wan Harun, 2011).

As observed, the increment occurred for claims made twenty years after death took place. However, decrements took place before and after that period. Does the increment imply that the process to locate heirs and sharers gets to be easier in that particular period of time? Is it also safe to assume that the decrements took place because the process to locate the heirs and sharers was tougher in these two time periods?

Inheritance cases have been left unclaimed for many reasons. Yaacob (2006) reported that it may take up from three to ten years to complete a claim process. He also stated that there were cases that prolonged to more than twenty years. Previous discussion has highlighted the effects of the limited jurisdiction of the *Syariah* Courts on the administration and distribution process of Islamic inheritance. Could it also be because it

was difficult for clients to complete an inheritance claim form? Were the enhancements introduced into this system also unable to lessen the number of unclaimed inheritance? To answer these questions, next paragraphs will discuss according to the following topics: 1) Difficulties incurred by clients to complete an inheritance claim form, and 2) Effect of IT enhancements on number of unclaimed inheritance.

Difficulties Incurred by Clients to Complete an Inheritance Claim Form

Any claim forms submitted to the Land Office must be enclosed with all the required documents before they can be processed (*Pembahagian Harta Pusaka Kecil*, n.d.). At present, majority of clients are just unaware of the correct procedures and processes to follow, thus are confused and do not know how to proceed to claim rights to inheritance (Abd Ralip, 2011; M. F. Abdul Rahman, 2008; Kurang faham punca pengagihan harta lewat,” 2010; Mahamood, 2006; W. A. H. Wan Harun, 2009; Yaacob, 2006).

Clients are not able to proceed with the claim process because they do not know the procedures (Abd Ralip, 2011). It is normal to see a client doing a formal search of the databases or request a copy of the death certificate at the National Registration Department one minute and the next minute the same client is seen at the High Court or in front of a Commissioner for Oaths trying to produce a Form of Declaration in place of an untraceable death certificate (Mahamood, 2006; W.A.H. Wan Harun, 2011).

Sometimes documents go missing and cannot be traced. To overcome this, copies of lost documents must be trace at different agencies (M. F. Abdul Rahman, 2008; Mahamood, 2006; W. A. H. Wan Harun, 2009; W.A.H. Wan Harun, 2011). Missing documents may lengthen the time to compile documents to be submitted along with the claim forms. Efforts to trace these documents at the respective institutions or agencies are costly.

Clients have to endure lengthy process time and also costly expenses. When clients have to deal with ARB or lawyers, they will feel the bane of having to pay hefty fees. ARB charges around two to three percent on the value of Small Estates while lawyers polled by the New Straits Times charges between one and 1.5 percent on the value. Lee (2008) stated that not many are aware that Land Office charges a lower process fee. The settlement fee for Small Estates cases at the Land Offices is as low as RM10 and as high as 0.2% of the value of the estates (*Pembahagian Harta Pusaka Kecil*, n.d.).

Effect of IT Enhancements on Number of Unclaimed Inheritance

The e-government in Malaysia was set up to change the manner in which the government bodies operate and deliver public service. The IT advancements were also made to lessen the problems of delay in the management of inheritance, such as e-*Shariah* portal (“E-*Syariah* making courts efficient,” 2007; N. Zakaria, 2004), USM’s e-*Faraid* software (Abd Majid & Mt Piah, 2005; S. Hamzah, 2002) and e-*Tapp* system (*Manual Pengguna Modul JKPTG Online - PPK, 2011*).

Syariah Courts uses the current e-*Syariah* portal (“E-*Syariah* making courts efficient,” 2007; N. Zakaria, 2004). On the other hand, Land Offices use the e-*Faraid* software designed by Universiti Sains Malaysia and this software is embedded in the e-*Tapp* system (Hussain, 2007; USM Plans to Export Software,” 2002). Prior to these advancements, *Faraid* certificates were produced manually. Therefore, with respect to the distribution of Small Estates, this paper acknowledges that e-*Faraid* has helped to simplify the distribution process at Land Offices by lessening the process time (Ab Raof, 1998; USM Plans to Export Software,” 2002). In addition, public managers have testified that e-*Syariah* has helped to reduce the number of backlogs and improve time taken to complete a trial (Muhammad, 2009), thus, reduce time to solve some backlog cases on Islamic inheritance.

Hussain (2007) pointed out some inaccuracies in solutions provided by e-*Faraid* and e-*Syariah*. This paper emphasizes the need to re-examine the system because there arise the question of non-*Syariah* compliance of the system.

Amidst these enhancements, the number of unclaimed inheritance cases kept increasing (Ahmad & Laluddin, 2010; *Dewan Rakyat Parlimen Kedua Belas Penggal Ketiga Mesyuarat Pertama Bil. 11, 2010*). Thus, it would not be wrong to imply that time reduction attributed to e-*Faraid* and e-*Syariah* is minimal. This paper is of the opinion that the central issue to be dealt here is the issue of not having one network model with proper guidelines for flow of processes and beneficiaries.

RELATED STUDIES AND SUGGESTIONS FOR IMPROVEMENTS

Over the years, clients incurred difficulties preparing the necessary documents for inheritance claim purposes. This has caused the accumulation of unclaimed inheritance. The normal time taken to complete an inheritance process is around three to ten years and may prolong to about twenty years (Yaacob, 2006). Land Offices will only process completed forms (W.A.H. Wan Harun, 2011).

Previous studies have looked at the Islamic inheritance distribution from different perspectives and have offered suggestions to improve the situation. Some studies suggested amending certain laws or drafting and enacting new laws or statutes to improve the functions of the *Syariah* Courts (S. G. Abdul Rahman, 2006; Awang, 2008; Buang, 2006a, 2006c; Disa, 2009; Mahamood, 2006; Mohamad Cusairi @ Khushairi, 2003; Mohamed Ibrahim, 2000; Muda, 2009; W. A. H. Wan Harun, 2009) or to expand the jurisdiction for *Syariah* Courts (Ahmad Bustami, 2007).

In particular, Article 121 (A) was an amendment introduced into the Federal Constitution in 1988. It stated that the Civil High Court and its' subordinate Courts do not have any authority over matters under the jurisdiction of the *Syariah* Courts. The amendment was intended to avoid conflicting orders made by the civil Courts and the *Syariah* Courts over similar matters (Mohamad, 2008). However, there still exist many areas where conflicts may arise because some procedural jurisdiction still lie with the Federal Constitution such as the Probate and Administration Act 1959 (W. A. Hamzah & Bulan, 2003; Marican, 2004; Mohamed Ibrahim, 2000).

Mohamad (2008) emphasized that it was important to have a system that can help to decide which Court should best hear a case given three situations, i) a member of the parties involved is not a Muslim and the *Syariah* Court does not have jurisdiction over non-Muslims, ii) Case involves issues within the jurisdiction of the *Syariah* Court and also the Civil Courts, and iii) A case within the jurisdiction of the *Syariah* Courts but has some constitutional issues tied to it. Mohamad proposed that both situation i) and ii) can best be settled by either forming a union of the two Court systems, or maintain the existing structure of the courts as they are.

Mohamad suggested that when two courts have to unite, common law cases will be heard by judges trained in common law while *Syariah* cases will be heard by a *Syariah* judge. A case involving both common law and

Syariah issues should be heard by two judges, one common law judge and one *Syariah* judge. In proposing this suggestion, Mohamad added that this suggestion would not be politically feasible.

In implementing the second suggestion, no consideration should be given to the religion of the parties involved. Thus, when cases involved both law issues arise, Mohamad suggested that the cases be heard by the common law Court presided by two judges, one from each Court system. However, he added that this suggestion would also be considered highly politically sensitive.

There were also suggestions to centralize all institutions handling Islamic inheritance (Mohamad, 2008; Mohamad Cusairi @ Khushairi, 2003; W. A. H. Wan Harun, 2009). This paper finds this not practical since *Syariah* Courts are under the purview of the respective states. Mohamad (2008) stated this would be possible if harmonization can take place between the court systems, however the decision was up to the legislature and not the courts.

Other studies encourage heirs to set up family holdings for land with shared deeds and forming a fund to buy lands that can undergo development (Buang, 2006b). This suggestion will only be applicable to specific situations. It was also suggested that the government use the *siyasa syar'iyah* approach to promote a paradigm shift from applying *Faraid* to inheritance after death to promoting the application of *wasiyah* and *al-wisoyah* to manage and disseminate wealth before death to eligible heirs (Ahmad & Laluddin, 2010). The practicality of this approach may not be acceptable to some people for the simple reason that appreciation of wealth may occur over time and the decision to divide wealth will still have to be agreed upon after death has taken place.

Some of these suggestions have materialized and have simplified the inheritance and distribution process, except for the suggestion to centralize the institutions handling Islamic inheritance which would need the approval of the legislatures. Amendments take a long time to be passed and enacted, thus they are not tangible and practical solutions to solve current problem of lengthy process time and high costs in the administration and distribution of inheritance at the moment. However, they signal the need to investigate and analyze the distribution problem further.

SIGNIFICANCE OF DISCUSSION

Unlike the Constitution of the United States which was amended only 30 times over a period of 230 years, the Malaysian constitution has undergone amendments 40 times in the period between independence in 1957 to 2010 (Faruqi, 2011). However, in the years after 1957, changes made to the constitution have not been able to lessen the number of unclaimed inheritance. Although this article agrees that there should be a major change to the constitution through constitutional amendments, it would be better if the following problem be analyzed again to find a better and practical solution to the problem of lengthy delay and high costs.

Mohamad (2008) stressed that in the present system, harmonization processes between the Court system will work well to settle cases involving matters under the jurisdiction of both Courts but there will always be added delays and additional costs to incur. He pointed that this anomaly can only be settled by the legislature and not the Courts. He also pointed out that the central issue at present is to find a mechanism for conflicting matters between the two Court systems, thus the issue of whether or not the *Syariah* Courts will have jurisdiction to distribute inheritance will still be pending.

This paper would also like to support the idea of having a Family Court as part of the Malaysian Judicial System as proposed by the Deputy Minister in the Prime Minister's Department, Datuk Shahrizat Abdul Jalil in 2000 to deal with matrimonial and family matters. Chelvarajah (2000) wrote that the Bar Council has considered the proposal and supported the idea because it would promote specialization as well as inject more humanitarian values into family and matrimonial matters and there will be lower legal fees. Chelvarajah also emphasized the need to look at the implementation of the Family Court in Australia to determine the requirements for establishing one such court in Malaysia.

CONCLUSION

Although many efforts have been done to cater the problem of lengthy time and costly expenses in the current distribution and inheritance process, the increasing number of unclaimed inheritance signals the need to fasten the administration and distribution process of Islamic inheritance. This paper acknowledges that constitutional amendments can help simplify the

system further but they take so long to be passed. There is a need to look for a more practical and tangible solution to the problem, thus, this paper wishes to highlight one of the novel contributions of this on-going research in constructing a network flow programming model to generate a set of guidelines for flow of processes and beneficiaries in the form of an easy to use network that would not only minimize time but also cost.

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