

Durham E-Theses

The concept of tarikah in the Islamic law of succession with special reference to the practices of the civil courts and the Syariah courts in Malaysia

Mohamad Asmadi bin Abdullah

How to cite:

Abdullah, Mohamad Asmadi bin (2005) The concept of tarikah in the Islamic law of succession with special reference to the practices of the civil courts and the Syariah courts in Malaysia. Doctoral thesis, Durham University.

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a <https://etheses.durham.ac.uk/id/eprint/1802/> is made to the metadata record in Durham E-Theses
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full Durham E-Theses policy](#) for further details.

**THE CONCEPT OF *TARIKAH* IN THE ISLAMIC
LAW OF SUCCESSION WITH SPECIAL
REFERENCE TO THE PRACTICES OF THE CIVIL
COURTS AND THE SYARIAH COURTS IN
MALAYSIA**

BY

MOHAMAD ASMADI BIN ABDULLAH

The copyright of this thesis rests with the author or the university to which it was submitted. No quotation from it, or information derived from it may be published without the prior written consent of the author or university, and any information derived from it should be acknowledged.

**A thesis submitted to
The University of Durham
For the Degree of
DOCTOR OF PHILOSOPHY**

**Institute of Middle Eastern and Islamic Studies
School of Government and International Affairs**

The University of Durham

November 2005

27 JUL 2006



TABLE OF CONTENTS

Table of Contents	i
Abstract	x
Declaration	xi
Dedication	xii
Acknowledgement	xiii
List of Abbreviations	xv
Table of Statutes	xvi
List of Cases	xvii
Table of Transliteration	xxi

CHAPTER ONE
INTRODUCTION

1.1. Background of the Research	1
1.2. Research Questions	8
1.3. Objectives of the Research	8
1.4. The Scope and Limitations of the Study	9
1.5. The Methodology and the Sources of the Research	10
1.6. The Outline of the Research	19

CHAPTER TWO

GENERAL ACCOUNT OF THE ISLAMIC LAW OF SUCCESSION AND THE APPLICATION OF THE LAW IN MALAYSIA

2.1.	Introduction	23
2.2.	The General Concept of the Islamic Law of Succession	24
2.2.1.	The Definition of <i>Farā`iḍ</i> and the Sources of the Law	24
2.2.2.	The Essential Requirements of Inheritance	27
2.2.3.	The Nature of Legal Heirs	31
2.2.3.1.	The Inner Family	31
	a) <i>Aṣḥāb al-Furūd</i>	32
	b) <i>‘Aṣabah</i>	33
2.2.3.2.	The Table of the Entitlement of the Inner Family	36
2.2.3.3.	The Outer Family and the <i>Bayt al-Māl</i>	39
2.2.4.	The Principles of Exclusion	40
2.3.	The Development of the Law in Malaysia	41
2.3.1.	Before and After the Advent of Islam	41
2.3.2.	The Islamic Law of Succession during the British Occupation	43
2.3.3.	The Present Application and the Classification of Estates	48
2.3.3.1.	Jurisdiction of the High Court	49
2.3.3.2.	Small Estate Administration	53
2.4.	Conclusion	62

CHAPTER THREE

THE COMPONENTS OF *TARIKAH* FROM THE PERSPECTIVES OF THE ISLAMIC LAW OF SUCCESSION AND THE LAWS APPLICABLE IN MALAYSIA

3.1	Introduction	65
3.2	The Definitions of <i>Tarikhah</i> from the Perspective of the Islamic Law of Succession.	66
3.2.1.	The <i>Hadīth</i> Relied upon by the Majority and the Minority	69
3.2.2.	The Concept of <i>Māl</i> (Property) in Islamic Law	70
3.2.2.1.	The <i>Māl</i> , Tangible and Intangible	70
3.2.3.	The Heritability of <i>Māl</i> (Tangible and Intangible Asset), <i>Haq</i> (Right) and <i>Manfa'ah</i> (Usufruct or Service)	75
	a) Tangible Assets	76
	b) Intangible Assets; <i>Manfa'ah</i> (Usufruct or Service)	76
	c) Intangible Assets; <i>Haq</i> (Right)	78
3.2.4.	Intellectual Property Rights	81
3.2.5.	<i>Al-Milkiyyah</i> or Ownership and the Unlawfully Acquired Property	81
3.2.6.	The Treatment of Prohibitions	84
3.3.	The Estate according to the Laws Applicable in Malaysia	86
3.3.1.	The Definition of Estate	86
3.3.2.	The Constituents of Estate	89
3.3.3.	Tangible and Intangible Assets	90

3.3.4.	The Treatment of Rights	91
3.3.5.	The Treatment of Usufruct	92
3.4.	Comparison of Islamic and Malaysian Laws	98
3.4.1.	The Definition of <i>Tarikah</i> and Estate	98
3.4.2.	The Constituents of <i>Tarikah</i> and Estate in Malaysian Law	99
3.4.3.	The Heritability of <i>Māl</i> ; Tangible and Intangible Assets	100
3.4.4.	The Heritability of <i>Ḥaq</i> (Rights)	102
3.4.5.	The Heritability of <i>Manfaʿah</i> (Benefits or Services)	103
3.5.	Conclusion	104

CHAPTER FOUR

ADMINISTRATION OF THE *TARIKAH*: RIGHTS ATTACHED TO ESTATES

4.1.	Introduction	105
4.2.	Is there Administration of <i>Tarikah</i> in Islamic Law?	106
4.2.1.	Brief Accounts of the Estate Administration in Malaysia	106
4.2.2.	The Administration of <i>Tarikah</i> in Islamic Law of Succession	109
4.2.3.	Comparison of Islamic and Malaysian Laws	110
4.3.	Funeral Expenses	111
4.3.1.	Funeral Expenses under Islamic Law	111
4.3.1.1.	Funeral Expenses and Special Debts	112
4.3.2.	Funeral Expenses under the Malaysian Laws	113

4.3.3.	Comparison of the Treatment of Funeral Expenses and Special Debts	114
4.4.	Payment of Debts	116
4.4.1.	Payment of Debts under the Islamic Law of Succession	116
4.4.1.1.	Types of Debt Liabilities	116
4.4.1.2.	Allah's Debts v. Creditors' Debts	119
4.4.2.	Payment of Debts and Liabilities under Malaysian Laws	119
4.4.2.1.	Estate Duty	120
4.4.2.2.	Settlement of Debts	122
4.4.2.3.	<i>Harta Sepencarian</i> or Jointly Acquired Property; An Ordinary Debt	124
4.4.3.	Comparison of the Treatment of Settlement of Debts	126
4.5.	The Execution of <i>Waṣiyyah</i>	129
4.5.1.	The Execution of <i>Waṣiyyah</i> under Islamic Law	129
4.5.1.1.	The Significance of <i>Waṣiyyah</i> in Islamic Estate Planning	130
4.5.1.2.	Limitation of <i>Waṣiyyah</i> on the Recipient	132
4.5.1.3.	Limitation of <i>Waṣiyyah</i> on the Quantum	134
4.5.2.	The Execution of <i>Waṣiyyah</i> or Bequest under Malaysian Laws	136
4.5.2.1.	The One-third Rule and the Beneficiary Must be a Non-legal Heir	136
4.5.3.	Comparison of the Treatment of the Execution of <i>Waṣiyyah</i>	138
4.5.3.1.	Nomination; Is It Typical of <i>Waṣiyyah</i> ?	139
4.6.	The Distribution of Estates	142
4.7.	The Transfer of Ownership to the Legal Heir and the <i>Locus Standi</i>	143
4.8.	Conclusion	147

CHAPTER FIVE

THE *HIBAH HARTA* OF THE BUMIPUTRA-COMMERCE TRUSTEE BERHAD

5.1.	Introduction	150
5.2.	The Concept of the <i>Hibah Harta</i>	152
5.2.1	The Offer and Acceptance and the Appointment of the Trustee	153
5.2.2.	The Delivery of the Subject Matter	155
5.2.3.	The Basic Conditions of the Contract	156
5.2.4.	The Distinctive Features of the <i>Hibah Harta</i> Instrument	156
5.3.	The <i>Hibah</i> and the Ownership Arising from a <i>Hibah</i> Contract from the Perspective of Islamic Law	158
5.3.1.	Taking Possession of the Gifted Property	160
5.3.2.	Retraction of <i>Hibah</i>	165
5.4.	The Trust and the Issue of Ownership	166
5.4.1.	The Trustee in the Instrument	166
5.4.2.	The Ownership of the Donee	169
5.5.	The <i>‘Umrā</i> and <i>Ruqbā</i>	170
5.5.1.	The Perspective of Islamic Law	171
5.5.1.1.	<i>‘Umrā</i>	171
5.5.1.2.	<i>Ruqbā</i>	173
5.5.2.	<i>‘Umrā</i> and <i>Ruqbā</i> in the Instrument	174
5.6.	The Analysis of the <i>Fatwā</i>	176

5.7.	The <i>Tarikah</i> and the Entitlement of the Donor’s and the Donee’s Heirs	179
5.8.	Conclusion	181

CHAPTER SIX

FAMILY *TAKĀFUL*, CONVENTIONAL LIFE INSURANCE AND
GOVERNMENT RETIREMENT BENEFITS

6.1.	FAMILY <i>TAKĀFUL</i> AND CONVENTIONAL LIFE INSURANCE	182
6.1.1.	Introduction	182
6.1.2.	The Concept of <i>Takāful</i>	183
6.1.3.	Conventional Life Insurance from the Perspective of Islamic Law	186
6.1.4.	Is There a Substantial Difference between <i>Takāful</i> and Conventional Insurance that Results in the Court Rulings?	190
6.1.5.	The Heritability of the Proceeds	194
6.1.5.1.	The Proceeds and the Nominee	195
	a) The Legitimacy of the Proceeds from the Perspective of Islamic Law	200
	b) The Financial Rights of the Policyholder	200
	c) The Analogy to the Payment of <i>Diyyah</i> or <i>Ḍamān</i>	203
	d) The Objectives of the <i>Takāful</i> and Conventional Life Insurance Policy	206
6.1.6.	Conclusion	207

6.2.	THE GOVERNMENT RETIREMENT BENEFIT SCHEME	208
6.2.1.	Introduction	208
6.2.2.	Differences of Opinions among Muslim Scholars Regarding the Heritability of Government Pension Benefits	209
6.2.3.	The Significance of Government Retirement Benefits	211
6.2.4.	Types of Retirement Benefits	214
6.2.5.	Do the Retirement Benefits Constitute an Absolute Right of a Pensionable Officer?	216
6.2.6.	Do the Retirement Benefits Arise from the Terms of the Contract of Service?	219
6.2.7.	The Difference between the Government Retirement Benefits Scheme and the Employee Provident Fund (EPF)	222
6.2.8.	Conclusion	224

CHAPTER SEVEN

THE JURISDICTION AND FUNCTIONS OF THE SYARIAH COURTS AS REGARDS THE ISLAMIC LAW OF SUCCESSION

7.1.	Introduction	226
7.2.	State Legislative Powers and the Establishment of the Syariah Courts	227
7.3.	Jurisdiction of the Syariah Courts pertaining to Muslim's Succession	229
7.4.	The Conflict of Jurisdiction with the Civil High Court	231

7.5.	The Function of the Syariah Courts as Currently Practiced pertaining to Muslim Estates	234
7.6.	Interpretations of Article 121(1A) of the Federal Constitution	237
7.7.	The Syariah Appeal Court’s View	240
7.8.	The High Court’s View	243
7.9.	The Analysis of the Judgments in the above Cases	245
7.9.1.	The Determination of Estate	245
7.9.2.	The Meaning of Probate and Administration of Estates	247
7.9.3.	Broad Meaning of the Islamic Law of Succession	248
7.9.4.	Muslim’s Personal Law	249
7.9.5.	The Conflict between Article 121(1A) and Other Statutory Provisions of Federal Acts.	250
7.10.	Are the Syariah Courts Ready to Take Jurisdictional Responsibility?	252
7.11.	Conclusion	256

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS	258
Bibliography	276
Glossary	287
Appendix	292

ABSTRACT

The primary objective of this thesis is to investigate the essential requirements of heritable estates, which are known as *tarikah* in Arabic, from the perspective of Islamic law. As a comparative study, this research attempts to explore the extent to which the concept of *tarikah* in Islamic law is currently implemented in the practice of estate administration in Malaysia. Establishing what constitutes the estate is often complex, as the deceased may own assets such as interest bearing bank accounts and conventional securities that do not comply with *Syarī'ah* law. Insurance and pension fund entitlements introduce further complications. All financial obligations have to be settled before probate can be granted, including mortgages on property, business loans and guarantees provided by the deceased. The situation is further complicated by the application of Malaysian Federal and State laws, as well as *Syarī'ah* law, and the jurisdictional conflict between the High Court and the Syariah Court. The estates of Muslims should of course be distributed as decreed by *Syarī'ah* law, but the interface between this and the Federal and State laws can cause confusion and complications. Other means of property disposal such as *waṣiyyah* and *hibah* should be fully and carefully utilized alongside the inheritance law as *Syarī'ah* compliant estate planning mechanisms, in order for estates to be smoothly managed on death, and to avoid family disputes over inheritance, which are a common occurrence. This study involved an examination of the definitions of *tarikah* available in the Islamic treatises, as well as interviews with *Syarī'ah* scholars with expertise in this area, and analyses of Malaysian court rulings regarding the estates of Muslims where disputes have arisen. The investigation sought the opinions of the *Syarī'ah* scholars on these issues, as well as on the current workings of the Federal and State laws of Malaysia.

DECLARATION

I hereby declare that this thesis has been written by me and that all materials which are not my own work have been identified. No portion of the work in this thesis has been submitted for a degree in this or any other university or institute of learning.

“The copyright of this thesis rests with the author. No quotation from it should be published in any format, including electronic and the Internet, without the author’s prior consent. All information derived from this thesis must be acknowledged appropriately.”

Mohamad Asmadi Bin Abdullah

Dedicated

To

**My late father, Haji Abdullah bin Haji Abdul Rahman, my mother, Hajjah Mek
Hasmah binti Haji Ali, my wife, Tengku Mas Ayu binti Tengku Mat, and my
children, Nik Umar and Nik Zufar.**

ACKNOWLEDGEMENTS

It is a pleasant duty for me to recognize and thank many people for their help and contribution leading to the completion of this study. First and foremost, I take great pleasure in expressing my deepest and utmost appreciation to my supervisors, Professor Rodney Wilson and Dr. Colin Turner, to whom I owe a special debt of gratitude for their skilful supervision, guidance, encouragement, comments, criticism and support throughout the process of completing my research.

I also wish to express many thanks to members of my family, in particular my late father, Haji Abdullah Bin Abdul Rahman, who passed away during my second year of study, whom I miss so much, and whose grave I have yet to visit as I sadly decided, for financial reasons, not to return home when I was informed of his death at about 4.00 am on 9th April 2004, and my mother, Hajjah Mek Hasmah Binti Haji Ali. Both have given constant moral support and continual spiritual guidance for my success in this world and the hereafter. I should like to offer as well my indebtedness to my beloved pregnant wife, Tengku Mas Ayu Binti Tengku Mat, and my two beloved sons, Nik Umar and Nik Zufar, for their invaluable encouragement, support and sacrifice and for providing me with a happy life and endless love and affection, especially at the time of my father's death.

Many thanks go to friends and colleagues at Bowburn, Durham and, Benwell and Fenham, Newcastle. In particular, Haji Remali and Kak Hae, Stephen Seymour and family, Fahmi and Arina, Bad and Haliza, Abe Anessee and Kak Anisah, Abe Talib and Kak Zu, Mahadi and Nurul, Seli and Faezah, Dr. Zul and Elyn, Pe'ie and Azilla, Ustaz

Asmady Sabah and Ina, Shidee and Ustazah Latifah, Amin and ‘Ā’isyah, Asyraf and Emy, Zul and Kak Wae of Newton Hall, Madi and Zurina, Khairul, Shawal and Sani, Kemaie and Watie, and two pupils of Qur’anic recitation study, Adik Ahnāf and Adik Rawḍah, for their sincere friendship and invaluable support and contribution.

Finally, I am also grateful to the Public Service Department of the Malaysian Government and to the International Islamic University of Malaysia for providing me with a scholarship and study leave, which has enabled me to undertake this research successfully.

LIST OF ABBREVIATIONS

A.I.K.O.L.	Ahmad Ibrahim Kuliyah of Laws
A.L.Q.	Arab Law Quarterly
A.P.K.K.B.	Akta Pusaka Kecil Kota Bharu
A.M.R.	All Malaysian Report
C.L.J.	Current Law Journal
F.M.S.L.R.	Federated Malay States Law Reports
J.H.	Jurnal Hukum
J.M.B.R.A.S.	Journal of the Malaysian Branch of the Royal Asiatic Society
J.U.U.I.K.I.M.	Jurnal Undang- Undang Institut Kemajuan Islam Malaysia
H.	Hijrah
I.I.U.M.	International Islamic University Malaysia
I.K.I.M.	Institut Kemajuan Islam Malaysia
J.K.S.M.	Jabatan Kehakiman Islam Malaysia
I.L.S.	Islamic Law and Society
I.Q.	Islamic Quarterly
J.I.C.L.	Journal of Islamic and Comparative Law
Ky.	Khsye's Reports
Ky.Ec.	Kyshe Ecclesiastical
M.L.J.	Malayan Law Journal
S.L.R.	Singapore Law Reports
T.O.L.	Temporary Occupation Licence

TABLE OF STATUTES

Administration of Islamic Law (Federal Territories) Act, 1993

Court of Judicature Act, 1964

Employee Provident Fund Act, 1991 (Act 452).

Federal Constitution of Malaysia.

Finance Act, 1992 (Act 476).

Insurance Act, 1996 (Act 553).

Majallah al-Aḥkām al-^cAdliyyah.

Pension Act, 1980 (Act 227).

Pension Adjustment Act, 1980 (Act 238).

Probate and Administration Act, 1959 (Act 97)

Selangor Administration of Islamic Law Enactment, 1952

Takaful Act, 1984 (Act 312).

The Rules of the High Court, 1980

Small Estates (Distribution) Act, 1955 (Act 98)

Subordinate Courts Act, 1948 (Act 92).

Wills Act, 1959 (Act 346)

Workmen's Compensation Act, 1952

LIST OF CASES

- Abdul Rahim v. Abdul Hameed & Anor* [1983] 2 MLJ 78
- Abdul Shaik bin Md. Ibrahim v. Hussein bin Ibrahim* [1999] 5 MLJ 618
- Ahmad bin Abdul Majid v. Habibah binti Abdul Majid & Anor* [2001] 2 MLJ 245
- Alagappa Chettiar v. Kader & Ors* [1939] MLJ 304
- Amanallah v. Hajjah Jamilah* [1975] 1 MLJ 30
- Attorney General v. Hajee Abdul Kadeer* (1883) 1 Ky 616
- Awang bin Abdul Rahman v. Shamsuddin bin Awang and Another* [1997] 2 JH 193
- Bachan Singh v. Mahinder Kaur & Ors* [1956] MLJ 97
- Boto` binti Taha v. Jaafar bin Muhamed* [1985] 2 MLJ 98
- Che Omar bin Che Soh v PP* [1998] 2 MLJ 55
- Chua Eh Swee v. Sew Chew Eng & Anor* (1982) 1 MLJ 84
- Dato` Ahmad bin Yunus v. Kerajaan Malaysia* [2002] 1 MLJ 288
- Datuk Menteri Othman bin Baginda v. Datuk Omi Syed Alwi* (1981) 1 MLJ 29
- Eshah binti Abdul Rahman v. Azuhar bin Ismail* [1997] 2 JH 219
- Fatimah binti Mat Akir & Anor v. Sharifah binti Ahmad & Ors* [1977] 1 MLJ 106
- Fatimah & Ors v. Logan & Ors* (1871) 1 Ky. 255
- Fatimah v. Moideen Kutty* [1969] 1 MLJ 72
- Fazil Rahman & Ors. v. AR.S. Nachiappa Chettiar* (1963) 29 MLJ 308
- Hajaj Halimatussaadiah v. Public Service Commission* [1992] 1 MLJ 513
- Haji Hussain v. Liah bt Lerong & Ors* (1980) MLJ 98
- Haji Wan Othman & Ors v. Government of the Federation of Malaya* [1965] 2 MLJ 31
- Harun bin Muda and Others v. Mandak bin Mamat and Others* [1999] 1 JH 63

Hujah Lijah binti Jamal v. Fatimah bini Mat Diah (1950) 16 MLJ 63

In the Estate of Tunku Abdul Rahman [1999] 1 AMR 30

In the Goods of Abdullah (1835) 2 Ky.Ec. 8

Jub`il bin Mohamed Taib Taral & Ors v. Sunway Lagoon Sdn Bhd [2001] 6 MLJ 669

Juma`aton and Anor v. Raja Hizaruddin [1998] 6 MLJ 557

Kalthom bt Abdul Wahid v. Nordin bin Othman (1994) 9 JH 178

Kechik & Ors v. Habeeb Mohamed & Anor (1963) 29 MLJ 127

Kersah La`usin v. Sikin Menan [1966] 2 MLJ 20

Khoo Teng Seong v. Khoo Teng Peng (1990) 2 CLJ 233

Kutai bin Haji Late; Dato` Bagindarajah Redek; Bin Kenek; Lanjong Bin Kenek v. Taensah binti Haji Enoh [1934] 1 MLJ 251

Lee Ah Thaw v. Lee Chun Tek (1978) 1 MLJ 173

Lokmanaalhakim bin Ramli & Ors v. Haji Ismail bin Ishak & Ors [1992] 2 CLJ 1031

Mamat bin Hassan & Anor v. Siti Khadijah binti Awang Hamat & Ors [1996] 5 MLJ 529

Mariah bte Mohamad (Administratrix of the estate of Wan Salleh bin Wan Ibrahim, deceased) v. Abdullah bin Daud (Dr Lom Kok Eng & Anor, Third Parties [1990] 1 MLJ 240

Md Hakim Lee v. Majlis Agama Islam, Wilaya Persekutuan, Kuala Lumpur [1998] 1 MLJ 681

Minister of Home Affairs v. Jamaluddin bin Othman [1998] 1 MLJ 369

Mohamad Habibullah bin Mahmood v. Faridah bte Dato` Talib [1992] 2 MLJ 793

Nor Bee v. Ahmad Sanusi (1981) 1(2) JH 63

Omar Ali bin Mohd & Ors v. Syed Jafarsadeq bin Abdul Kader Alhadad & Ors [1995] 3 SLR 388

Papoo v. Veriah [1965] 1 MLJ 127

Puncak Klasik Sdn Bhd v. Foh Chong & Sons Sdn. Bhd. (1998) 1 CLJ 60

Re Abdul Salam, deceased; Abdul Razak v. Kasi Mohamad Shirazil Anwar [1938] MLJ 83

Re Bahadun bin Haji Hassan [1974] 1 MLJ 4

Re Estate of Nik Yusof bin Wan Omar Pn.P.P.(KN).100/79/1 &P.P.P.(D)214

Re Estate of Tunku Mohamed Jawa ibni Almarhum Sultan Abdul Hamid, Deceased [1982] 2 MLJ 44

Re Hee Chun Meng [1989] 2 MLJ 310

Re Man bin Minhat [1965] 2 MLJ 1

Re M. Mohamed Hanifa, (the deceased) (1940) 9 MLJ 229

Re Wee Guan Ho, deceased [1940] MLJ 212

Re Ismail bin Rentah (1940) MLJ 98

Re Mutchilin (1960) 26 MLJ 51

Re Rosmawati binti Sharibun & Another [2002] 4 AMR 4913

Re Timah binti Abdullah Deceased (1941) MLJ 51

Roberts v. Ummi Kalthom [1966] 1 MLJ 163

Saeda binti Abu Bakr & Malik bin Haji Mohamed Yusuf v. Hj Abdul Rahman bin Haji Mohamad Yusuf & Osman bin Haji Mohamed Yusuf (1918) 1 FMSLR 352; [1983] JH 53

Salmiah binti Che Mat v. Zakaria bin Hashim [2000] 1 JH 79

Shaik Abdul Latif and others v. Shaik Elias Bux (1915) 1 FMSLR 204

Siti binti Yatim v. Mohamad Nor bin Bujai (1928) 6 FMSLR 135

Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia [1999] 1 MLJ 489

Tan Heng Poh v. Tan Boon Thong (1992) 3 CLJ 1340

Tengku Jaafar v. Governemant of Pahang [1987] 2 MLJ 74

The Official Administrator v. Haji Abdul Majid bin Shakabudin [1939] 1 MLJ 162

Tijah binti Hussin v. Pentadbir Tanah Daerah, Alor Gajah & Lain-lain [1994] 3 MLJ 424

Wan Puziah v. Wan Abdullah bin Muda & Another [2001] JH 235

Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1990] 3 MLJ 493

Zulkifli bin Ayob v. Velasani a/p K Madhavan & Anor [2000] 1 MLJ 593

TABLE OF TRANSLITERATION

Arabic	Transcription	Arabic	Transcription
أ	a, u	ض	ḍ
ا	ā	ط	ṭ
ب	b	ظ	ẓ
ت	t	ع	^c superscript
ث	th	غ	gh
ج	j	ف	f
ح	ḥ	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	z	و	w, ū, aw
س	s	ه	h
ش	sy	ء	ʿ
ص	ṣ	ي	y, ay, ī

Notes:

1- Arabic terms are italicised and with Arabic transliteration

2- Arabic terms that are applied in statutes are not transliterated such as Syariah Court, *nazr*, *ruju`* etc. because they follow the standard application in the statutes.

CHAPTER ONE

INTRODUCTION

1.1. Background of the Research

The Islamic law of succession is enacted in the *Syarī'ah*, which forms the Islamic religious laws¹ that are considered by Muslim jurisprudence as a manifestation of God's revelation.² The law forms a vital and integral part of the Islamic law of personal status i.e. Islamic family law.³ As a religion-based law, Muslims are under a religious duty to apply the Islamic law of succession regarding the disposition of their estates upon death. This means that ignoring the principles of Islamic law regarding the administration and distribution of an estate as laid down in the Qur'an and the *Sunnah* without good reason amounts to a grave sin.⁴

In this respect, in response to a question regarding the significance of the performance of this religious obligation, particularly by those who live in countries where this law is not generally applicable Muzammil H. Siddiqi stated, therefore, suggests that:

“It is very important that Muslims in America (and the West in general) prepare their wills before their death. The reason is that in America (and

¹ Wilson, Rodney, *Economics, Ethics and Religion, Jewish, Christian and Muslim Economic Thought*, New York: New York University Press, 1997, p.118.

² Powers, David S., The Islamic Inheritance System, A Socio-Historical Approach, *A.L.Q.*, 8(1993), p. 13.

³ Coulson, N.J., *Conflicts and Tensions in Islamic Jurisprudence*, London: The University of Chicago Press, 1971, p.8.

⁴ The Qur'anic verses *al-Nisā'* (4): 13 and 14 state: “Those are limits set by Allah, those who obey Allah and His Messenger will be admitted to Gardens with rivers flowing beneath, to abide therein (forever) and that will be the supreme achievement. But those who disobey Allah and His Messenger and transgress His limits will be admitted to a fire, to abide therein, and they shall have humiliating punishment.” The translation of the Qur'anic verses throughout the research is based on the translation by ‘Alī, ‘Abdullāh Yūsuf, *The Meaning of the Holy Qur'an*, new edition with revised translation and commentary, Maryland: Amana Corporation, 1992.

the Western countries), the Islamic laws of inheritance are not recognized. If a Muslim dies intestate, i.e. without having made a will, then his/her wealth most probably will be distributed according to the state laws where he or she lived, not according to Allāh's laws. A Muslim in this case may be held responsible on the Day of Judgment because of his/her negligence in a very important matter."⁵

In Malaysia, Islamic law is recognized by the legal system. It was regularly implemented before the coming of British colonial power. The *Majallah Ahkam* and the *Hanafite Code of Qadri Pasha*, which were applied in Turkey and Egypt respectively were translated and applied in the State of Johore.⁶ In the states of Malacca, Pahang and Terengganu, Islamic laws were implemented by statute before the coming of the British.⁷ In the case of *Shaik Abdul Latif and others v Shaik Elias Bux*,⁸ Edmonds J.C stated that during the British intervention, the Mohammedan law which was modified by local customs was the only law applicable to Malays.⁹

In fact, the British did not interfere in the application of Islamic personal law, which includes the law of succession, during its colonization of the Malay States. Even though the implementation of Islamic law was gradually replaced with English common law through the British system of indirect rule and the establishment of a secular system, the

⁵ Dr. Muzammil H. Siddiqi is a former President of the Islamic Society of North America. See Siddiqi, Muzammil H., *Inheritance and Will*, [online], 20th June 2002. Available from: <http://www.islamonline.com> [accessed 6th April 2005].

⁶ Musa, Shafaai, *The Conditions of the Countervalues of the Contract of Sale under Islamic Law with Occasional Comparison with English Law*, Ph.D Thesis, Glasgow Calédonian University, 2000, p. 1. The *Majallah Ahkam* was translated and known as *Majallah Ahkam Johore* whereas the *Hanafite Code of Qadri Pasha* was translated and known as *Ahkam Shariyyah Johore*.

⁷ Ibrahim, Ahmad and Joned, Ahilemah, *The Malaysian Legal System*, Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1987, pp. 53-54.

⁸ (1915) 1 F.M.S.L.R. 204.

⁹ Ibid, p.214. R.J. Wilkinson stated: "There can be no doubt the Muslim Law would have ended by becoming the law of Malaya had not British law stepped in to check it." See Wilkinson, R.J., *Papers on Malay Subject*, Kuala Lumpur: Federated Malay States Government Press, 1971, p. 49.

Islamic laws relating to family and inheritance were maintained.¹⁰ Indeed, the present Federal Constitution of Malaysia statutorily recognizes the application of the law, as it is included in its State List of the Ninth Schedule. This sets out clearly that the Islamic personal and family laws, including the laws relating to succession (testate and intestate), of those professing the religion of Islam are within the jurisdiction of the states to enact.

However, observing the present scenario regarding the implementation of the Islamic law of succession in Malaysia, it appears that it is far from satisfactory. There is no statute enacted by the legislative body to implement the Islamic law of succession.¹¹ The administration of Muslim estates follows the same statutes that regulate the administration of non-Muslim estates.¹²

Apart from this, the application of the law also encounters legal problems particularly relating to jurisdictional conflict.¹³ Even though Malaysia currently practices a dual court system and it is clearly enumerated in the Federal Constitution that the Islamic law of succession is a matter for the states and should be adjudicated by the Syariah courts, the civil courts maintain that they have jurisdiction.

¹⁰ Hooker, M.B., *Islamic Law in South-East Asia*, Singapore: Oxford University Press, 1984, p.17.

¹¹For non-Muslims, there is a statute regulating testacy and intestacy cases. For testacy, the relevant Act is the Wills Act 1959 (Act 346) and for intestacy, the relevant Act is the Distribution Act 1958 (Act 300). As it is a Muslim personal law, the full implementation of the law is legislatively recognized in Muslim countries. Egypt, Syria, Tunisia, Morocco, Iraq, Jordan and Algeria are examples of Muslim countries that implement the law through legislation. See Nasir, Jamal J., *The Islamic Law of Personal Status*, London: Graham & Trotman, p. 200-201.

¹²The Acts governing the administration of the estates of both Muslims and non-Muslims are the Probate and Administration Act 1959 (Act 97) and the Small Estates (Distribution) Act 1955 (Act 98).

¹³ The conflict of jurisdiction still occurs even though there is an amendment to article 121 of the Federal Constitution, which gives exclusive jurisdiction regarding *Syarī'ah* matters to the Syariah court. After the amendment, article 121 now reads ... 1(A) The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

Although the Islamic law of succession is prescribed in detail by the Qur'an¹⁴ and the *Sunnah*, there are some areas that need further analysis. Despite the details of revealed clarification on the subject, due to the considerable changes affecting the economic and commercial conditions in the present world, as compared to the time of the Prophet Muḥammad, there is a need for analytical research to be conducted in relation to aspects that are not expressly mentioned in the Qur'an and the *Sunnah*. It is therefore a challenge for contemporary Muslim scholars to interpret Muslim belief in a modern context.¹⁵ Rather than focusing merely on one particular school of law, such research should take into account the opinions of other schools of legal thought as long as these opinions are based on the principles as correctly deduced from the Qur'an and the *Sunnah*. This is based on the contention that the primary references of Islamic law are the Qur'an and the *Sunnah*, not the opinions of any particular school. Besides this, the present situation, which certainly affects the effectiveness of the implementation of the Islamic law of succession, should also be considered. The emergence of different schools of law and the presence of divergent opinions (*ikhtilāf*) among Muslim scholars should be regarded as a kind of juristic discourse.

Based on these facts, many Muslims in Malaysia believe that the implementation of Islamic personal law, in particular the Islamic law of succession, is still not satisfactory. The present situation arises perhaps due to a lack of understanding and awareness among the Muslims in Malaysia of how the law can be implemented. This is further related to the legal barriers established by the statutory provisions, which were historically adapted

¹⁴ Wilson, Rodney, *Economic Development in the Middle East*, London: Routledge, 2001, p.104.

¹⁵ Wilson, *Economics, Ethics and Religion Jewish, Christian and Muslim Economic Thought*, p. 116.

from the English laws. It is clear that reforms to the related laws are necessary in order to enable the full implementation of the Islamic law of succession. To make the laws viable and effective, such reforms must take into consideration local factors such as religious, cultural and social values as well as the political and economic environment of the Malaysian community.

Furthermore, the issue of *tarikah*, the Islamic equivalent of 'estate', is also related to Islamic estate planning. Estate planning in the Islamic context is extremely important because it determines the smoothness of the distribution process and to whom one's wealth devolves upon death. This can avoid resentment, distress and dissatisfaction among family members and furthermore, can secure the life, at least financially, of one whom the deceased dearly loved, but who is not among the recipients under inheritance law.

In Malaysia, there is an instrument known as *Hibah Harta*, which has developed from the concept of *hibah* (gift). This issue is related to the topic because the distribution of one's wealth according to the *farā'id* (inheritance) law does not apply unless and until the rights, which are attached to the estate have been fully discharged. One of these rights and liabilities is the disposition by way of *hibah*, which is made prior to the death, the ownership of the subject matter being completely transferred immediately upon the completion of the contract.

Here, this research will examine the instrument particularly regarding the issue of *Syarī'ah* compliance in order to ascertain the validity of the instrument from the Islamic perspective. Besides, the issues of government retirement benefits, the proceeds of the family *takāful* (mutual cooperation) and conventional life insurance are also important. This is based on the notion that ownership is an essential component of the concept of heritable estate and hence, this research will identify whether these fall within the heritable estate or not. Here, attempts are made to argue the necessity of diversifying the means of disposal of property upon death, not just confining them to distribution under the *farā'id* law, because the beauty of Islamic law, particularly with respect to the disposition of property upon death, is crystallized upon the application of the whole system of distribution, not a particular part thereof. This is the importance of resorting to Islamic estate planning by a Muslim.

This thesis represents a contribution to the debate concerning the rule of the Islamic law of succession in Malaysia. After conducting a study on the subject of this law and its administration and application in Malaysia, it is concluded that the issue of *tarikah*, which is part and parcel of inheritance, is a vital topic for discussion. To the best knowledge of the researcher, no research that deals exclusively with the present topic has yet appeared. This is perhaps due to the lack of sources elaborating in detail the topic of *tarikah* by Muslim scholars. What is normally found is a general discussion on the theory of *tarikah*, which simply focuses on its definition as given by the classical Muslim jurists, without expanding the concept for modern application.

Nowadays, there are many modes of estate distribution that have been created to protect the interests of the deceased as well as of his/her family. At the same time, business transactions are not limited to the use of money as the medium of exchange, but extend to the use of shares, securities and bonds. Commercial contracts can also give rise to property rights. These factors are directly related to the issue of *tarikah* because when a Muslim dies, he/she leaves behind his/her wealth, which should be inherited by the legal heirs. The books on inheritance law in Malaysia are concerned merely with the administration of estates in general. No work has yet appeared elaborating in depth the concept of the estate according to the Islamic perspective. This gave the researcher the incentive to embark on the study of the concept of *tarikah* with the hope that it will make an invaluable contribution to the implementation of the Islamic law of succession in Malaysia.

The present study is therefore aimed at analyzing the relevant statutes as well as the views of classical and contemporary Muslim scholars on the concept of *tarikah*. The opinions of non-Muslim scholars like N.J Coulson, David Pearl and Lucy Carol are also examined. The decisions of the courts in Malaysia are examined in order to ascertain to what extent the *tarikah* concept in Islamic law is applied. The position of Islam in Malaysia, as well as the issues of jurisdiction between the civil and Syariah courts, cannot be dismissed as they are directly related to the success of the implementation of the law. This study is therefore not limited to an analysis of the present legislation but rather it is of an interdisciplinary nature.

1.2. Research Questions

In this study, the following questions will be discussed:

- 1- What are the essential requirements of heritable estates according to Islamic law?
- 2- What are the rights and liabilities attached to the *tarikah* according to Islamic law and are these followed under Malaysian laws?
- 3- Is the *Hibah Harta*, an instrument of estate planning, *Syari'ah* compliant?
- 4- Are the family *takāful*, conventional life insurance policies and government retirement benefits heritable?
- 5- What are the statutory functions of the Syariah courts in the administration of Muslim estates in Malaysia?

1.3. Objectives of the Research

1. To examine the components of the *tarikah* and the requirements of heritable estates as prescribed by the Muslim scholars of the four Sunni schools of law namely the Ḥanafīs, Mālikīs, Syāfi'īs and Ḥanbalīs.
2. To analyze and evaluate the relevant statutory provisions relating to the application of the *tarikah* concept in the administration of Muslim estates in Malaysia.
3. To study the rights and liabilities, which are attached to the *tarikah* and to examine to what extent these rights and liabilities are observed in the administration of Muslim estates in Malaysia.
4. To look in detail at the statutory powers of the Syariah courts and the jurisdictional issues regarding the administration of the Islamic law of succession in Malaysia.

5. To inquire into some of the practical problems relating to Islamic estate planning in Malaysia, particularly the question of *Syari'ah* compliance, and to ascertain the importance of diversifying the modes of disposition of estates upon death.
6. To provide recommendations for possible and viable reforms to overcome the existing problems in relation to the concept of *tarikah* and its administration in Malaysia.

1.4. The Scope and Limitations of the Study

The central concern of this study is the analysis of the concept of *tarikah* as developed by Muslim scholars, and the application of this concept in the administration of Muslim estates in Malaysia. It is therefore a comparative study in nature, with the purpose of identifying any consistencies and inconsistencies between the two. An analysis of the relevant Qur'anic verses, the traditions of the Prophet Muḥammad and the opinions of classical and contemporary Muslim scholars regarding the concept of *tarikah*, is necessary. This research is, however, confined to the opinions of the Muslim scholars of the four Sunni schools of laws. This is because the majority of Muslims in Malaysia follow the Syāfi'ī's school of law. References to other than the Syāfi'ī's are only made for reasons of comparison, and where necessary for making suggestions.

The relevant Malaysian laws regulating the administration of Muslim estates as well as the Malaysian courts' decisions regarding the concept of estate are within the scope of the research. Furthermore, jurisdictional issues are also discussed, but the discussion does not stretch to unnecessary facts of jurisdictional conflict pertaining to Islamic law in general.

Rather, it is confined to the relevant issues of estate administration for the purpose of highlighting the problems and to propose necessary reforms.

It is not the purpose of this study to highlight all the existing issues in Malaysia relating to questions of inheritance. For this reason, the study examines in depth only three current issues, namely the estate planning instrument of *Hibah Harta* of the Bumiputra Commerce-Trustee Berhad, the Government retirement benefits, the family *takāful* and conventional life insurance distribution. These are selected on the basis of their significance in Muslim affairs in Malaysia as well as the complicated and confusing facts of their nature, which cause difficulties in solving the question of rights of inheritance.

1.5. The Methodology and the Sources of the Research

This study is comparative, as well as descriptive and quasi analytical in nature and is mainly based on literature research. Since the study analyses concepts and issues from an Islamic perspective, the methodology applied must be one that is consistent with Islamic research practices. Hence, this study adopts thorough analysis on the Qur`anic and *ḥadīth* texts, as well as the relevant *fiqh* literature of the four schools of Islamic law namely Ḥanafīs, Mālikīs, Syāfi`īs and Ḥanbalīs. In studying the concept of *tarikah* in the Islamic law of succession, the texts of the Qur`an and the *Sunnah*, which constitute the primary sources of the law, are heavily relied upon. This is in line with a *ḥadīth* narrated by Mu`ādh Ibn Jabal that when the Prophet sent him to Yemen, he asked:

“What will you do if a matter is referred to you for judgment? Mu`ādh said: I will judge according to the Book of Allah. The Prophet asked: What if you find no solution in the Book of Allah? Mu`ādh said: Then I will judge by the *Sunnah* of the Prophet. The Prophet asked: And what if

you do not find it in the *Sunnah* of the Prophet? Mu'ādh said: Then I will make *ijtihād* to formulate my own judgment. The Prophet patted Mu'ādh chest and said: Praise be to Allah who has guided the messenger of His Prophet to that which pleases Him and His Messenger.”¹⁶

Comparative study entails the study using more or less identical methods of two contrasting case. It embodies the logic of comparison in that it implies that we can understand social phenomena better when they are compared in relation to two or more meaningfully contrasting cases or situations.¹⁷ With regard to legal research, Lepaulle pointed out that comparative law method is the best way for anyone to analyse his own system and in fact there is no other better way for any hypothesis or theory to be upheld than in the light of comparison.¹⁸

As this study includes a comparative study of the four well-known Sunni schools of law, it is therefore based on the analysis of the views of the classical Muslim scholars of the four schools, namely the Ḥanafīs, Mālikīs, Syāfi'īs and Ḥanbalīs. The benefit of this is to enable the researcher to propose the expansion of the application of the Islamic Law of Succession in Malaysia and to avoid the rigidity and the extreme idea of strict adherence to the Syāfi'īs. This is based on the arguments that the primary sources of Islamic law is the Qur'an and the *Sunnah*, and the opinions of Muslims jurists of those schools are based on their understanding in interpreting the vague revealed texts. In other words, their opinions should be treated as means in understanding and developing the texts of the

¹⁶ Al-Alwani, Taha Jabir, *Source Methodology in Islamic Jurisprudence*, Washington: The International Institute of Islamic Thought, 2003, 3rd. edition, p. 9.

¹⁷ Bryman, Alan, *Social Research Methods*, 3rd. edition, Oxford: Oxford University Press, 2004, p. 53.

¹⁸ Lepaulle, *The Function of Comparative Law*, 35 Harv.LR, 1922, p. 853, cited in Malik, Nora Abdul, *Islamic Arbitration (Taḥkīm) and Mediation in Resolving Family Disputes- A Comparative Study under Malaysian and English Law*, Ph.D Thesis, Glasgow Calédonian University, 2002, p. 15.

Qur'an and the *Sunnah*. Comparative analysis provides such an opportunity in attempting to find a solution among many different arguments by comparing and contrasting how such historical views can be applied to the modern problems.

In such study, the opinions that represent each schools of law were obtained by studying the books written by the authors of each school. This is for the purpose of understanding the methods applied by each school of law to solving a particular problem. Among the books referred to are the Ḥanafīs' *Rad al-Mukhtār ʿalā Dur al-Mukhtār* (1404H) by Ibn ʿĀbidīn, the Mālikīs' *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid* (1981) by Ibn Rusyd, the Syāfiʿīs' *al-Muhadhdhab* (n.d.) by al-Syīrāzī, *Mughnī al-Muḥtāj* ((1958) by al-Syarbīnī, the Ḥanbalīs' *al-Mughnī wa al-Syarḥ al-Kabīr* (1992) by Ibn Qudāmah and *Kasyāf al-Qināʿ ʿalā Matn al-Iqnāʿ* (1981) by al Bahūtī.

In some cases, there are several different opinions available from the same Sunni school of law on one particular issue, and hence it is challenging to discuss all the opinions. To address this, the study selects the most dominant view of each school to represent the view of the school as a whole. A study of this nature is necessary in order to acquire a proper understanding of the *Syarīʿiah* rulings. By analyzing the legal thoughts of classical Muslim jurists, it is possible to comprehend their methodology in deducing legal rulings as well as the reasoning behind a particular ruling. In addition, it enables an understanding of the legal arguments and principles formulated by them. All this helps in the examination of the present position of Muslim estates administration in Malaysia.

The works of contemporary Muslim and non-Muslim scholars were also consulted. This is significant taking into account the rapid changes occurring in a developing society. Such changes certainly affect the law applicable in such a society, which must develop in order to suit the changing local needs and requirements and Islamic law is no exception to such a requirement. The views of contemporary Muslim scholars were therefore consulted. The books referred to are the *Majma' al-Fatāwā* (1989), Zuhaylī's *al-Fiqh al-Islāmī wa Adillatuhū* (1987), Khafīf's *al-Milkiyyah fī al-Syarī'ah al-Islāmiyyah ma'a al-Muqāranah bi al-Syarā'ir al-Waḍ'īyyah* (1990), al-Zarqā's *al-Madkhal ilā Nazariyyah al-Iltizām al-Āmmah* (n.d), Pearl's *A Textbook on Muslim Personal Law* (1987), Coulson's *Succession in the Muslim Family* (1969) and Nasir's *The Islamic Law of Personal Status* (n.d).

With respect to the administration of the Muslim estates in Malaysia, references are made to the relevant statutory laws. Legislation pertaining to deceased Muslim estates administration includes the Federal Constitution of Malaysia, the Rules of the High Court 1980, the Probate and Administration Act, 1959, and the Small Estates (Distribution) Act 1953. The relevant statutory provisions regarding the administration of Muslim estates are also examined, and comparisons made with the Islamic law of succession in order to identify to what extent the Islamic law is being practiced. In addition, relevant reported cases of the Malaysian civil and Syariah courts are also studied. This is vital for the purpose of looking into the facts of the cases as well as the opinions of the civil and Syariah court judges.

Furthermore, references are made to books on inheritance law in Malaysia namely *The Islamic law of successions in Malaysia* (2004) by Pawancheek Marican, *Probate and Administration in Singapore and Malaysia: Law and Practice* (1991) by G Raman and *The Law of Wills, Probate Administration and Succession in Malaysia and Singapore* (1997) by Mahinder Singh Sidhu. These books provide valuable information regarding estate administration in Malaysia generally.

According to Moten, the type of analysis to be used in researches depends upon the type of the research being conducted.¹⁹ Therefore, since the research is quasi-analytical study, the method used in analysing the data is descriptive as well as discursive analysis. This is important in order to comprehend and to develop the concepts of *tarikah* in the Islamic Law of Succession as well as the estate as administered in Malaysia. In this quasi-analytical research, the researcher developed arguments which were based on evidences obtained from the textual analysis of the mentioned epistemological sources of Islamic law and the contributions from the mentioned schools of law. Such a quasi analytical approach maintained in analysing the material and court cases.

Interpretation is the process by which the researcher put his own meaning of the text and primary data collected and analysed, and compares that meaning with those advanced by others.²⁰ According to Schutt, interpretive social scientists believe that social reality is socially constructed and that the goal of social scientists is to understand what meanings people give to reality, not to determine how reality works apart from these

¹⁹ Moten, Abdul Rashid, *A Guide to Research Proposal and Report Writing*, Malaysia: Research Centre International Islamic University Malaysia (IIUM), 1998, p. 17.

²⁰ Loraine Blaxter, et.al., *How To Research*, Buckingham: Open University Press, 1996, p. 197.

interpretations. Taking an interpretative stance can mean that the researcher may come up with surprising findings, or at least findings that appear surprising if a largely external stance is taken, that is, a position from outside the particular social context being studied.²¹ Here, as Bryman asserted, the researcher is not simply laying bare how members of a social group interpret the world around them, but will almost certainly aiming to place interpretations that have been elicited into a social scientific frame.²² Hermeneutics is one of the three possible approaches applicable in interpreting documents. The other two are qualitative content analysis and semiotics.²³

The researcher, thus, pursued and applied interpretative analysis in relation to hermeneutics. Hermeneutics is a term that is drawn from theology and that, when imported into the social sciences, is concerned with the theory and method of the interpretation of human action.²⁴ According to Bryman, the central idea behind hermeneutics is that the analyst of a text must seek to bring out the meanings of a text from the perspective of its author.²⁵ Luckman pointed out that hermeneutic consists of systematic interpretations of the meaning of the parts in relation to the meaning of the whole, and of the whole in relation to the meaning of the parts always by reference to the constitutive characteristics of textual genres and epochs.²⁶ This approach's appeal to qualitative researcher is that it is an approach to the analysis of documents (and indeed

²¹ Bryman, Alan, *Social Research Methods*, p. 15.

²² Ibid.

²³ Ibid.

²⁴ Ibid, p. 13.

²⁵ Ibid, p. 394.

²⁶ Luckman, Thomas, "Hermeneutics as a Paradigm for Social Sciences?", in: Brener, Michael, ed., *Social Method and Social Life*, London: Academic Press, 1981, p. 219.

other data) that explicitly draws on two central tenets of the qualitative research strategy: an emphasis on the point of view of the author of the text and a sensitivity to context.²⁷

Semi-structured interviews with *Muftīs* and academics in Malaysia were conducted, especially regarding issues that could not be found in the legal texts. The interviews are important for obtaining views, suggestions and observations regarding the topic under scrutiny, which are important when analyzing the contemporary development of the implementation of the concept of *tarikah* in Malaysia.

The interview is about the eliciting of information by the interviewer from the interviewee and the operation of rules of varying degrees of formality or explicitness concerning the conduct of the interview. The aim of social research interview is for the interviewer to elicit from the interviewee all manner of information such as interviewee's own behaviour or that of others, attitudes, norms, beliefs, and values. The types of interviews are structured interview, standardized interview, semi-structured interview, unstructured interview, intensive interview, qualitative interview, in-depth interview, focused interview, focus group, group interview, oral history interview and life history interview.²⁸

For this research, the researcher applied the method of semi-structured interview. The researcher prepared a series of questions that were in general form of an interview schedule but was able to vary sequence of questions.²⁹ The questions were frequently

²⁷ Bryman, 395.

²⁸ Ibid, p.113.

²⁹ Ibid.

somewhat more general in their frame of reference from that typically found in a structured interview schedule. Also, the researcher had some latitude to ask further questions in response to what were seen as significant replies.³⁰ Interviews with *Muftīs* and academics in Malaysia were conducted. The reasons for undertaking the interviews are especially regarding issues that could not be found in the legal texts. In other words, interviews are used to bridge the historical gap in interpreting the historical text and attempting to find answers to the contemporary problems.

In conducting the interviews, the researcher listed down the questions and topics, but the questions addressed to the interviewee did not follow exactly in the way outlined in the schedule. The researcher also asked questions that were not included in the guide. This is to give the interviewees the opportunity to express their thorough views on the questions addressed. From this, the researcher would have the chance to gain relevant information as much as possible in order to analyse the issues discussed. However, during the interview, the researcher had asked all the questions prepared and had used similar wordings.

The interviews were beneficial in terms of obtaining views, suggestions and observations regarding the topic under scrutiny, which are important when analyzing the contemporary development of the implementation of the concept of *tarikah* in Malaysia. From these interviews, the researcher was able to gather information regarding the contemporary Islamic issues such as the position of the proceeds of the conventional life insurance and Family *Takaful*, the concept of property in Islamic law, and the concept of *Hibah Harta*

³⁰ Bryman, p. 113.

in Malaysia. The researcher was also able to understand in depth the administration of estate in Malaysia in terms of procedural matters, after interviewing the Collector and the Executive of *Amanah* of the Kota Bharu Public Trust Corporation.

On the issue of Islamic law, interviews were conducted with Dato' Hashim Yahya, the former *Mufti* of the Wilayah Persekutuan, Kuala Lumpur, Dato' Hj. Hasbullah Mohd Hassan, the *Mufti* of the State of Kelantan and Dato' Shukri Muhammad, the Deputy *Mufti* of the State of Kelantan. With regard to the estate-planning instrument of *Hibah Harta*, an interview was held with Mr. Aimi Zulhazmi, the Manager of the Bumiputera-Commerce Trustee Berhad (BCT) to gather information regarding its perception of the concept. With respect to the administration of estates, interviews were conducted with Tuan Haji Mohd Zin, the Head of Assistant Directors and Madam Karimah, the Assistant Director, the Division of Small Estates Distribution of the Kota Bharu Land Office, and with Cik Maimun Daud, the Executive of *Amanah* of the Kota Bharu Public Trust Corporation.

To obtain information regarding the contemporary issues of Islamic law such as *Syari'ah* compliance, interviews were conducted with academics that are actively participating in the process of the development of Islamic law in Malaysia, namely Dr. Mohd. Daud Bakar, the former Deputy Rector of the International Islamic University and a member of the Central *Syari'ah* Advisory Council of the Central Bank of Malaysia and Securities Commission of Malaysia, Dr. Shafai Musa, the former Head of the Department of Islamic law, Professor Dr. Razali Nawawi, Dr. Ismail @ Mohamad and Dr. Zulkifli Muda of the

Kulliyyah of Laws, the International Islamic University. The information obtained from these interviews and discussions are used for the analysis of the effectiveness and weakness of the application of the laws and for subsequent suggestions and reforms.

1.6. The Outline of the Research

This research focuses primarily on the analysis of the concept of *tarikah* as developed in the Islamic law of succession and the administration of estates in Malaysia. It attempts to compare the principles of *tarikah* as developed by Muslims scholars, the statutory provisions, court interpretations and comprehensions of the term 'estate' in estate administration. Furthermore, the research also embarks on related issues that have an impact on the application of the Islamic concept in estate administration as well as on necessary suggestions for reform. This research consists of eight chapters including the introductory and concluding chapters.

The current chapter deals with introductory aspects of the research, discussing the general background and nature of the study. It also discusses the methodology adopted and the sources referred to throughout as well as the research questions, objectives, scope and limitations of the study. The chapter provides general information for the reader so that they have a clear idea of what the research is all about.

Chapter Two deals with the background of the Islamic law of succession as well as its application in the Malaysian legal system. It discusses in brief the subject of the Islamic

law of succession and gives an historical sketch of its application in Malaysia, as well as its modern application in the Malaysian courts.

Chapter Three looks at the literal and technical meanings of *tarikah*, as understood by the classical Muslim jurists in their treatises and analyzes the principles they have adopted. In connection with this, the chapter examines the components of *tarikah* according to the Islamic law of succession. In this respect, it is necessary to discuss a related issue, namely the concept of property in Islamic law. For the purposes of comparative analysis, this chapter conducts an inquiry into the meaning of 'estate' as stated in the Malaysian statutory provisions and in the administration of deceased Muslims' estates. The inquiry includes an examination of the meaning, definition and classification of the term 'estate'.

Chapter Four attempts to identify the rights and liabilities that are attached to Muslim estates as prescribed by the Qur'an and the *Sunnah*. There is a particular focus on the theoretical framework regarding these rights and liabilities, such as funeral expenses, debts, bequests and the rights of the heir. The chapter also deals with the issue of at what point the rights of the heir arise. It draws a comparison with the principles adopted in Malaysia by analyzing the current legislation as well as the judges' opinions available in reported cases. There is also a discussion of the opinions of those directly involved with the administration of Muslim estates in Malaysia especially regarding the practical aspects. In addition, the chapter examines other related issues, namely the *wasīyyah* (will) and jointly acquired property, which have significant effects on the rights of heirs.

Chapter Five examines the estate-planning product (*Hibah Harta*) of the Bumiputra-Commerce Trustee Berhad. There is a detailed analysis of the nature of this product, which adopts the mechanism of *hibah*, including the concepts of *‘umrā* and *ruqbā*. For this purpose, the chapter examines the theoretical framework of the general concept of *hibah* in Islamic law as well as the issue of transference of ownership and the legitimacy of the *‘umrā* and *ruqbā* conditions from the Islamic law point of view. It is interesting that in this chapter, considerable attention is paid to the *fatwā* (legal Islamic opinion), which has been issued by the *Fatwā* Council of Wilayah Persekutuan Kuala Lumpur, concerning the validity of the product. The comments of Malaysian Muslim scholars on the issue of the legitimacy of this product, including the process of the issuance of the *fatwā* are also highlighted.

Chapter Six examines the inheritance issues regarding the proceeds of the family *takāful*, conventional life insurance and government retirement benefits. The chapter studies the nature of monies received under the life *takāful* and conventional insurance policies as well as the objectives of the policies. This is an important area of study due to the fact that the legitimacy of the property is an essential of the heritable estate; hence it is pertinent to highlight the issue of the validity of conventional life insurance policies from the Islamic perspective. With respect to retirement benefits, the discussion focuses on their nature and objectives, which includes the pension, the issue of whether the benefits constitute an absolute right of the government officer as well as the nature of the contract of service. The chapter also analyzes the relevant *fatāwā* and opinions of contemporary Muslim scholars on this subject.

Chapter Seven deals particularly with jurisdictional issues and the functions of the Malaysian Syariah court pertaining to matters of Muslim inheritance. It analyzes the relevant statutory provisions in the Malaysian Federal Constitution regarding the position of Islamic law as well as the establishment and jurisdiction of the states and the Syariah courts particularly regarding the Muslim estate. The chapter also discusses the interpretations of civil and Syariah court judges of the relevant statutory provisions and the need for reforms to the present status quo. Special attention is given to arguments regarding the significance of fully empowering the Syariah courts with exclusive jurisdiction over Muslim succession. The analysis in this chapter takes into account the necessity of the Islamic concept of *tarikah* being interpreted and adjudicated by the appropriate court and by qualified judges.

Finally, Chapter Eight provides the concluding remarks of the whole thesis and suggestions for possible reforms to the current law applicable in Malaysia.

CHAPTER TWO

GENERAL ACCOUNT OF THE ISLAMIC LAW OF SUCCESSION AND THE APPLICATION OF THE LAW IN MALAYSIA

2.1. Introduction

The primary objective of this research is to study the concept of *tarikah* in the Islamic law of succession and its application in the administration of the deceased Muslim's estate in Malaysia. In relation to this, it appears important to discuss briefly the general concept of the Islamic law of succession and the development of this law in Malaysia. This chapter provides an important gateway to the present research, as its deliberate aim is to focus on the general outlines of the subject and the applicability of the law from the perspective of the Malaysian laws.

The chapter is divided into two parts. The first deals with the general concept of the Islamic law of succession. It discusses the essential principles of the law and its sources, the basis of inheritance, and the ascertainment of the rightful recipients and their positions regarding estate distribution. The second part focuses on the historical development of this law in Malaysia and its current application. An attempt is made to respond to the issue of whether or not the law has been duly recognized and adopted both before and after independence.

2.2. The General Concept of the Islamic Law of Succession

2.2.1 The Definition of *Farā'id* and the Sources of the Law

In Arabic, the Islamic law of succession is commonly known as *al-farā'id*, which literally means fixed portions.¹ *Faraḍa* is the root word of *farā'id* and has several meanings as applied in the Qur'an. However, in relation to the present subject, the term denotes *al-taqdīr*, which literally means determination as applied in the Qur'anic verse *al-Baqarah* (2):237.² Technically, according to al-Syarbīnī, the term denotes the quantum of shares allotted to the legal heirs as determined by the *Syar'īah*.³ Ibn 'Ābidīn explains that the knowledge of *farā'id* is to do with principles regarding determining the entitled legal heirs, their quantum of shares, the impediments and the causes of inheritance, the exclusions from inheritance and the classification of the legal heirs.⁴

In the light of the above definitions, it is possible to deduce that the Islamic law of succession emphasizes the entitlement of the legal heirs and their respective quantum of shares of the estate as fixed by the *Syar'īah*. In relation to this, the Islamic law of succession imposes many principles and conditions, such as the principles of double shares and priority in succession that must be satisfied in order to realize the entitlement.

¹ Brill, E.J., *First Encyclopedia of Islam 1913-1936*, New York: Leiden, 1965, vol. iii, p. 783. See also Mustafa, Ibrahim, et.al., *al-Mu'jam al-Wasīf*, Istanbul: Al-Maktabah al-Islamiyyah, n.d., p. 683.

² The Qur'an, *al-Baqarah* (2): 237; "And if you have divorced them before you have touched (had a sexual relation with) them, and you have fixed (*faraḍtum*) unto them the *mahr* (bridal-money given by the husband to the wife at the time of marriage)..."

³ Al-Syarbīnī, Muḥammad al-Khaṭīb, *Mughnī al-Muḥtāj*, Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1958, vol.3, p.2.

⁴ Ibn 'Ābidīn, *Hāsiyah Rad al-Mukhtār 'alā Dur al-Mukhtār*, 3rd edition, Bākjistān: Maktabah Rasyīdiyyah Ku'tah, vol. 5, 1404H, p. 534.

As a divine law, its primary or epistemological sources are the Qur'an and the *Sunnah* of the Prophet Muḥammad. The principles and conditions regarding the devolution of a deceased Muslim's estate are deduced from the above sources. The Qur'an and the *Sunnah* prescribe in detail the entitlement and the quantum of shares of each legal heir. There are three Qur'anic verses, known as verses of inheritance that elucidate in detail matters of inheritance, namely chapter *al-Nisā'* (4): 11, 12 and 176.⁵ In summary, these verses explain and prescribe the entitled legal heirs, their respective portions of shares, the principle of the 2:1 ratio between male and female legal heirs and the need to settle the rights attached to the estate prior to the distribution. It is a distinctive feature of this branch of Islamic law that in the main, the very detailed explanation and prescription of the principles are contained in the Qur'an, as compared to other branches of Islamic law. Referring to this subject, Coulson states: "nowhere is the fundamental Islamic ideology of law as the manifestation of the divine will more clearly demonstrated than in the laws of inheritance."⁶

The *Sunnah* elaborates further the general inheritance rules, and in some cases introduces new principles that are not expressly mentioned in the Qur'an. For instance, the rule of priority in succession,⁷ the principle of the completion of 2/3 between a daughter and

⁵ Powers, *The Islamic Inheritance System; A Socio-Historical Approach*, p.20.

⁶ Coulson, N.J., *Succession in the Muslim Family*, London: Cambridge University Press, 1971, p.3.

⁷ The *ḥadīth* "Gives the *farā'id* (the shares of the inheritance that are prescribed in the Qur'ān) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased." See Ṣaḥīḥ al-Bukhārī, translated by Khan, Muḥammad Muḥsin, *The Translation of the Meanings of Ṣaḥīḥ al-Bukharī*, Riyāḍ: Dār al-Salām, 1997, vol. 8, p. 385.

son's daughters,⁸ the entitlement of the maternal grandmother⁹ and the entitlement of the *bayt al-māl* (the state treasury) to the estate.¹⁰

Apart from the Qur'an and *Sunnah*, the inheritance laws draw its epistemological sources from *ijmā'* or the consensus of Muslim jurists, and individual *ijtihāds* or reasoning. These two sources are applicable in situations where no clear injunction is found in the primary sources. In this case, Muslim jurists perform *ijtihād*, which is clearly based on the principles deduced from the Qur'an and the *Sunnah*, in order to solve newly arising problems encountered by Muslims. Some examples are the *ijtihād* of 'Umar on the entitlement of paternal grandmothers, and in the case of *al-gharāwayn*, the interpretation of Abū Bakr on the meaning of *al-kalālah* and the principles of *al-musyārakah* by 'Alī, Zayd and Ibn 'Abbās.¹¹

It is important to mention here that Coulson suggests that the *Syarī'ah* does not legislate a new system of inheritance but simply modifies the Arab customary system of succession by introducing a new group of legal heirs namely the Qur'anic heirs.¹² The entitlement of residuary heirs is maintained but they are subject to the prior rights of the Qur'anic heirs. Thus, it can be seen that the *Syarī'ah* does not totally abrogate the old customary system

⁸ The *ḥadīth* "The Prophet applied the principle of the completion of the maximum 2/3; daughter is entitled to 1/2 and son's daughter is entitled to 1/6." See Khan, Muhammad Muhsin, Translation of Ṣaḥīḥ al-Bukhārī, vol. 8, p. 387

⁹ The *ḥadīth* "The Prophet gave portion 1/6 to the grandmother in the absence of mother." See Khan, p. 378.

¹⁰ The *ḥadīth* "I am the legal heir of the person who dies without any legal heir". This implies that the property would be inherited by the *bayt al-māl* because the Prophet does not inherit anything for himself but for the community of Muslim. See al-Syarbīnī, *Mughnī al-Muṭāj*, p. 4-5.

¹¹ 'Aṭīyyah, Muḥammad Abū al-Ḥāj, *Ḍawābiṭ al-Irth fī al-Tasyrīf al-Islāmī*. 3rd edition, n.p.: Dār al-Thaqāfah al-'Arabiyyah, 1981, p. 26. See also Barrāj, Jumu'ah Muḥammad, *Aḥkām al-Mawārith fī al-Syarī'ah al-Islāmiyyah*, 'Ammān: Dār al-Fikr li al-Nasyr wa al-Tawzīf, 1981, pp. 35.

¹² Coulson, *Succession in the Muslim Family Law*, p. 30.

of succession but instead recognizes many of its principles through its divine revelations. Clearly, this concept must stand as a fundamental principle of Islamic law when issuing a *fatwā* pertaining to issues on which a specific ruling is not found in the Qur'an or the *Sunnah*. According to al-Qaradāwī, as long as there is no contradiction with the injunctions available in the Qur'an or the *Sunnah*, all human actions and conduct not related to acts of worship are permissible.¹³

However, despite the fact that it is only a modification of law, there are significant differences between the Arab customary succession and the Islamic law of succession as far as the entitlement of residuary heirs is concerned. Even though in Arab customary practices succession is in favour of male heirs, the basic criterion for such entitlement is the capability of defending the honour of the family and tribe.¹⁴ As a result, many male heirs who are entitled to inherit under the Islamic law of succession, such as minors, the elderly and the blind, were previously excluded from inheritance because they were unable to meet this basic condition.

2.2.2. The Essential Requirements of Inheritance

The entitlement of each recipient to the estate is based on their legitimate relationship with the deceased. Islamic law has established specific criteria that must be met for a relationship to be legitimate and to enable the survivor to inherit from the deceased. This implies that Islamic law does not recognize all relationships as capable of constituting the basis of inheritance.

¹³ Al-Qaradāwī, Yūsuf, *The Lawful and The Prohibited in Islam*, Kuala Lumpur: Islamic Book Trust, 1985, pp.14 -17.

¹⁴ Pearl, David, *A Textbook on Muslim Personal Law*, London: Croom Helm, 1987, pp. 148-149.

From the facts regarding the entitlement of legal heirs, it is understood that primarily, the marriage relationship, the blood relationship and the religion-based relationship are the relationships that are recognized by Islamic law to be the basis of inheritance.¹⁵ These relationships are important in determining the legal heirs of the deceased. For instance, a divorced wife should not be simply dismissed from inheritance because of the divorce. The nature of the divorce, either revocable or irrevocable, should be taken into account because this determines whether the marriage relationship remains or has ceased to exist. If a husband dies within the period of *‘iddah* (waiting) of his divorced wife, the latter is still entitled on the grounds that the marriage relationship between them remains in existence, albeit constructively.

Another example is in the case of a blood relationship; the issue of the legitimacy of birth from the perspective of Islamic law is vital and determines the legal paternity of a child. This means that a child born within the period of less than 6 months of a marriage contract, or of the consummation of the marriage, is not entitled to inherit his or her biological father's estate on the grounds that no legitimate blood relationship existed between them.

Regarding the above explanation, it is important to clarify that the Islamic law of succession does not recognize relationships based on love, friendship or adoption as a

¹⁵ See al-Syarbīnī, p. 4. Besides the three criteria, there are another two, namely relationships arising from the emancipation of a slave and from an oath of allegiance. The former has become irrelevant nowadays, whereas the latter is still a practice among the Arabs, but seems irrelevant in Malaysia where no cases have been reported.

legitimate basis for inheritance. This indicates that the individual has no right to decide who will inherit their wealth upon their death.

A right of inheritance does not arise until and unless one's death and the survival of the legal heirs are legally established. These two conditions may seem easy to ascertain, but are in fact problematic when dealing with circumstances such as a missing person, because the death is not known. The ascertainment of death and the survival of the deceased and the legal heirs respectively in a missing person case is extremely important because it determines whether any rights of inheritance exist or not.

In normal circumstances, one's death is established by the testimony of at least two trustworthy witnesses who have seen the death. However, in the case of a missing person, the appropriate course of action is to refer the matter to a court of law, which after due investigation, may pronounce the death. This pronouncement of the court is considered valid from the Islamic point of view as long as it is based on the recognised principles. To protect the estate, the date of death of a missing person is the date it is pronounced by the court.¹⁶ Any legal heir who lives at the time a person is missing, but then dies prior to the date of the death as pronounced by the court, is therefore not entitled to inherit the estate.

The same principle applies to the determination of the survival of legal heirs. The whole estate can simply be distributed if there is no uncertainty regarding the death of a missing

¹⁶ Barrāj, *Aḥkām al-Mawārīth fī al-Syarī'ah al-Islāmiyyah*, p. 663. See also Rashid, Abdul, *Undang-Undang Pusaka Dalam Islam: Suatu Kajian Perbandingan Dalam Islam*, Kuala Lumpur: Penerbitan Hizbi & Al-Hidayah Publisher, 1997, p. 69 and Coulson, p. 200.

legal heir. In this case, it is important to establish that the heir is alive at the time of the deceased's death in order to realize his right of succession. However, in the absence of any legally acceptable evidence of his survival, the pronouncement of his death by the court will resolve the problem. In this respect, for the purpose of protecting the right of the deceased to his own estate, when the court issues a declaration of an heir's death, it corresponds to the date he or she went missing and as a result he or she is certainly not entitled to inherit because their death precedes the death of the deceased.

It should be noted that inheritance does not occur without the existence of an heritable estate. The Muslim scholars have placed this aspect in their treatises alongside the conditions of the death of the deceased and the survival of legal heirs so as to constitute the pillars of inheritance.¹⁷ This shows the significance of the existence of the heritable estate to the Islamic law of succession. In relation to this, it is extremely important to identify the actual components of the estate, which generally consist of both tangible and intangible assets including rights and usufructs. In addition, prior to the distribution of the estate among the legal heirs, the *Syarī'ah* lays down matters that must be duly considered for the purpose of freeing the estate from any other legitimate claims. Funeral expenses, debts and liabilities and valid bequests of the deceased must be settled prior to distribution.

¹⁷ For example, see Barrāj, pp. 159-160, 'Aṣṭiyyah, pp. 166-167 and al-Jawād, Aḥmad 'Abd, *Usūl 'Ilm al-Mawārīth*, Beirut, Dār al-Kutub al-'Ilmiyyah, p.1.

It should be noted that in order to realize a right of inheritance, an heir must be free from any impediment of inheritance.¹⁸ Generally, an heir who kills the deceased is consequently debarred from the right to inherit the victim's wealth. This is important because if a killer is entitled to inherit, killing might be a means to acquire wealth by way of succession. This would bring universal chaos into the society. According to Imām al-Ramlī, a Syāfi'ī's jurist, the purpose of imposing such a rule is to prevent homicide from being a means to succeed one's property.¹⁹

Furthermore, inheritance cannot occur between two persons of different religions. The principle here is that, a non-Muslim is not entitled to inherit a Muslim's estate and vice versa. The issue of slavery, as outlined by the Muslim scholars as an impediment, appears to be rather irrelevant nowadays on the grounds of the abrogation of this practice in the modern world.²⁰

2.2.3. The Nature of Legal Heirs

2.2.3.1 The Inner Family

The *'aṣhāb al-furūd* (Qur'anic heirs) and the *'asabah* (male agnate relatives) constitute the inner family of the deceased. The inner family comprises of heirs whose rights of entitlement and shares in the estate are specifically prescribed and fixed by the *Syarī'ah*,

¹⁸ Al-Syarbīnī, pp. 5-4. See also Ibn Rusyd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*, Egypt: Syarikah Maktabah wa Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī, 1981, vol. 2, pp. 352- 353.

¹⁹ Cited in Khan, Muhammad Mustafa, *Islamic Law of Inheritance; a New Approach*, 2nd edition, New Delhi: Kitab Bhavan, 2000, p. 50.

²⁰ This impediment is irrelevant today due to the fact that the practice is prohibited. In Malaysia, the act of slavery is prohibited as stated in article 6(1) of the Federal Constitution, which prohibits the act of holding a person in slavery. See also *ibid*, p. 49.

and heirs who have no fixed shares but would exhaust all the remaining estate after being taken by the *`aṣḥāb al-furūd*.

This family is further divided into three categories. The first consists of the primary heirs constituting the sons, husband, wife, father, mother and daughters. The second category consists of secondary heirs constituting germane sisters, consanguine sisters, uterine sisters and uterine brothers. The third category consists of substitute heirs, namely the agnatic grandfather, paternal and maternal grandmothers and agnatic granddaughters.

The categorization of the inner family is based on the priority of rights among them. The primary heirs always get priority in succession in the sense that no heirs from the secondary or substitute categories affect their entitlement or their share of the estate. The secondary heirs on the other hand are entitled only in the absence of male relatives of the primary or secondary heirs. The substitute heirs' right to the estate is subject to the absence of the respective heirs of the primary category.

a) *`Aṣḥāb al-Furūd*.

The Qur'anic verses *al-Nisā'* (4): 11, 12 and 176 shed light on the entitlements of the legal heirs and their specific quantum of shares. The rights of the husband, wife, father, mother, daughter, agnatic granddaughter, uterine brother, uterine sister, germane sister and consanguine sister are explained in the above verses. These people are known as the *`aṣḥāb al-furūd* or the Qur'anic heirs. However, apart from them, the agnatic grandfather and the paternal and the maternal grandmother are also included in the category of

Qur'anic heirs even though they are not mentioned in these verses, as their entitlements originate from the interpretations of the Qur'anic verses and the *Sunnah*.

The agnatic grandfather is included based on the understanding that the term 'father' used in the above verse denotes also the agnatic grandfather.²¹ The paternal and maternal grandmothers' inclusion is on the other hand based on the *ḥadīth* and *ijmā'* of the companions of the Prophet Muḥammad.²² They are named *'aṣḥāb al-furūd* because they are allocated with specific portions of the estate by the Qur'an, the *ḥadīth* or the *'ijmā'*. These fixed portions are 1/2, 1/3, 1/4, 1/6 and 1/8.

b) *'Aṣabah*

Even though a son or male offspring is expressly mentioned in the chapter *al-Nisā'* (4):12, his specific portion is not pronounced. He is therefore not from the *aṣḥāb al-furūd* group but instead he is an *'aṣabah*²³ or residuary heir. *'Aṣabah* denotes the group of agnatic heirs whose blood relationship with the deceased is not from a female relative. Their entitlement to the estate falls second after the rights of the Qur'anic heirs are fully met. If the estate is completely exhausted by the Qur'anic heirs, the *'aṣabah* will receive nothing.

²¹ Al-Zuhaylī, Wahbah, *al-Fiqh al-Islāmī wa Adillatuhū*, Beirut: Dār al-Fikr, 1987, vol. 8, p. 298.

²² 'Ubādah al-Ṣāmit said: The prophet had decreed that the paternal and maternal grandmothers share equally the portion 1/6. See al-Naysābūrī, Muḥammad 'Abd al-Ḥākim, *al-Mustadrak 'alā al-Ṣaḥīḥayn*, Beirut: Dār al-Kutub al-'Ilmiyyah, n.d., p. 376. See also Ibn Rusyd, p. 349 and al-Syarbīnī, p. 16.

²³ This is termed as actual *'asabah*. There is another kind of *'aṣabah*, which is based on the emancipation of a slave. According to al-Syarbīnī, if a freed slave dies, his former master is entitled to inherit only after it being taken by *'aṣḥāb al-furūd*. In the presence of actual *'aṣabah*, he is *de facto* excluded because the former exhausts the property. In the order of entitlement, their right comes just after the actual *'asabah*. They have prior rights over the *dhawu al-arḥām* and the *bayt al-māl*. See al-Syarbīnī, p. 20 and Khan, p. 49

This principle is known as the golden rule.²⁴ It is based on the *ḥadīth* which states: “Give the *farāʿid* (the shares of the inheritance) to those who are entitled to receive it. Whatever remains, should be given to the closest male relative of the deceased or the *ʿaṣabah*.”²⁵ Moreover, the verses also explicitly express the situation of a father who may become residuary heirs²⁶ and the possibility of the *ʿaṣabah* group converting their female counterparts of the Qurʾanic heirs to *ʿaṣabah*.

ʿAṣabah is further categorized into four classes namely i) the son and his descendants ii) the father and his ascendants iii) the descendants of the father iv) the descendants of the paternal grandfather and v) the lines of descendants of the great paternal grandfather and higher grandfathers in ascending order.²⁷ *ʿAṣabah* is generally and was originally made up of agnatic male relatives. However, it should be noted that *ʿaṣabah* does not necessarily consist merely of male relatives.

As noted above, it is understood that daughters, agnatic granddaughters, germane sisters and consanguine sisters who are Qurʾānic heirs could possibly be converted into *ʿaṣabah* by their male counterpart of *ʿaṣabah*. Besides this, germane and consanguine sisters, in the absence of sons or agnatic grandsons, would be converted by daughter or agnatic grandson. In this situation, when their position as *aṣḥāb al-furūd* has changed into *ʿaṣabah*, their entitlements are as *ʿaṣabah* and consequently, they are no longer

²⁴ *De facto* exclusion is different from *de jure* exclusion. The former is applicable to the golden rule whereas the latter is applicable only within the categories of *ʿaṣabah*.

²⁵ This *ḥadīth* was narrated by Ibn ʿAbbās and was reported by al-Bukhārī in his *Ṣaḥīḥ*. See Khan, *Translation*, p. 73.

²⁶ The verse clearly expresses that in the absence of any son or agnatic grandson, the father will inherit as the *ʿaṣabah*, and further, in their absence but with the presence of a daughter or agnatic granddaughter, the father will inherit in both the capacity of *aṣḥāb al-furūd* and of *ʿaṣabah*.

²⁷ Coulson, p. 33

guaranteed to receive any specific portion of shares in the estate. They are now subjected to *de jure* and *de facto* exclusions.

It is to be noted that the principle of double share between male and female heirs is applicable to some heirs in the category of *‘aṣabah*. This is based on the chapter al-Nisā’ (4) verses 11, 12 and 173. This applies when female legal heirs of the *‘aṣḥāb al-furūd* are converted into *‘aṣabah* by their male counterparts. This principle is commonly known as *al-ta‘ṣīb*.

Daughters, agnatic granddaughters, germane sisters and consanguine sisters are the four female legal heirs of *‘aṣḥāb al-furūd*, who are affected by the principle. In the presence of a male counterpart, their entitlement is in the capacity of *‘aṣabah* instead of *‘aṣḥāb al-furūd* and as a result, they have no fixed shares. They will share the remaining estate left by the *‘aṣḥāb al-furūd* with their male counterpart following the principle of double share, namely the ratio of 2:1.²⁸

The difference of shares between male and female legal heirs is due to the nature of the burden in terms of the financial responsibility that is borne by the male legal heir. In Islamic family law, a woman is only accountable financially to herself. In contrast, a man is burdened with the responsibilities of supporting and maintaining others including his wife, children, parents, brothers and sisters. In this respect, even though a Muslim woman receives less of the estate than a Muslim man, she receives it solely for herself and is

²⁸ See Khan, *Translation of al-Bukhārī*, p.385.

under no legal duty to spend it on others,²⁹ whereas a man is subject to the possibility of being summoned to court if he neglects his responsibilities.³⁰

2.2.3.2. Table of the Entitlement of the Inner Family

The Entitlement of Primary Heirs

Heirs	Portions and Positions	Situations
Husband	a) 1/2 b) 1/4	a) No offspring b) Presence of offspring
Wife	a) 1/4 b) 1/8	a) No offspring b) Any offspring
Father	a) 1/6 b) 1/6 + Residue c) Residue	a) Presence of male offspring b) Presence of female offspring but no male offspring c) No male or female offspring
Mother	a) 1/6 b) 1/3 of the whole estate c) 1/3 of the remaining estate	a) Presence of any offspring (male or female) or presence of two or more collaterals (brothers or sisters or mixture of them; germane or consanguine or uterine or mixture of them) b) Absence of any offspring or in the presence of only one collateral (germane or consanguine or uterine) c) This case is known as <i>gharāwayn/ gharībatayn/ ‘umāriyyatayn</i> . It happens when the only entitled legal heir is the husband, wife, father or mother. The father may convert the mother into a residuary heir and their shares are based on a 2:1 ratio.
Daughter	a) 1/2 b) 2/3 c) Residue	a) Alone and absence of male offspring. b) Two or more daughters and absence of son. They share the portion equally. c) Presence of son; she is converted into a residuary heir the by son. She inherits in her capacity of an <i>‘aṣabah</i> .
Son	No specific share; he is always an <i>‘aṣabah</i>	He is very powerful. He could reduce the shares of the Qur’ānic heirs including the spouse and the ascendants and could totally exclude the collateral from inheritance. He is never excluded from inheritance.

²⁹ See also a *fatwā* issued by A Group of Islamic Researchers, Why Male’s Share of Inheritance Doubles Female’s?, [online], 27th March 2005, available from: <http://www.islamonline.com> [accessed on 6th April 2005]. In this *fatwā*, the researchers put an example: “If a father dies and leaves \$30,000 to his children (lets say there are 2 sons and 2 daughters). Each son gets \$10,000 and each daughter gets \$5,000 dollars. However, the sons have to support their mothers, their wives, their children, and their sisters (if the sisters are not married yet), while the sisters can keep the money to themselves. So, who ends up having more money at the end? Of course the girls.”

³⁰ Al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhū*, vol. 4, pp. 25- 26. See also al-Qaraḍāwī, Yūsuf, *Fatwa Terkini Wanita & Keluarga*, translated into Bahasa Malaysia by H. Mohd. Roihan M.A., Kuala Lumpur: Pustaka Shuhada, 1996, p. 177.

The Entitlement of Secondary Heirs

Heirs	Portions and Positions	Situations
Uterine brother and sister	a) 1/6 b) 1/3 c) Excluded	a) Alone b) More than one, either male or female or mixture. c) By any offspring of the deceased or any male agnatic ascendant.
Germane sister	a) 1/2 b) 2/3 c) Principle of double share d) Accompanying residuary e) <i>al-Musyārah</i> f) Excluded	a) Alone b) More than one c) Converted by her/their male counterpart i.e germane brother d) Converted by daughter or agnatic granddaughter e) Share the portion equally with the uterine brothers and sisters in the case of <i>al-ḥajariyyah</i> . f) By son or agnatic grandson, or father (not by agnatic grandfather)
Consanguine sister	a) 1/2 b) 2/3 c) 1/6 d) Principle of double share e) Accompanying residuary f) Excluded	a) Alone b) More than one c) Presence of one germane sister; the rule of the completion of the maximum 2/3 d) Converted by her/their male counterpart into an <i>‘aṣabah</i> e) Converted by daughter or agnatic granddaughter f) By i- Son or agnatic grandson ii- Father (not agnatic grandfather) iii- Two germane sisters because the maximum portion of 2/3 has been exhausted by the germane sisters iv- Germane sister/s who is/are converted into <i>‘aṣabah</i> by daughter or agnatic granddaughter v- Germane brother
Germane and consanguine brother	No specific shares; they inherit in the capacity of <i>‘aṣabah</i>	Their rights of inheritance arise only in the absence of a son or agnatic grandson or father. With the presence of any of them, they are <i>de jure</i> excluded.

The Entitlement of Substitute Heirs

Heirs	Portions and Positions	Situations
Agnatic grand father	Portions and positions of father	The same situations of father apply. However, as a substitute heir, he is excluded by father. This is based on the principle of the nearer in degree excludes the more remote. There are different opinions among Muslim jurists pertaining to the issue whether agnatic grandfather may exclude collateral as father does. According to Abū Bakr, the agnatic grandfather excludes the collaterals whereas according to ‘Alī and Zayd, the principle of exclusion does not apply. Both instead, apply the doctrine of <i>al-muqasamah</i> and the case is called as the competition between agnatic grandfather and the collaterals. Ali and Zayd further have different opinions on the method of calculation.
Ṣaḥīḥ grand mother	a) 1/6 b) Excluded	a) Alone or regardless of the side whether maternal or paternal. b) By: i) Mother (maternal and paternal grandmother) ii) Father (paternal grandmother only) iii) Principle of the nearer in degree excludes the more remote applies.
Agnatic grand daughter	a) 1/2 b) 2/3 c) Principle of double share d) 1/6 e) Excluded	a) Alone in the absence of any daughter and those who may convert her into an ‘aṣabah. b) More than one in the absence of any daughter and those who may convert them into ‘aṣabah. c) Presence of agnatic grandson or her male counterpart, she/they become ‘aṣabah and inherit in their capacity of ‘aṣabah, not as Qur’ānic heirs. d) Presence of one daughter only and in the absence of her/their male counterpart. This is the principle of the completion of the maximum portion 2/3 of the female offspring. e) By: i) Son ii) In the absence of her/their male counterpart, she/they is/are excluded by two or more daughters because the maximum portion of 2/3 has been exhausted by the daughters. This applies except in the presence of agnatic male offspring who are below her/them. The latter will convert the former into ‘aṣabah even though he is not her/their counterpart.

2.2.3.3. The Outer Family and the *Bayt al-Mal*

There is another group of relatives of the deceased that is the *dhawu al-arḥām*. Coulson names it as the outer family.³¹ This denotes relatives who are neither *ʿaṣḥāb al-furūd* nor *ʿaṣabah*. Like the inner family, the outer family also has a blood relationship with the deceased but their entitlement exists only in the absence of any blood relative belonging to the inner family. A husband or wife cannot preclude them because the right of inheritance of the former is based on the subsisting contract of marriage.

The Sunni schools of law do not unanimously agree on the entitlement of this group. Originally, only the Ḥanafīs and the Ḥanbalīs³² recognized their entitlement based on the Qurʾanic verse *al-Anfāl* (8): 76, which states the preference of some relatives over others and their preference over all believers in matters of inheritance.³³ The Mālikīs and the Syāfiʿīs however, prioritized the *bayt al-māl* over them in the absence of any blood relative of the inner family. This meant that there was no right at all in favour of them. However, due to problems of corruption and mismanagement in the *bayt al-māl*, later scholars of both schools issued a different decree recognizing the entitlement of the outer family.³⁴

³¹ Coulson, p. 31.

³² Ibn ʿĀbidīn, p. 540 and Badrān, Abū ʿAynayn Badrān, *Aḥkām al-Tarikah wa al-Mawārith*, Iskandāriyyah: Muʿassasah Syabāb al-Jāmiʿah, 1981, p.255.

³³ "Blood-relations among each other have closer personal ties, in the Decree of Allah, than (the Brotherhood of) Believers and Muhajirs."

³⁴ Al-Syarbīnī, vol. 4. p. 630 and Ibn Rusyd, p. 339.

2.2.4. The Principles of Exclusion

It can be seen from the above-mentioned Qur'anic verses, that the entitlement of each *'aṣḥāb al-furūd* is dependant upon the presence and absence of other heirs. Hence, their shares are subject to the possibility of being reduced. Taking the husband as an example, his share is reduced from one-half to one-quarter if his wife dies leaving behind a child. Similarly, a wife is originally entitled to one-quarter but if the husband dies and is survived by a child, her portion is reduced to one-eighth. A mother's portion of one-third is reduced to one-sixth if her son or daughter leaves behind any offspring or collaterals. This reduction is known as partial exclusion in the Islamic law of succession. It applies to the portions that fathers, mothers, husbands, wives and daughters are entitled to. Because they are primary heirs they are never totally excluded from the inheritance.

On the other hand, total exclusion affects the rights of inheritance of secondary and substitute heirs. This total exclusion applies to the situation of an heir who may be totally excluded from inheritance and entitled to nothing due to the presence of other heirs. According to Coulson, there are two types of total exclusion, namely *de facto* and *de jure* exclusion. The former is applicable to the golden rule that is the complete satisfaction of the fixed portions by the *'aṣḥāb al-furūd*, which exhausts the estate to the extent of there being nothing left for the *ʿaṣabah*. The latter is, on the other hand, applicable to the group of *ʿaṣabah* and occurs where one relative is deemed by law to have a superior relationship tie with the deceased and thereby excludes others from inheritance.

In other words, *de jure* exclusion is merely applicable to the *‘aṣabah*. This type of exclusion is significant in ascertaining the nearest *‘aṣabah* to the deceased. The nearest heir would totally exclude the more remote, and in this situation, exhaust all the remaining estate. There are three rules to be observed in order to determine the nearest heir, namely the rule of class, the rule of degree and the rule of the strength of blood-tie. The rule of class states that the higher excludes the lower, the rule of degree is that the nearer excludes the more remote and the rule of the strength of blood-tie is that the stronger blood-tie excludes the more remote.³⁵

2.3. The Development of the Law in Malaysia

2.3.1. Before and After the Advent of Islam

Before the advent of Islam, the distribution of property among the Malay population was based on the *adat* laws, or tribal customs, of either *adat perpatih* or *adat temenggong*.³⁶ These *adats* were brought from Sumatera, Indonesia. *Adat perpatih* is the matriarchal law brought by the Malays of Minangkabau who migrated to the State of Negeri Sembilan, where it is preserved until today.³⁷

On the other hand, the Malays of Palembang brought the *Adat Temenggong*. This *adat* was originally matriarchal but with the influence of the old Hindu civilization of Java was

³⁵ Anderson, J.N.D., *Islamic Law in The Modern World*, London: Stevens & Sons Limited, 1959, p. 61.

³⁶ Ibrahim, Ahmad, *Family Law in Malaysia and Singapore*, Singapore: Malayan law Journal Pte. Ltd., 1984, p. 294. See also Idris, Tan Sri Dato' A Samad Idris, *Pembahagian Harta Pusaka Menurut Adat Perpatih: Pengalaman Malaysia*, in *Pentadbiran Harta Menurut Islam*, edited by Abdul Monir Yaacob and Mohd. Fauzi Mustafa, Kuala Lumpur: IKIM, 1999, p. 232.

³⁷ Ibrahim, Ahmad, *Family Law in Malaysia and Singapore*, p. 294. Wilkinson, R.J., Malay Law, in Hooker, M.B., *Readings in Malay Adats Laws*, Singapore: Singapore University Press, 1970, p. 7.

entirely abandoned and became patriarchal except in matters of property disposal.³⁸ The Sultanates of Palembang and the Kingdom of Malacca played a significant part in spreading the *adat* to the other Malay states.³⁹ In other words, the *adat perpatih* was practiced in Negeri Sembilan and this *adat* has been preserved up to the present day,⁴⁰ whereas in other Malay States, the applicable *adat* was the *adat temenggong*. Despite the changes that had occurred to the customary practices of *adat temenggong*, the distribution of property among the Malays remained matriarchal. The devolution of property, such as land and houses, upon death was always in favour of women.⁴¹

With the advent and influence of Islam, prior to the period of British occupation, three laws became applicable to the Malays, namely the *adat perpatih*, the *adat temenggong* and Islamic law. Taylor concludes that the customary laws and the Islamic law were really two irreconcilable systems. The customary laws were strictly preserved and as a result, part of the Islamic law was superimposed.⁴² This resulted in the laws applicable at that time being a mixture of Malay customary law and Islamic law.⁴³

Taylor suggests that although the Malays were committed to Islamic law, they never adopted all its principles.⁴⁴ In matters of succession, Wilkinson submits that the Malays did not adopt the entire Islamic law of succession.⁴⁵ Taylor submits that the inheritance

³⁸ Wilkinson, R.J., *Malay Law*, p.7.

³⁹ Ibrahim, Ahmad and Joned, Ahilemah, *The Malaysian Legal System*, p. 32.

⁴⁰ Taylor, E.N., *Malay Family Law*, *J.M.B.R.A.S.* 15:1 (1957), p. 3.

⁴¹ Wilkinson, p. 12 and 32.

⁴² Taylor, *Malay Family Law*, p. 4.

⁴³ Hooker,., *Islam in South East Asia*, 1983, p. 161.

⁴⁴ Taylor, p. 4.

⁴⁵ Wilkinson, *Papers on Malay Subjects*, IV, 1908, 1-45, p. 37. See also Taylor, E.N., *Aspects of Customary Inheritance in Negeri Sembilan*, in: Hooker, M.B., *Readings in Malay Adat Laws*, p. 163.

laws applicable to the Malays were a mixture of Islamic law and *adat* laws as stated in the rules of succession applied at that time:

- (i) On the death of a peasant, his widow is entitled to a special share in his estate, as her share in *harta sepencarian* unless provision has been made for her *inter-vivos*, as for example by registering land in her name. If the deceased had no children and the estate is small she may take the whole estate; in other cases she takes a half or less according to circumstances;
- (ii) The residue of the estate is distributed according to Muslim law but in as much as the widow's special share is discretionary, her one-eighth, or one-quarter share can and should be taken into consideration in assessing the special share.⁴⁶

2.3.2. The Islamic Law of Succession during the British Occupation

As part of the Straits Settlement, English law was introduced as the law of general application through the medium of the Charters of Justice in 1807, 1826 and 1855. These charters provided that English law should be the law of the land applied to the native inhabitants in so far as the various religions, manners and customs would permit, over all civil, criminal and ecclesiastical matters.⁴⁷

However, it was found that in matters of Muslim inheritance, the principles of English law were followed. This is evident in the case of *In the Goods of Abdullah*⁴⁸ in which

⁴⁶ Taylor, p. 167. See also Hooker, M.B., *Adat Laws in Modern Malaya*, Kuala Lumpur: Oxford University Press, 1972, p. 15.

⁴⁷ Sheridan, L.A., *Malaya, Singapore and the Borneo Territories*, London: Steven Ltd., 1965, p. 14-15.

⁴⁸ (1835) 2 Ky. Ec. 8.

case, the English judge decided against the principles of Islamic law by applying English law allowing a will to be executed in excess of one-third of the estate. Benjamin Malkin R. held that the 1807 Charter introduced the law of England into Penang and consequently a Muslim could, by will, dispose of his entire property, even though such a will would be contrary to Muslim law.⁴⁹

It was further held that English law was the law of the land in Penang as stated in the case of *Fatimah & Ors v. Logan & Ors*.⁵⁰ In this case, it was contended by the Attorney General for the plaintiff that Muslim law must be applied. However, the court objected the contention stating that since the *lex loci* of Penang was English law, the validity of the will which was for more than one-third of the Muslim's estate must therefore be decided in accordance with English law.

On the basis of the above illustrations, it can be clearly seen that the principle of Islamic law, which prescribes that a deceased Muslim is only allowed to bequeath his property to the maximum of one-third of his estate, was simply ignored. Instead, the British attempted to introduce English legal principles allowing a Muslim testator to bequeath his property exceeding the limit outlined by the *Syarī'ah*.

In the Federated Malay States, under British occupation, with regard to ownership of land, the Land Enactment was introduced in about 1880, which was largely based on the

⁴⁹ Buang, Salleh, *Malaysian Legal History; Cases and Materials*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 2002, p. 6.

⁵⁰ (1871) 1 Ky. 255.

Australian Torrens system of registration of title.⁵¹ Pertaining to inheritance of land, a provision was inserted in the Land Enactment empowering the Collectors i.e. the district officers to hear and determine claims regarding succession to the *mukim* (district) registered land of a deceased person. In dealing with these cases, the Collector took no account of movable property or issues of debt attached to the deceased Muslim's estate.⁵²

Muslims faced problems in following the Islamic laws because the jurisdiction of the *kathis* who administered the Islamic law was restricted to questions of marriage, divorce and alimony. In other words, they had no power to distribute property either upon divorce or upon death.⁵³ In 1886, the Perak State Council ordered the land of a major chief to be transmitted to the female line.⁵⁴ Taylor stated:

“A great many titles were registered from the first in the names of women—a practice obviously not attributable to Muhammadan influence. The explanation is that until the close of the nineteenth century the people in the Malay States did not have any formal succession to property. In the absence of any documents of title of any kind whatsoever the family of a deceased peasant simply succeeded to his land by survivorship. If any dispute arose it was settled by the elders of the village in accordance with ancient custom. If the disputants were not satisfied it is more likely that they resorted to the *kris* than to the *kathi*.”⁵⁵

However, since then, according to Ahmad Ibrahim, the Islamic law of succession has been more extensively adopted and the customary laws have only survived in relation to the rights of widows and divorcees.⁵⁶ It is to be noted that under the British

⁵¹ Taylor, *Malay Family Law*, p. 5.

⁵² Taylor, p. 7.

⁵³ Ibid p. 4.

⁵⁴ Wilkinson, *Papers on Malay Subjects*, IV, 1908, 1-45, p. 37. See also Taylor, *Aspects of Customary Inheritance in Negeri Sembilan*, p. 163.

⁵⁵ Taylor, *Malay Family Law*, p.9.

⁵⁶ Ibrahim, Ahmad, *Islamic law in Malaysia*, Kuala Lumpur: Malaysian Sociological Research Institute Ltd. 1965, p. 245.

administration, a system of indirect rule had been established in the Malay states. Even though the Sultans were the heads of state, they acted on the advice of the British residents except in matters of Islamic law and Malay custom. Regarding the applicability of the principles of the Islamic law of succession, it appears that they were duly recognized by the British. There are several cases that support this suggestion.

Based upon the decisions of the Collectors and the courts, it is possible to conclude that the principles of the Islamic law of succession were frequently adopted.⁵⁷ Even though they were not written in the form of a statute, the principles were duly adopted by referring to either relevant Islamic textbooks or Muslim experts. The *Kathi* was frequently called as a witness on issues of fact. In hearing disputes and as practical administrators, the Collectors applied the traditional principle of distribution “according to the Muhammadan law as varied by local custom.”⁵⁸

In the case of *Re Timah binti Abdullah Decd*,⁵⁹ the Islamic principle regarding the exclusion of non-Muslim heirs from inheritance was followed. The Court held that the non-Muslim next of kin of the deceased Muslim were not entitled to inherit on the basis of the difference in religion. In this case, Gordon Smith J. applied the principle referring to the opinions of the Syāfiʿī school of law contained in the books of Tyabji and *Minhāj al-Ṭālibīn*.

⁵⁷ Ibid, p. 246.

⁵⁸ Taylor, *Malay Family Law*, p. 8. According to Taylor, the Collectors' cases were never reported or preserved in any way.

⁵⁹ (1941) MLJ 51.

The Syāfi's school of law holds the view that a will exceeding one-third of the whole estate is valid subject to the approval of the legal heirs. In other words, if the legal heirs do not approve, the will is valid only up to one-third. This principle was adopted during the colonial period in deciding cases pertaining to a Muslim's will in favour of legal heirs and in excess of the maximum one-third.

In the case of *Sheikh Abdul Latif & Ors v. Sheikh Elias Bux*,⁶⁰ the Court decided that the will made in excess of one-third was inoperative with respect to such part of the property bequeathed to testator's adopted son exceeding one-third of the estate, which was permissible for him to leave to a stranger but also inoperative in so far as it deprives testator's two brothers and sister of their legal shares as heirs.

The Islamic principle that a will must not be in favour of an heir was also adopted. This is evident in the case of *Siti binti Yatim v. Mohamad Nor bin Bujai*⁶¹ where Burton J. held that a will which gave to an heir a larger share than he is entitled to under Islamic law in preference over others was wholly invalid as it was not consented by other legal heirs.

In *re Ismail bin Rentah*,⁶² Raja Musa J firmly stated the applicability of the Muhammadan law to Malays. In this case, the Court decided on the issue of nomination and held that it was not a conferment of right to take the deceased's estate beneficially upon death but instead, the nominee appointed stood as a trustee and hence must distribute the estate in accordance with the Islamic inheritance system.

⁶⁰ [1915] 1 FMSLR p. 204.

⁶¹ (1928) 6 FMSLR 135.

⁶² (1940) MLJ 98.

2.3.3. The Present Application and the Classification of Estates

The application of the Islamic law of succession was supposedly secured with the inclusion of the law in the Malaysian Federal Constitution. The relevant clause is contained in the Ninth Schedule of the Federal Constitution, which empowers the states' governments to enact the Islamic laws relating to succession, testacy and intestacy. However, to date no statute on the Islamic law of succession has been legislated by any of the state legislative bodies. For the non-Muslim however, there are specific Acts that regulate the disposition of estate, testacy and intestacy. The Wills Act, 1958 regulates the testate death and the Distribution Act, 1959 regulates intestate death.

The present jurisdiction on the administration of deceased Muslim estates appears problematic. As it is part of Islamic law, the Syariah court which serves as the state court is the appropriate forum to decide cases on Muslim inheritance. However, due to the conflicting provisions in the Federal Constitution, the civil court firmly believes that it has jurisdiction over disputes pertaining to the Islamic law of succession. In the Federal List of the Federal Constitution, there is a general clause stating that succession falls under the Federal Government. Similar wording is also found in the State List, but this specifically refers to Islamic law, empowering the State Legislature to enact the Islamic law of succession.

2.3.3.1. Jurisdiction of the High Court

The Federal Constitution, as the supreme law of Malaysia lists the matters that fall within the power of the Federal Legislative Assembly, i.e. the Parliament to make laws. Article 74 of the Federal Constitution of Malaysia provides:

“Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or the Third List set out in the Ninth Schedule.”

With respect to the jurisdiction of the civil courts pertaining to issues of succession and inheritance, paragraph 4 (e) (i) of the Federal List in the Ninth Schedule of the Federal Constitution clearly provides that in matters of succession, testacy and intestacy as well as probate and letters of administration it is within the power of the Federal Legislative Assembly to enact laws. Paragraph 4 (e) (i) of the Federal List provides:

“Subject to paragraph (ii), the following;

(i) contract, partnership, agency and other special contract; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and hypothecation, except land; *bona vacantia*; equity and trusts; marriage, divorce and legitimacy; married woman’s property and status; interpretation of Federal law; negotiable instruments; statutory declarations; arbitration; mercantile law; registration of businesses and business names; age of majority; infants and minors; adoption; succession, testate and intestate; probate and letters of administration; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence;

Furthermore, section 24 of the Courts of Judicature Act 1964 provides in very specific wording the civil jurisdictions of the High Court. This section states clearly that the High Court has the jurisdiction to grant probates of wills and testaments and the letters of administration of the estates of deceased persons leaving property within the territorial

jurisdiction of the Court and to alter or revoke such grants. The letters of probate and letters of administration are also known as letters of representation, which upon being granted by the High Court confer powers, duties, obligations and rights on the executor or administrator of the deceased's estate. The person or persons to whom such letters are granted are in law called the deceased's personal representative.⁶³

The Probate and Administration Act 1959, which is the primary Act dealing with the administration of the estates of deceased Muslims and non-Muslims, is one of the laws enacted by the Parliament following the powers conferred on it by the Federal List of the Federal Constitution. It regulates matters pertaining to the administration of the deceased's estate in Malaysia. The Act empowers the High Court to issue probate and letters of administration appointing the executor or administrator of the estate. If the deceased dies with a valid will, upon proper application to the Registrar of the High Court, a letter of probate will be granted by the High Court conferring powers on the executor appointed by the deceased in his will to administer and distribute the estate accordingly.

The idea of appointing the deceased's representative as executor or administrator and vesting the estate including choses in actions⁶⁴ in them is for the purpose of protecting the interests of the parties who might become the rightful recipients of the estate left by the

⁶³ Section 2 of the Probate and Administration Act 1959 provides that the personal representative is defined as the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the Court.

⁶⁴ In *Re Abdul Salam, deceased; Abdul Razak v Kasi Mohamad Shirazil Anwar* [1938] MLJ 83, the High Court held that the right of residuary legatee in residue comprising of undivided immovable property is regarded as a chose in action.

deceased.⁶⁵ For this reason, there are situations whereby the executors appointed by the testator through a valid will may not be granted probate. Instead, the Court applies its discretionary power by granting probate but with the will annexed to a person whom the Court deems the fittest to administer the estate.⁶⁶ In doing so, the Court is guided by the rule stated in the proviso of the section that the priority of right to the grant depends either on who is entitled most to the estate or who is the most rightful recipient of the estate. The same applies to the appointment of an administrator. The interest of the beneficiaries in the estate becomes the priority in determining who should be the administrator.⁶⁷

The distribution of Muslim estates takes place after all debts and liabilities attached to the estate are paid off. For non-Muslims, the distribution of estates following intestacy must accord with the Distribution Act 1958. However, for the Muslim, there is no such statute prescribing in detail the rules and principles as laid down under the *farā'id* law. The personal representative must apply to the Syariah court for a certificate of *farā'id*, which

⁶⁵ In protecting interest in the deceased's estate, the High Court allowed beneficiaries to institute actions in court even though they had no grant of probate or administration. The reason for such approval was they were not suing on behalf of the estate. They were suing in their own capacity as beneficiaries of the estate for a declaration to protect the property of the estate and to prevent its sale. Based on this reason, the Court further held that they had the locus standi to do so as they had at least an equity in the estate. See *Omar Ali bin Mohd & Ors v Syed Jafarsadeq bin Abdulkadir Alhadad & Ors* [1995] 3 SLR 388.

⁶⁶ S. 16 of the Probate and Administration Act provides inter alia the situations where the Court may find it unsuitable to grant probate to the executor appointed by the testator. For example, in the situation where the executor appointed is legally incapable, perhaps due to minority of age or unsoundness of mind, the grant would not be issued to them but instead, to other persons who the Court deems the fittest.

⁶⁷ S. 30, *ibid*. The High Court held in *Ree Wee Guan Ho, deceased* [1940] MLJ 212 that a grant of letters of administration with the will annexed can only be made by the High Court or a judge when sitting in open court. It further held that a grant of letters of administration in any case cannot be made to a petitioner who has no interest in the estate. See also *Attorney General v Hajee Abdul Cader* (1883) 1 Ky 616. In this case, the Court held that where a will provided that on the death of the executors named therein the grandsons of the deceased should succeed as executors in point of age, the eldest having the first right, and the Court duly appointed the eldest grandson. See also Singh, Mahinder, *The Law of Wills Probate Administration and Succession in Malaysia and Singapore*, Kuala Lumpur: International Law Book Services, p.143.

specifies the portions and the entitled legal heirs of the deceased. In the light of the decided cases previously discussed, it is clear that the judges have often referred to treatises and manuals written by Muslim scholars including *Minhāj al-Tālibīn* by al Nawāwī, which was translated by E.C.Howard from the French translation of Van Ben Berg, *Mohammadan Law* by Syed Amir Ali, *Muhammadan Law* by F.B. Tyabji, *Outlines of Muhammadan Law* by A.A.Fyzee and *Islamic Law in Malaysia* by Ahmad Ibrahim.

In the case of *Amanallah v Hajjah Jamilah*,⁶⁸ a will was created by the deceased in which he bequeathed all his property to the plaintiff. The will was challenged by the defendant on the ground that he was entitled to a share in accordance with the Muslim law of inheritance. The Court referred to the books of *Minhāj al-Tālibīn* and the 4th edition of the Tyabji on Muslim law. It was held that the will was invalid as it disposed of more than one-third of the deceased's property and was made in favour of an heir, without being consented by other heirs. In *Re Mutchilin*,⁶⁹ the Court referred to Howard's translation of the *Minhāj al-Tālibīn* and decided that according to the Syāfi'ī school of law, the theory of *radd*⁷⁰ did not apply and therefore the widow of the deceased was entitled to one-quarter of the estate. The remaining three-quarters escheated to the *Bayt al-Māl*.

⁶⁸ [1975] 1 MLJ 30.

⁶⁹ (1960) 26 MLJ 51.

⁷⁰ *Radd* means return.

2.3.3.2. Small Estate Administration

The small estate is defined in the Small Estate (Distribution) Act, 1955 as an estate of a deceased person consisting of wholly or partly immovable property situated in any state and not exceeding six hundred thousand *ringgits* in total value. This means that the existence of immovable property such as land is the most significant requirement to constitute an estate as a small estate. If a deceased dies without landed property, even though the total value of the estate is less than RM600,000, the estate does not fall within the above definition.

The purpose of having small estate distribution departments is merely to expedite the process of distributing the deceased's estate. Within the Department of the Director General of Land and Mines, there are 36 Small Estate Distribution Units throughout the country and each unit has a Collector to deal with the affairs of administration and distribution of small estates.⁷¹

According to Mr. Mohd. Zin bin Dollah, the Head Assistant Director of the Small Estate Distribution Unit of Kelantan, Malaysia, the process of administration and distribution of small estates deals with cases that do not involve the death of the entitled legal heirs and or issues requiring a decision to be made prior to that made within the last four months.⁷²

⁷¹ Buku Panduan Permohonan Pembahagian Harta Pusaka Kecil, Seksyen Pembahagian Pusaka, 3rd edition, Kuala Lumpur: Jabatan Ketua Pengarah Tanah dan Galian Kementerian Tanah dan Pembangunan Koperasi, Kuala Lumpur, n.d., p. 1.

⁷² Dollah, Mohd. Zin, *Pentadbiran dan Pengurusan Harta Pusaka Kecil, Kertas Kerja 1*, Seminar dan Dialog Mengenai Harta Pusaka, Jajahan Tumpat, 8th July 2003, p.2.

By having these departments or units for small estates, the cost of administering and distributing the estate may be reduced. In the case of the non-small estate, the court proceedings can be costly and time consuming for the parties concerned⁷³ because currently there is only one High Court for each state in Malaysia. The High Court has a number of jurisdictions amongst which is that pertaining to succession issues. Taking into consideration the facilities provided by the offices of Collectors in the districts of each state in Malaysia, and the presence of one High Court for each state, it is clear that the administration and distribution of small estates is significantly vital taking into account the interests of the public. Moreover, cases of small estate administration involve issues pertaining to land ownership, and the expertise and vast experience of the Collector in such matters is very much appreciated.⁷⁴

It would seem that the Collector has the original and exclusive jurisdiction over matters pertaining to small estate administration and distribution. The High Court has no such jurisdiction and hence, any civil suit pertaining to the administration and distribution of a small estate that brought before the High Court will not be entertained. The exclusive nature of the Collector's jurisdiction can be further argued by pointing to the provision in section 4(1) of the Small Estate (Distribution) Act. This section clearly shows that with regard to small estates, only grants and orders issued by the Collector are valid and effective in vesting any interest of such estates in the entitled beneficiaries. It is therefore

⁷³ For the process of administration and distribution at the district Collector's office, the total cost normally is around RM37. But if a case is referred to the High Court for appeal, the total cost may reach RM1565. See Buku Panduan Permohonan Pembahagian Harta Pusaka Kecil, p. 6 & 7.

⁷⁴ *Fathimah binti Mat Akir v Sharifah binti Haji Ahmad & Ors* [1977] MLJ 106.

possible to conclude that any letter of representation or order issued by the High Court has no effect on such property and hence, is invalid.

This principle was upheld in *Fathimah binti Mat akir & Anor v Sharifah binti Hj Ahmad & Ors*⁷⁵. In this case, a settlement officer made an order under the Small Estates (Distribution) Ordinance 1955 (as the Act was known before its revision in 1972) for the distribution of the estate of one Akil bin Lebai Mat who had a quarter share in a piece of land. According to the record of the proceedings kept by the settlement officer, all the beneficiaries of the estate present agreed to the distribution. Subsequently it was alleged that one of the widows was of unsound mind. Her daughters applied to the High Court to set aside or vary the settlement officer's order and for a declaration that a half-share of the deceased's interest in the said land be transferred to this widow as '*syarikat*' property. The trial judge dismissed the application. On appeal the Federal Court held that the High Court had no jurisdiction to entertain the suit on the grounds that it related to a small estate. The Court further stated that the legislature has expressly provided by s. 4(1) of the Small Estate (Distribution) Ordinance that it is not the High Court, but the Collector who exclusively has original jurisdiction.

The above decision was followed in *Lokmanaalhakim bin Ramli & Ors v Haji Ismail bin Ishak & Ors*.⁷⁶ In this case, the plaintiffs claimed that the order of distribution was wrongly made by the Collector on the grounds that he had failed to consider a letter of renunciation made by the defendants in which they renounced their share in the estate

⁷⁵ [1977] 1 MLJ 106

⁷⁶ [1992] 2 CLJ 1031.

and that the Collector also failed to appoint a guardian for the minor beneficiaries in the case. The High Court held that the matters complained of were within the exclusive original jurisdiction of the Collector and thus the High Court could not entertain the civil suit.

A similar judgment was held in *Ahmad bin Abdul Majid v Habibah bte Abdul Majid & Anor*.⁷⁷ In this case, the plaintiff and the defendants were siblings of the deceased, the former being the eldest son. The plaintiff claimed that the order of the Gombak District Land Administrator was made in an arbitrary fashion, as it did not follow the procedure laid down by the Small Estate (Distribution) Act 1955. The plaintiff, through originating a summons, applied for his entitlement to his deceased mother's estate under Islamic Law. According to the plaintiff, his name was not included in the list stating the legal heirs of the deceased, and moreover, the application to the Gombak District Land Administrator for the distribution of the estate was made without his knowledge. The High Court held that it had no jurisdiction to hear the plaintiff's application. This decision was made on the grounds that the issue in dispute involved a small estate that was subject to the provision of the Act and was exclusively within the original jurisdiction of the Collector as prescribed in section 4(1) of the Act:

“Save as in this Act otherwise provided no interest in any small estate shall devolve on or rest in any person by virtue of any instrument other than an order or grant made under this Act.”

However, despite the exclusive jurisdiction of the Collector in respect of the administration and distribution of small estates, there is an exception to the rule. The

⁷⁷ [2001] 2 MLJ 245.

High Court still has jurisdiction to deal with small estates if the deceased dies with a valid will. In this regard, the High Court has the power to issue letters of representation. This situation is applicable in both testacy and intestacy cases, which include situations where the deceased leaves a will but does not appoint an executor. In other words, it is the High Court that has exclusive jurisdiction to grant letters of probate or of representation with a will annexed even though the estate is a small estate. The Small Estate (Distribution) Act, 1955 has no effect on this original exclusive jurisdiction of the High Court by virtue of section 5 of the Act, which guarantees its exclusive jurisdiction.⁷⁸

Moreover, the exclusive jurisdiction of the High Court is further guaranteed by section 27(3) of the Act itself. The provision in this section precisely indicates that in cases pertaining to small estates, in which letters of administration have been granted by the High Court, the Collector shall have no power to deal with such estates even with regard to any part of the estate that has not been fully administered. Relying on this authority, it is submitted that if the Collector issues an order or grant pertaining to a small estate for which the High Court has already issued letters of administration, such an order or grant becomes null and void.

The issue of the exclusive jurisdiction of the High Court over small estates was dealt with in *Chua Eh Swee v Sew Chew Eng & Anor.*⁷⁹ In this case, a letter of representation was

⁷⁸ Section 5(1) of the Act states: "Subject to this section, nothing in this Act shall effect the exclusive jurisdiction of the High Court to grant probate of any will or testamentary disposition or letters of administration in any case in which the deceased has left a valid will or other valid testamentary disposition in respect of a small estate or part thereof and the grant when made shall have effect in all respects as if the estate had not been a small estate."

⁷⁹ (1982) 1 MLJ 84.

issued by the High Court in respect of the deceased's estate. Subsequently it was found that part of the estate had been left without administration. That part was then brought before the Collector of Land Revenue (CLR) who issued an order for distribution under section 17(3) of the Small Estate (Distribution) Act, 1955. The High Court held that the order by the CLR was null and void on the grounds that under section 17(3) of the Act the CLR could only hear cases where the grant of letters of administration had been granted by an authority other than the High Court. According to the Court, under section 27(1) and (2), which concerns any estate which is partly administered, any further application relating to the same estate may be made to the High Court, whether or not the estate is, or has become, a small estate. The Court further held that even though the plaintiff was present at the hearing before the CLR, submitted herself to his jurisdiction and did not appeal against the distribution order these factors did not vest in the CLR the authority to hear the application for distribution.

It is therefore important to mention here that the exclusive original jurisdiction conferred upon the Collector pertaining to small estate succession is with respect only to intestacy cases where the deceased dies without a valid will. This is pursuant to section 5(1) of the Act, which indicates the exclusive jurisdiction of the High Court to issue grants of probate and letters of administration with wills annexed. The issuance of probate as well as letters of administration with wills annexed is made where the testator has executed a valid will. For this reason, it is submitted that with respect to small estates, the only jurisdiction conferred upon the Collector is pursuant to a death where there is no will. Section 5(1) further stipulates that when the High Court has the jurisdiction to grant

letters of representation pertaining to small estates, such grants shall have effect as if the estate had not been a small estate. Therefore, where the Collector has original exclusive jurisdiction to issue an order or grant pertaining to small estate administration and distribution, it is solely with respect to intestacy death.

With regard to the deceased Muslim's estate, the distribution is normally made in accordance with the principles of the Islamic law of succession particularly the Syāfi'ī's school of law.⁸⁰ However, there are no statutory provisions for the Collector to follow when distributing the estate under the *farā'id* system. Section 12(7) of the Act only states that the Collector is legally responsible for carrying out the distribution based on the laws applicable to the beneficiaries, but does not mention that the *Syarī'ah* is the law of the beneficiaries.⁸¹ In other words, the mode of distribution is dependant upon which law the beneficiaries decide to follow. They may choose to avoid distribution under the *farā'id* system and decide that the distribution be made based on their unanimous agreement that all the legal heirs regardless of their gender are entitled to the same proportion of the deceased's estate.

In this regard, the Act states that if any difficult point of Muslim law, Malay custom or the native law or customs of Sabah and Sarawak arises, the Collector may refer the matter to the Ruler of the State in which the district is situated or to such other person or body of persons as the Ruler may direct. In other words, in the case of a dispute arising pertaining

⁸⁰ Dollah, Mohd. Zin, *Pentadbiran dan Pengurusan Harta Pusaka Kecil, Kertas Kerja 1*, p. 5.

⁸¹ S. 12(7) states "The Collector shall ascertain, in such manner as may be most appropriate, the law applicable to the devolution of the estate of the deceased, and shall decide who in accordance with that law are the beneficiaries and the proportions of their respective shares and interests."

to the Muslim law, the reference to the Ruler of the State means the Religious Council of the State. For any other matter, the Collector may state a case for the opinion and directions of the High Court, which may be heard and disposed of by a judge in chambers.⁸² In this respect, the Collector is guided by the general principles contained in the Islamic texts written by Syāfi's Muslim scholars. There is no specific written statutory provision that enumerates in detail the principles of the Islamic law of succession.

Even though the High Court has no original jurisdiction over small estate administration pursuant to a death where there is no will, the decision of the Collector is subject to appeal to the High Court. This implies that the High Court still has jurisdiction over such matters that at first seem to be extensively and exclusively in the Collector's jurisdiction. Under section 29 of the Act, the appellate jurisdiction is precisely identified and hence, any person aggrieved by an order, decision or act made or done by a Collector under the Act, has the right to appeal to the High Court.⁸³

According to Rahmah Hussain J in *Ahmad bin Abdul Majid v Habibah bte Abdul Majid*,⁸⁴ 'aggrieved party' refers to any person who has an interest in the estate and is not satisfied with the Collector's decision. The presence of such a person at the hearing conducted by the Collector is not sufficient to constitute them as an aggrieved party. Hence in this

⁸² S.19.

⁸³ Section 29(1) of the Act states "Subject to the other provisions of this Act and to subsection (5) any person aggrieved by any order, decision or act made or done by a Collector under this Act may appeal to the High Court."

⁸⁴ [2001] 2 MLJ 245.

case, the Court rejected the argument put forward by the plaintiff that he was an aggrieved party as mentioned in regulation 10(1) (c).

Regulation 10(1) (c) of the Small Estate (Distribution) Regulations 1955 provides that a notice of appeal has to be lodged within 14 days from the date wherein the decision of the Collector was announced. According to Mr. Dollah, Mohd. Zin, if the 14 days elapses, an appeal may be forwarded to the High Court to have the period extended.⁸⁵

However, this opinion does not correspond with the decision of the High Court in *Tijah bte Hassin v Pentadbir Tanah Daerah, Alor Gajah & Lain-lain*.⁸⁶ The plaintiff was not satisfied with the order of distribution made by the Collector, she claimed that the land in dispute was subject to the Naning customary law and should not have been distributed according to the Small Estates (Distribution) Act, 1955. She therefore applied for a declaration for a correction to be made at the District and Land Office to the effect that she was entitled to 1/3 of the land. Based on the facts of the case, the Court found that the plaintiff had agreed that the land be distributed by the Collector according to the Act. The order of the Collector was made on 20th August 1986 and the plaintiff brought the action five years and six months later. The Court held that such an action was not in accordance with the procedure and time limit specified by the Small Estates (Distribution) Regulations, 1955. The plaintiff had not exercised her right of appeal within 14 days of the date of the order; based on this and pursuant to regulation 10(4), her rights were lost.

⁸⁵ Dollah, Mohd. Zin, p. 6.

⁸⁶ [1994] 3 MLJ 424

In *Mamat bin Hassan & Anor v Siti Khatijah bte Awang Hamat & Ors*⁸⁷ the plaintiff applied for an extension of time to file a notice of appeal against the order of the Collector of small estates, which was made by virtue of section 13 of the Small Estates (Distribution) Act, 1955 on 31 January 1982. The order of the Collector had excluded him from entitlement. His application was made on the grounds that he was entitled to the estate of the deceased according to the *farā'id* and that he was unaware of the distribution order until 1994. Therefore the issue before the Court was whether it had the power to grant such an extension. The Court held that the rules pertaining to appeals under the Act were specifically provided for under the Small Estates (Distribution) Regulations 1955 and since the Regulations contain no provision giving the Court the power to extend the 14 day appeal period given to the aggrieved party, the extension could not be extended. Based on the Regulations, the Court has no power to extend the prescribed 14 days period.

2.4. Conclusion

On the basis of the above discussion, it can be concluded that the Islamic law of succession was applicable in Malaysia, prior to the advent of British rule. The law was gradually replaced by the practice of distribution based on the *adat* laws to the extent that, while under British occupation, the British judges occasionally recognized the law as the law of the land, as evident in the case of *Ramah v. Laton*.⁸⁸

⁸⁷ [1996] 5 MLJ 529.

⁸⁸ (1927) 6 FMSLR 128.

Currently, pursuant to the statutory provisions of the Federal Constitution, the administration and distribution of estates, Muslim and non-Muslim, are handled by the High Court with the assistance of the Collectors of the Land Office. The administration of the deceased Muslim's estate falls under the jurisdiction of the High Court and, upon the issuance of letters of representation, the responsibility of administering the estate passes to the executor or the administrator who acts as the personal representative of the deceased.

Personal representatives are under a duty to administer the estate with prudence and diligence. They owe a fiduciary duty towards the beneficiaries of the estate. Acting in the capacity of the representative of the deceased, the personal representatives are conferred with powers as well as rights which enable them to administer the estate diligently. Those powers and rights are conferred upon them primarily by the Probate and Administration Act 1959, which becomes the major reference point and provides guidelines for them.

Based on the discussion pertaining to the jurisdiction of the High Court and its powers, and the rights, duties and obligations of the personal representatives as stated primarily in the Probate and Administration Act, 1959, it is submitted that the function of the High Court is merely to ascertain that the administration of the estate is duly carried out. The duty of the High Court is to ensure that the interests of the beneficiaries in the estate are well protected. In other words, the High Court plays a supervisory role with regard to the administration of the non-small estates of the deceased.

With respect to the administration of small estates, even though it seems that it is exclusively in the jurisdiction of the Collector who has the expertise in matters pertaining to land administration, the actual scenario is that the High Court plays the dominant role. The only original exclusive jurisdiction of the Collector pertains to small estates where the deceased has left no valid will. However, despite this jurisdiction, the High Court is empowered with an appellate jurisdiction to reconsider the Collector's decision upon application by an aggrieved party.

The High Court is also empowered with an original exclusive jurisdiction to deal with small estates if the deceased dies with a valid will. In this situation, even though the estate is a small estate, its administration is directly under the Probate and Administration Act, 1959 and not the Small Estate (Distribution) Act, 1955. Therefore, it is submitted that the High Court is statutorily conferred with a broad jurisdiction in the administration of estates regardless of whether they are classified as small or non-small estate.

CHAPTER THREE

THE COMPONENTS OF *TARIKAH* FROM THE PERSPECTIVES OF THE ISLAMIC LAW OF SUCCESSION AND THE LAWS APPLICABLE IN MALAYSIA

3.1. Introduction

As discussed in the previous chapter, the estate of the deceased constitutes one of the pillars of succession. This implies the significance of the estate, without which succession can never take place. As far as the administration of Muslim estates in Malaysia is concerned, the statutory provisions of the Probate and Administration Act 1959 and the Small Estate Distribution Act 1956 are the major sources of reference. The Islamic law of succession constitutes one of the personal laws of Muslims in Malaysia and therefore, this law should be fully implemented in order to satisfy the rights and interests of the parties concerned, namely the creditor, the legatee and the legal heir of the deceased.

The abovementioned Acts contain general provisions mostly pertaining to the procedural matters. They do not specify the rules applicable under the Islamic Law of Succession. It would be in the best interest of Muslims if the distribution of estates is done following the *Syarī'ah* law. It is a fact that, historically, the distribution of estates of a deceased Muslim according to this law has been recognized by the British during its occupation in Malaysia. Furthermore, the Federal Constitution specifically enumerates the applicability

of the law as clearly stated in the State List of the First Schedule. Thus, the proposal does not imply something new, as the historical evidence support this. This however, does not imply extending the Islamic law to include non-Muslim citizens. This statement does not propose anything for this, as their cases should be treated under the available procedures.

This chapter will discuss the meaning of *tarikah* from the perspectives of Islamic law and the laws applicable in Malaysia. It will analyze the definitions of *tarikah* as discussed by the Muslim jurists of the four Sunni schools of law and examine the relevant issues such as the *ḥadīth* relied upon by the jurists as the basis for their *tarikah* definitions. The concepts of *māl* and *milkiyyah* in Islamic law and the inheritance of rights, usufruct and services will also be discussed. With regard to the Malaysian laws, an examination of the relevant statutory provisions of the Malaysian legislation will be undertaken and the principles adopted by the courts in decided cases scrutinized. Furthermore, attempts will be made to identify the similarities and differences between the two systems of laws and the extent to which the Malaysian laws could be harmonized with the Islamic law in this matter is discussed.

3.2. The Definitions of *Tarikah* from the Perspective of the Islamic Law of Succession

The Arabic word *tarikah* or *tirkah* literally denotes things left behind by the deceased.¹ It also indicates the estate or the heritage left behind by the deceased.² The term is derived

¹ Ibn Manẓūr, Muḥammad, *Lisān al-ʿArab*, Beirut: Dār al-Şādir, 1990, vol. 10, p. 4 and al-Muʿjam al-Wasīṭ, p. 84.

² Baʿalbakī, Rūḥī, *Al-Mawrid, A Modern Arabic- English Dictionary*, 8th edition, Beirut: Dār al-ʿIlm li al-Malāyīn, 1992, p. 311.

from the root word *taraka*, which literally implies to leave behind by way of succession or bequest.³

However, the Muslim jurists have differed in their attempts to give this term a technical definition. To the Ḥanafīs, the technical meaning of *tarikah* is the property and property rights left behind by the deceased, which are free from any attachment of other's rights.⁴ The Mālikīs define *tarikah* as the divisible rights that are the legal entitlement of the rightful person after the death of the owner.⁵ The Syāfī's' definition of *tarikah* is anything left behind by the deceased⁶ The Ḥanbalīs definition is that *tarikah* is the rights left behind by the deceased.⁷ In the light of these definitions, it appears that the differences are in fact due to the questions pertaining either to the attachment of other's rights to the estate or to whether rights and usufruct constitute the components of the estate of the deceased alongside the tangible assets.

Even though the definitions of *tarikah* incorporate the rights related to the estate, it is sufficient to focus here only on the issues relating to the components of *tarikah*. This stance is taken after considering the fact that a discussion on the components of estate would necessarily include the examination of other important issues such as the two different versions of *ḥadīth*, which were referred to by the classical Muslim scholars as well as the concept of *māl*, or property, according to Islamic law. In other words, it is

³ Ibid., p. 310.

⁴ Ibn 'Ābidīn, p. 535.

⁵ Al-Dusūqī, Muḥammad 'Arifah, *Ḥāshiyah al-Dusūqī 'alā Sharḥ al-Kabīr*, Beirut: Dār al-Fikr, n.d., vol. 4, p. 457.

⁶ Al-Syarbīnī, p. 3.

⁷ Al-Bahūtī, Ibn Yūnus Ibn Idrīs, *Kashāf al-Qinā' 'alā Matn al-Iqnā'*, Iskandariyyah: Mu'assasah Syabab al-Jāmi'ah, 1981, vol. 4, p. 402.

unavoidable that this chapter involves a long discussion in order to reach a conclusion regarding what constitutes *tarikah* according to Islamic law and the laws applicable in Malaysia. Having said this, the issues regarding the attachment of rights to the *tarikah* as discussed by the Muslim jurists will be dealt with in detail in a separate chapter.

To elaborate further these definitions, it is important to study the sources that were referred to by the Muslim jurists when constructing their respective definitions. In this regard, two different versions of the Prophetic traditions have been identified as forming the basis of these definitions. Apart from this, it appears that the issue of the constituents of *tarikah* is closely related to the issue of the concept of property, or *māl*, in Islamic law, and this definitely stretches to the discussion of issues regarding the *Syarī'ah* compliance of the wealth belonging to or acquired by the deceased. This is because, when looking into these definitions, apart from the attachment of rights to the estate, the focus is also on the terms *māl* and *ḥaq*. Furthermore, wealth belonging to the deceased nowadays comprises both tangible and intangible assets, such as financial rights and intellectual property rights, and this becomes an important issue because in Islamic law, heritable *māl* might include rights and services which are intangible in nature. Therefore, it is necessary to examine the concept of *māl* to provide a sufficient understanding of the actual components of *tarikah* so that suitable and practicable proposals regarding the administration of estates in Malaysia can be put forward.

3.2.1 The *Hadīth* Relied upon by the Majority and the Minority

The difference of opinions among the four Sunni schools of law regarding the components of the estate is a result of their reliance on two different versions of the *ḥadīth* of the Prophet. The Ḥanafīs' definition, which apparently confines the scope of *tarikah* to tangible assets only, is based on the version which states that only *māl* is heritable. This *ḥadīth* states nothing pertaining to the heritability of rights. On this basis the jurists have placed only *māl* within the definition of *tarikah*, precluding rights and usufruct from inheritance. This version of the *ḥadīth* reads, "one who leaves the *māl*, or the property, behind him, it is for his legal heirs".⁸

On the other hand, the majority opinion has relied on the *ḥadīth*, which states: "one who leaves behind the property or the right, it is for his legal heirs".⁹ According to this opinion, the text of the *ḥadīth* clearly shows that *māl* and *ḥaq* are the components of *tarikah*. Relying on this *ḥadīth*, the majority have formed their stance that the heritable estate of the deceased should include *māl* (tangible assets) and *ḥaq* and *manfa'ah* (intangible assets).

It is evident from the above discussion that the two versions of the *ḥadīth* are the cause of the different views of the four Sunni schools regarding the definitions of *tarikah*. As a consequence of this, they differ regarding the components of *tarikah* as to whether it

⁸ Al-Mubārakfūrī, Muḥammad bin 'Abd al-Raḥīm, *Tuḥfah al-Aḥwadhī bi Sharḥ Jāmi' al-Tirmizī*, n.p. : Dār al-Fikr, 1974, vol. 6, p. 264. Syawkānī states in *Nayl al-Awṭār* that a similar *ḥadīth* was narrated by al-Bukhārī, Muslim, Aḥmad from Abū Hurayrah: "Whoever leaves behind property, his *ʿaṣabah* will inherit, and whoever leaves behind debts or nothing, then he is supposed to come to me, because I am his guardian." See al-Syawkānī, Muḥammad bin 'Alī bin Muḥammad, *Nayl al-Awṭār*, Cairo: Maṭba'ah Muṣṭafā al-Ḥalabī, 1250H, vol. 6, p. 57.

⁹ Ibn Mājah, *Sunan Ibn Mājah*, Cairo: Maṭba'ah 'Isā al-Ḥalabī, n.d., vol.2, pp. 914- 915.

consists of *māl* only or also includes *ḥaq* and *manfaʿah*. To the Mālikīs, Syāfiʿīs and Ḥanbalīs, the *tarikah* components consist of tangible and intangible assets, whereas to the Ḥanafīs only tangible assets are heritable.

3.2.2. The Concept of *Māl* (Property) in Islamic Law

3.2.2.1. The *Māl*, Tangible and Intangible

It has been discussed in the previous subsection that to the Mālikīs, Syāfiʿīs and Ḥanbalīs, the *tarikah* comprises *māl* and *ḥaq*, whereas to the Ḥanafīs, it consists of *māl* only. In this regard, it is important to examine further the meanings of *māl* and *ḥaq* in order to ascertain the actual components of *tarikah* that can be inherited by the legal heir.

The Arabic word *māl*, or property, originates from the root word *mawala* that literally means to finance.¹⁰ Ibn Manẓūr defines *māl* as things commonly known and that can be owned.¹¹ Ibn al-Athīr defines it as everything that one owns.¹² These definitions take into account the customary practice of the Arabs. Originally the Arabs used the term *māl* to refer only to gold and silver, but subsequently its application was extended to include things owned physically, including camels.¹³ Al-Zuhaylī defines *mal* literally as being anything a man owns that is in his actual possession and this includes corporeal and usufruct. Gold, silver, animal, plant, money and benefits or usufructs such as the riding of vehicles, the wearing of clothes and the residing in houses are regarded as *māl*. On the other hand, birds in the sky, fish in the water, mines deep in the earth and plants in the

¹⁰ Al-Mawrid, p. 1143.

¹¹ *Lisān al-ʿArab*, vol. 11, p. 635.

¹² Al-Fayrūzabādī, *al-Qāmūs al-Muḥīṭ*, Beirut: Dār al-Iḥyāʾ al-Turāth al-ʿArabī, 1991, vol. 4, p. 70.

¹³ Ibn al-Athīr, *al-Nihāyah fī Gharīb al-ḥadīth wa al-ʿĀthār*, n.p.: al-Maktabah al-Islāmiyyah, n.d., vol. 4, p. 373.

jungle are not literally *māl* on the basis that they are not in the actual possession of a man.¹⁴

In their attempts to give a technical meaning to the term *māl*, Muslim jurists have provided various definitions. Their different definitions are due to their understandings of what constitutes the basis or foundation of *māl*. To the Hanafīs, *māl* must be something that exists physically and is desirable. According to Ibn ʿĀbidīn, it is whatever human instinct inclines to and also is capable of being stored for the time of necessity.¹⁵ The same definition is given by article 126 of the *Majallah al-Aḥkām*. By virtue of these definitions, it appears that the fundamental elements of *māl* are its storability and desirability. Hence, rights and usufruct are not *māl* according to the Hanafīs on the grounds that they are not capable of being stored.

The definitions of the Mālikīs, Syāfiʿīs and Ḥanbalīs appear the same as far as the foundations upon which a thing can constitute *māl* are concerned. To the Mālikīs, as stated by al-Syāṭibī, *māl* is anything on which ownership is conferred and, which entitles the owner complete freedom of enjoying it by preventing others from any kind of interference.¹⁶ The Syāfiʿīs define it as constituting things that can give benefit to a human being. Imām al-Suyūṭī states that *māl* refers to anything that is valuable and exchangeable, and in the case of its destruction, the destroyer is liable to pay

¹⁴ Al-Zuhaylī, Wahbah, vol. 4, p. 40, Badrān, Abū ʿAynayn, *al-Syarīʿah al-Islāmiyyah Tārīkhuhā wa Naẓariyyah al-Milkiyyah wa al-ʿUqūd*, n.p.: Muʾassasah Syabāb al-Jāmiʿah, p. 286, and Khafīf, ʿAlī, *al-Milkiyyah fī al-Syarīʿah al-Islāmiyyah maʿa Muqāranatihā bi al-Qawānīn al-ʿArabiyyah*, Beirut: Dār al-Nahdah al-ʿArabiyyah, 1990, p. 25.

¹⁵ Ibn ʿĀbidīn, vol. 4, p. 501.

¹⁶ Al-Syāṭibī, Abū Iṣḥāq Ibrāhīm bin Mūsā al-Gharnati, *al-Muwāfaqāt fī ʿUṣūl al-Syarīʿah*, Cairo: n.d., vol. 2, p. 17.

compensation. He continues by stating that *māl* must be something that is desired by a human being's inclination, such as money.¹⁷ The Ḥanbalīs define it as constituting things that contain a benefit and are capable of being used in normal situations.¹⁸

From the above definitions, it is possible to conclude that the Mālikīs underline the ownership, the Syāfi'īs emphasize the value and the Ḥanbalīs highlight the benefits, as being the elements the subject matter must consist of in order to be counted as *māl*. On the basis of this conclusion, it can be seen that *māl* can be tangible and intangible, or corporeal and incorporeal. In other words, the majority view is that usufruct and rights are part of *māl* even though their existence is not physical in nature. The usufruct and the right are capable of being owned, and can also be valuable and beneficial.

However, it should be borne in mind that the foundations of the ownership, value and benefit must be *Syarī'ah* compliant. This is a fundamental principle because a Muslim is strictly prohibited to consume whatever is regarded unlawful in the eye of Islamic law, such as blood, carcasses, liquor, pork, usury and dead animals. In other words, these prohibited things are not counted as *māl*. On this basis, as far as Islamic law is concerned, the prohibited is not permitted to be the subject matter of any kind of contract, and if it is such a contract is invalid.¹⁹

¹⁷ Al-Suyūṭī, Jalāl al-Dīn 'Abd al-Raḥmān, *al-Asybah wa al-Nazā'ir*, Beirut: Dār al-Kutub al-'Ilmiyyah, 1983, p. 327.

¹⁸ Bakar, Mohd. Daud, "Konsep dan Matlamat Harta dalam Pembangunan Ummah", *Seminar Pentadbiran Harta Menurut Islam*, jointly organized by IKIM and Institut Tanah dan Ukur Negara (INSTUN) Kementerian Tanah dan Pembangunan, 16th – 17th November 1998 at IKIM, p. 8. See also Islam, "Muhammad Wohidul, al-Mal: The Concept of Property in Islamic Legal Thought", *A.L.Q.*, (1999), p. 363.

¹⁹ Al-Zuhaylī, vol.4, p. 44.

In the light of the above discussion, it is clear that the definitions given by the majority, which do not confine *māl* to desirable and storable items, but are broader than this, are to be preferred. Arguably, it can be said that the definition of *māl* is dependant upon the interest and usage of the people. There is nothing in the Qur'an or the *Sunnah* which defines the term. In fact, the Qur'an uses the term *māl* in a general sense referring to wealth; the *al-Munāfiqūn* (63): 9 states: "O ye who believe! Let not your riches or your children divert you from the remembrance of Allah." and the *al-Nisā'* (4): 29 states: O ye who believe! Eat not up your property among yourselves in vanities; but let there be amongst you traffic and trade by mutual good will."

In other words, it is the custom and the usage of the people that determines the foundations of any definition. This notion is supported by the literal definition of *māl*, which is based on the historical account of the practice of the Arabs. Furthermore, with regard to the Ḥanafīs' view, a later definition of *māl* has been given by al-Kāsānī, a Ḥanafī jurist. He gives a definition, which is different from the dominant view of his school of *Fiqh*. In fact, his definition is relatively similar to the definitions of the majority, i.e. beneficial and *Syarī'ah* compliant. He defined *māl* as whatever is beneficial according to Islamic law.²⁰

²⁰ Al-Kāsānī, *Badā'ī al-Ṣanā'ī fī Tartīb al-Syarā'ī*, Beirut: Dār al-Kitāb al-ʿArabī, Beirut, 1982, vol.7, p. 147.

In this regard, by referring to the Qur'an as the primary source of Islamic law, it is apparent that the purpose of the creation of human beings is to administer the world.²¹ All other creatures that exist on the earth or in the air as well as in the sea are solely for the beneficial use of human beings.²² In relation to this, and for the purpose of inheritance, the opinion of the majority of Muslim jurists that the components of *tarikah* consist of *māl*, *manfa'ah* and *ḥaq* is arguably the correct one. Since inheritance is about the transfer of ownership of one's wealth upon death, anything that is considered as one's wealth is therefore heritable. In contrast, the old Ḥanafīs' definition appears inappropriate to this modern world.

When considering contemporary developments especially in matters relating to wealth creation, it is clear that the majority's definitions are the more acceptable. This is based on the fact that in recent times, there have emerged various kinds of property as well as new transactions that give rise to different kinds of rights. Furthermore, the requirement of storability seems inapplicable because nowadays having a legitimate document such as a grant or certificate, rather than physical control can prove the ownership of wealth. The classification of *māl* by Daud Bakar, which is suitable to the modern context, appears to adopt the majority's definition. According to him, *māl* or property can be classified into three types:

- a- tangible assets like landed property, present items and stock including Islamic bonds that are asset-based such as *ijārah*, *musyārah* and *muḍarabah* bonds.

²¹ *Al-Baqarah* (2): 30 "Behold, thy Lord said to the angels: "I will create a vicegerent on earth." They said: "Wilt Thou place therein one who will make mischief therein and shed blood?- Whilst we do celebrate Thy praises and glorify Thy holy (name)?" He said: "I know what ye know not."

²² *Al-Baqarah* (2): 29 "It is He Who hath created for you All things that are on earth; Then he turned to the heaven And made them into seven firmaments. And of all things He hath perfect knowledge."

- b- intangible assets such as copyright and royalty, trade name, trademark, industrial design, etc
- c- financial rights (*haqq māliyy*) such as rights to receive (receivable) that include Islamic bonds, deferred dowry & maintenance, right to damages, the right to *takāful* compensation, etc.²³

3.2.3. The Heritability of *Māl* (Tangible and Intangible Asset), *Ḥaq* (Right) and *Manfaʿah* (Usufruct or Service)

By virtue of the above classification, as far as the Islamic law of succession is concerned, it would seem sensible to adopt the majority's definition because inheritance is related to people's wealth, and nowadays, there are numerous rights that can be considered as personal wealth.

In this regard, after examining the issues regarding the definitions of *tarikah*, the two different versions of the *ḥadīth* and the concept of property in Islamic law, it is important to turn here to an in-depth study of the issue of the heritability of *māl*, *ḥaq* and *manfaʿah*. Ismail Mohd @ Abu Hassan holds the, arguably correct, opinion that as far as inheritance is concerned, the most tenable and practical view is the opinion of the majority.²⁴

²³ Bakar, Daud, *Islamic Property Management: An Overview*, Seminar on Islamic Financial Planning, organized by Centre For Research and Training (CERT), The Quality Hotel City Center Kuala Lumpur, Malaysia, 29th – 30th July 2002.

²⁴ Ismail Mohd @ Abu Hassan, *The Role of the Islamic Law of Succession and Administration of Estate in Islamic Financial Planning*, Seminar on Islamic Financial Planning, organized by Centre For Research and Training (CERT), The Quality Hotel City Center Kuala Lumpur, Malaysia, 29th – 30th July 2002, p. 5.

a) Tangible Assets

There is no disagreement among the four Sunni schools of law that as long as the subject matter is regarded as constituting *māl*, it falls under the definition of *tarikah* and hence is heritable. Animals, land, houses, buildings, money, shares and *ijārah*, *musyārakah* and *mudārabah* bonds are therefore heritable because they constitute *māl*.

b) Intangible Assets; *Manfaʿah* (Usufruct or Service)

With regard to usufructs, such as driving a vehicle or residing in a house, Muslim jurists are of different opinions as to whether they constitute *māl* or not. To the Ḥanafīs, usufruct is not capable of being stored and its existence does not subsist. It ceases to exist gradually by way of its consumption. Relying upon this argument, the Ḥanafīs view is that it does not constitute *māl* and hence is not heritable. This is supported by the textual *ḥadīth*, which they accept to the effect that only *māl* is heritable.²⁵

However, this appears to ignore the fact that usufruct is the main purpose of the existence of property, without which the property becomes useless. For instance the purpose of a house is for residence and hence if a house is not capable of being used, even though it is nicely built, it loses its value and inevitably becomes useless. In other words, the Ḥanafīs have failed to take into account that there is an inter-relationship between the corporeal and the usufruct. The benefit of usufruct is actually dependent on the usage of the corporeal, and the existence of the corporeal is useless if it has no value, i.e. the usufruct.

²⁵ Abū Zahrah, Muḥammad, *ʾAkām al-Tarikāt wa al-Mawārīth*, Cairo: Dār al-Fikr al-ʿArabī, n.d., p. 43

For instance, when a tenant rents a house under a contract of lease for a fixed period as stipulated and agreed in the contract, but dies prior to the expiry of the tenancy period, the Hanafīs hold the view that the tenancy agreement ceases automatically upon his death. In other words, the usufruct that has been utilized by the tenant and their family based on the tenancy agreement does not pass to the legal heirs, namely the widow/widower and children by way of succession. It follows that these parties need to make a new agreement to remain in the house, or alternatively search for another house to live in, even though they are the same people who lived there prior to the death of the original tenant. This applies simply because, according to the Ḥanafīs, the contract ceases upon the death of the tenant.

Another example is in the case of *waṣiyyah* of usufruct for a certain period. This contract is legitimate according to the four Sunni schools of law. On the basis of such a contract, the testator remains the lawful owner of the bequeathed property, a house for instance, and the ownership is never transferred to the legatee. The legatee is entitled to utilize or live in the house as long as the agreed period does not lapse. According to the Ḥanafīs, upon the death of the legatee the legal heirs have no right to remain in the house because that right ceases immediately upon the legatee's death.²⁶

In contrast, the rights of the legal heirs of the dead tenant or legatee are secured if the majority view is adopted. Upon the death of the legatee, the contract of lease and the bequest of usufruct for a fixed period still subsist even though the lessee or the legatee

²⁶ ʿAbd al-Laṭīf, Ḥassan Ṣubḥī Aḥmad, *Aḥkām al-Mawārīth fī al-Syarīʿah al-Islāmiyyah*, Iskandariyyah: Muʿassasah Syabāb al-Jāmiʿah, n.d., pp. 22-23.

has passed away. The benefit or usufruct passes to the legal heirs and consequently the legal heirs are under an obligation to pay all the rentals. In terms of simplicity, social security and economic value, as far as the case of lease contracts and the bequests of usufruct are concerned, it is submitted that the majority view is preferable. This applies because, as pointed out by the majority, usufruct is heritable due to the fact that it constitutes *māl*.

c) Intangible Assets; *Ḥaq* (Right)

With regard to *ḥaq* or rights, the four Sunni schools of law unanimously agree that rights which have no connection at all with property, i.e. rights *in personam* such as the right to guardianship, to divorce, to revoke a divorce or a gift and the right to custody do not constitute *māl*. These rights solely depend on the person's desire and wishes, which definitely do not constitute *māl*. They have no attachment to or relationship with the property. On that basis, Muslim jurists unanimously agree that these rights are not heritable because they are merely personal rights and have no monetary value.²⁷

Besides rights *in personam*, there are three other types of right:²⁸

- a) The right which is in the property itself or right *in rem*,
- b) The right which is subservient to the property, and
- c) The right which is a mixture of the right *in rem* and right *in personam*.

²⁷ Abū Zahrah, p. 45.

²⁸ Rahman, Tanzil-ur, *A Code of Muslim Personal Law*, Karachi: Islamic Publishers, 1980, vol. ii, p. 410.

Right *in rem* is the right to ownership of the property itself and accordingly there is a consensus among the four Sunni schools of law that this kind of right is heritable. Any kind of property left by the deceased and to which no dispute arises in terms of the deceased's legitimate ownership of that property from the Islamic point of view, is therefore heritable. This right is heritable because its existence depends solely on the property concerned and hence the heritability of the right follows the heritability of that property.

Rights that are subservient to the property include the right to reside in a house, the right to cultivate agricultural land, the right of neighbourhood,²⁹ the right to redeem a mortgage, the right of way, the right of the passage of water, the right to climb stairs, the right to the option of defecting, the right to the option of the loss of essential quality and the right to the option of selection, and these are unanimously agreed to be heritable. These rights are different from the rights *in rem* because they do not exist in the property itself. Instead, they might depend on, aid, relate to or arise out of the property concerned.³⁰ The four Sunni schools of law unanimously agree on the heritability of these rights because they constitute *māl* and have financial value.

However, with regard to rights that resemble both rights *in rem* and in *personam*, Muslim jurists differ on the question of their heritability. Examples of these rights are the right of pre-emption, the right to the option of exercising a covenant and the right to the option of

²⁹ It is a right to build or heighten one's house or building. It applies in the case of apartments. The top level flat owner and his heirs have the right to build another flat on top of the building, which might have risky consequences such as collapse. See al-Zuhaylī pp. 46-47.

³⁰ Barrāj, pp. 81-83.

inspecting a property. To the Ḥanafīs, these are not heritable because they do not constitute *māl*. They are merely based on personal desires and wishes and furthermore, there is no evidence in the Qur'an or the *Sunnah*, which states their heritability.³¹

On the other hand, the majority of Muslim jurists are of the view that it is necessary to identify which right is the more significant. If the right in *rem* is more significant, such a right is heritable; if it has a lesser impact than the right in *personam* it is not heritable. In other words, the rights of pre-emption, of the option to inspect and of the option to exercise a covenant are heritable because with these rights, the property aspect has a stronger impact than the personal desire. This is in line with the *ḥadīth*, which refers to the heritability of *māl* and *ḥaq*. On the basis of the *ḥadīth* the majority applied the principle that all rights are originally heritable unless there is a proof to the contrary.³²

In conclusion, the difference of opinion between the Ḥanafīs and the majority is due to the different versions of the *ḥadīth* to which they have referred. Based on the *ḥadīth*, they have established their own principles in ascertaining the components of *tarikah*. To the Ḥanafīs, the applicable principle is that only *māl* is heritable and the heritability of rights occurs on the condition that there exists evidence or proof showing the connection of the rights with *māl*. This is based upon the version of the *ḥadīth* they referred to which does not enumerate the word *ḥaq* along with *māl*. In contrast, the majority relied on the version of the *ḥadīth* that enumerates both *māl* and *ḥaq*. In the light of this version, the

³¹ Rahman, Tanzil-ur, p. 412.

³² cAṭiyyah, p. 84.

majority underlined the principle that all rights are heritable unless there is proof to the contrary.

3.2.4. The Intellectual Property Right

The difference of opinion regarding the concept of *māl* expands to the determination of whether intellectual property constitutes *māl* or not. A *fatwā* was issued by the Majma^c al-Fiqh al-Islāmī regarding the status of trademarks and patent rights in this respect.³³ The *fatwā* declared that such intellectual properties constitute personal rights. They have financial value and are capable of being traded. The owner has absolute ownership of it and any act of infringement is therefore disallowed.³⁴ On the basis of this *fatwā*, it appears that intellectual property is therefore heritable. This is based on the fact that intellectual property constitutes *māl* and hence is capable of being transferred by way of contracts of exchange, unilateral contracts and inheritance.

3.2.5. *Al-Milkiyyah* or Ownership and the Unlawfully Acquired Property.

Ownership is the most important factor in deciding the heritability of property. Failure to meet this condition may result in the non-heritability of the property concerned. This section provides a brief discussion of the requirement of *milkiyyah*. It should be noted that Chapter six looks at the issue of *milkiyyah* in greater detail by concentrating on the government retirement benefits, conventional life insurance and the family *takāful* business, from the perspectives of Islamic law and the laws applicable in Malaysia.

³³ The fifth conference of the Mu^tamar Majma^c al-Fiqh al-Islāmī was held on 10th December 1988 in Kuwait.

³⁴ Majallah Majma^c al-Fiqh al-Islāmī, 3 (5): 2581.

Islamic law specifies two categories of ownership, namely absolute and non-absolute ownership. Absolute ownership is where the property exclusively and absolutely belongs to the owner and is not subject to limitations of time.³⁵ The owner has the absolute right to deal with the property and no one else has any share in it.³⁶ In this respect, the owner has exclusive power to dispose of the property as he wishes. Islamic law provides four legitimate means for acquiring absolute ownership:³⁷

- a) The contract of exchange such as trading and leasing contracts, and unilateral contracts such as *waṣiyyah*, *hibah* and *waqf*
- b) The replacement, or *khalafiyyah*, i.e. inheritance, the payment of *diyyah* and compensation
- c) The control over permissible things such as fish in the sea and birds in the sky, and
- d) The product of things owned such as chicken's eggs, cow's milk, etc.

In defining the term *tarikah*, the Muslim scholars have stated several examples that, according to them, can form part of the *tarikah*. For instance, the Ḥanafīs and the Syāfi'īs include *al-diyyah al-wājibah*, or the blood money that becomes obligatory upon the killer who kills the deceased by mistake or through a *ṣulḥ*, or conciliation.³⁸ However, it can be argued that blood money falls under the category of *khalafiyyah*. Furthermore, according to the Syāfi'īs' definition, the alcoholic drink that turns to vinegar and the prey or fish that is caught in a trap or a net that was deliberately placed by the deceased, after

³⁵ Al-Zuhaylī, vol. 4, p. 59.

³⁶ Al-Qaraḍāwī, Yūsuf, *Fiqh al-Zakāh*, Beirut: Mu'assasah al-Risālah, 1997, vol.1, p. 130.

³⁷ Al-Zuhaylī, vol. 4, pp. 68-77. See also Bakar, Mohd Daud, *Islamic Property Management: An Overview*.

³⁸ Ibn 'Abidīn, p. 535 and al-Syarbīnī, vol. 3, p. 3.

the death of the deceased are regarded as part of the *tarikah*.³⁹ Again, it can be argued that these two illustrations respectively represent the fourth and the third means of acquiring ownership. In addition, according to this definition, the inclusion of *diyyah* in the *tarikah* is comparable to the *diyyah* that is payable from the deceased's estate in the case where a person dies as a consequence of falling into a hole dug by the deceased in his/her lifetime.⁴⁰

On the other hand, non-absolute ownership is either the ownership of the corporeal without the usufruct, or the ownership of the usufruct without the corporeal. An example of the former is a bequest of a usufruct, such as the right to reside in a house. In contrast, examples of the latter are lease, *waqf* and hire contracts. However, it is important to note that this kind of ownership is different from the permission to use.⁴¹ The latter does not confer any ownership and there is no issue of inheritance. With the former on the other hand, the issue of heritability refers to the concept of *māl* as discussed above.

Having discussed these means of acquisition, any other means of acquiring property that are not legitimate according to Islamic law, do not entitle ownership to the acquirer. With wealth acquired by way of robbery, *ribā* (including bank interest), *rishwah* (corruption), *gharar*-based transactions, stealing or gambling, the question of heritability rests upon the issue of whether the wealth was legally within the ownership of the deceased or not. Relying upon this contention, it is possible to conclude that if the ownership is not

³⁹ Al-Syarbīnī, p. 3. See also al-Zuhaylī, vol.4, pp. 53-54.

⁴⁰ Barrāj, p. 78.

⁴¹ Al-Zuhaylī, vol. 4, p. 61.

legitimate it is not valid to transfer the wealth to the deceased's legal heirs, because the condition of legitimate ownership has not been met. It is therefore submitted that these kinds of wealth do not constitute *tarikah*.

3.2.6. The Treatment of Prohibitions

As far as inheritance is concerned, items that are prohibited, from the perspective of Islamic law, include things such as drugs, intoxicants and pork. In other words, the prohibition here applies to the subject matter that is prohibited because of its nature or substance. However, it would seem that the issue of whether this kind of wealth is considered *tarikah* or not depends on the question of whether it constitutes *māl* or not. In other words, if these things constitute *māl* they are heritable and if otherwise they are not.

The legal principle regarding this issue is whether these items are beneficial or not. In this regard, to Muslims, the benefit must accord with Islamic law rulings. It is a fundamental principle that the *Syarī'ah* promotes benefits and prevents hardship.⁴² Chapter *al-Anbiyā'* (21): 107 states: "We sent thee not, but as a mercy for all creatures". Regarding intoxicants and gambling, chapter *al-Baqarah* (2): 219 states: "They ask concerning wine and gambling. Say: In them is great sin and some profit, for men, but the sin is greater than the profit". The prohibition of such things is enumerated in chapter *al-Mā'idah* (5): 90: "O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork; eschew such (abomination), that ye may prosper". Chapter *al-A'raf* (7): 157 further states: "Those who follow the

⁴² Zaydān, 'Abd al-Karīm, *al-Madkhal li Dirāsah al-Syarī'ah al-Islāmiyyah*, 16th edition, Beirut: Muassasah al-Risālah, 2001, p. 40.

Messenger, the unlettered Prophet, whom they find mentioned in their own scriptures, in the law and the Gospel, for he commands them what is just and forbids them what is evil, he allows them as lawful what is good and pure and prohibits them from what is bad and impure; he releases them from their heavy burdens and from the yokes that are upon them. So it is those who believe in him, honour him, help him, and follow the light that is sent down with him, it is they who will prosper”.

In light of these Qur`anic verses, Muslim jurists have developed a legal maxim: Indeed the *Syarīʿah* promotes benefits in totality; preventing hardship and promoting benefits.⁴³ In other words, the prohibition of things by the *Syarīʿah* implies that such things do not bring benefit Islamically to the Muslim and hence, they do not constitute *māl*. It can be argued that even though the Ḥanafīs view is that the prohibited can also constitute *māl*, taking into account the interest of the non-Muslim, the prohibited is not heritable to the Muslim because its consideration of *māl* is entirely based on the interest of the non-Muslim. To a Muslim, such interest does not exist at all. In fact, as far as the Islamic law of succession is concerned, having benefit is unanimously agreed on by Muslim scholars as being fundamental to the subject matter being considered as constituting *māl*.⁴⁴ Having said this, as far as Muslims are concerned, it is submitted that if something does not constitute *māl*, it is not heritable.

⁴³ Al-Syātibī, *al-Muwāfaqāt*, vol. 2, p. 6 & 37.

⁴⁴ Al-Zuhaylī, vol. 4, p. 44.

3.3. The Estate according to the Laws Applicable in Malaysia

3.3.1. The Definition of Estate

Section 2 of the Probate and Administration Act 1959, defines estate as:

“all property which if a person died intestate would vest in the Chief Justice under section 39.”

Section 39 of the same Act generally pertains to the vesting of the property of an intestate. The relevant provision of the section is sub-section (1), which states that:

“where a person dies intestate his movable and immovable property until administration is granted in respect thereof shall vest in the Corporation in the same manner and to the same extent as it vests in the Probate Judge in England.”

In considering the above provisions, it is possible to say that together they define the estate as including the movable and immovable property of the deceased who dies intestate. This definition restricts the meaning of estate to the intestate death. In other words, the property of the deceased who dies testate does not fall within this definition. Hence, it is clear that this statutory definition is absolutely different from the literal meaning, as mentioned earlier, that is the definition of estate is applicable to the property of the deceased who dies testate or intestate.

Having discussed this, property that has been the subject of testamentary disposition is not the deceased's estate, but instead it is the deceased's legacy. The term legacy is literally defined as “money or property that one receives from someone who has died, in accordance with their wishes officially recorded while they were alive.”⁴⁵ This clearly

⁴⁵ Longman Dictionary of Contemporary English, Second Edition, England: Longman Group UK Limited, 1987, at p. 597.

shows that the statutory definition of estate emphasizes the fact that the estate of the deceased is the property that passes to the legal heirs by way of succession and not through a bequest.

Section 2 of the Wills Act 1959 defines a will as “a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child.” This definition uses the term ‘property’ rather than the term ‘estate’. It is therefore understood that there is a difference pertaining to the legal terms used for property disposed by will and property disposed by way of succession. It is submitted therefore that in legal usage, the term ‘estate’ merely refers to the net estate, which would be specifically inherited by the legal heirs of the deceased after the paying off of all debts and liabilities and funeral expenses.

It is significant to note that the term ‘intestacy’ stated in the above provision contains several meanings. It is not really restricted to the situation of death with no valid will. It includes a person who leaves a will but dies intestate as regards some beneficial interest in his movable or immovable property.⁴⁶ In situations where there is a failure of the executors, even though the deceased leaves a valid will, the situation of his death could be possibly considered as ‘intestacy’. This implies that the bequeathed property falls within the statutory meaning of estate and hence is automatically vested in the

⁴⁶ Section 2 The Probate and Administration Act, 1959.

Corporation until the court grants a letter of administration.⁴⁷ The relevant part of section 16 of the Probate and Administration Act, 1959 enunciates the situations where there is a failure on the part of the executors as:

“Where-

- a) no executor is appointed by a will;
- b) the executor or all the executors appointed by will are legally incapable of acting as such, or have renounced;
- c) no executor survives the testator;
- d) all the executors die before obtaining probate or before having administered all the estate of the deceased; or
- e) the executors appointed by any will do not appear and extract probate, letters of administration with the will annexed may be granted to such persons as the Court deems fittest to administer the estate.”

Apart from this, section 7 of the same Act enumerates the situations where there is a cessation of the right of the executors to prove their executorships, which renders the testacy intestate. The provision reads:

“Where a person appointed executor by a will-

- a) survives the testator but dies without having taken out probate of the will;
- b) is cited to take out probate of the will and does not appear to the citation;
or
- c) renounces the probate of the will,
his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his estate shall devolve and be committed in like manner as if that person had not been appointed as executor.”

A similar definition is found with respect to the administration of small estates. Section 3(2) of the Small Estate (Distribution) Act 1955 provides:

“For the purpose of this Act a small estate means an estate of a deceased person consisting wholly or partly of immovable property situated in any State and not exceeding six hundred thousand *ringgit* in total value.”

⁴⁷ G.Raman, *Probate and Administration in Singapore and Malaysia: Law and Practice*, Kuala Lumpur: Malayan Law Journal Sdn. Bhd., 1991, p. 10.

This definition emphasizes the total value of the estate and its classification. To constitute a small estate, the total value must not exceed RM600,000 and the presence of immovable property is required. The absence of immovable property removes such an estate from this definition even though the total value is less than RM600,000.

In a seminar and dialogue session on estates, Mr. Mohd Zin bin Dollah⁴⁸ defined the estate as being properties or anything that has value and is left behind by the deceased upon his/her death.⁴⁹ He classified the estate for the purpose of administration into two types, namely movable and immovable properties. He cited examples of immovable property as being land, houses or permanent buildings constructed on the land and any interest of the deceased in the land, and movable property as being cash in savings accounts, shares, transport, firearms, etc.⁵⁰ Money in the Employment Provident Fund, National Shares Trust, New Shares Trust, Johore Shares Trust, etc are also examples of movable property.⁵¹

3.3.2. The Constituents of Estate

On the basis of the above statutory definition of estate, it can be seen that the basic classification of estates is movable and immovable property. However, this definition is not very helpful in ascertaining the components of the estate. Therefore, it is necessary to

⁴⁸ Mr. Mohd. Zin bin Dollah is the Head of Director Assistants, Estate Distribution Unit, Kelantan, and is currently dealing with the administration and distribution of small estates situated in the Kota Bharu district.

⁴⁹ Kertas Kerja 1, *Pentadbiran dan Pengurusan Harta Pusaka Kecil*, Seminar Dan Dialog Mengenai Harta Pusaka Jajahan Tumpat, Anjuran Bersama Pejabat Tanah Jajahan Tumpat Dan Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan Negeri Kelantan, 8 July 2003, p.1.

⁵⁰ Ibid.

⁵¹ Buku Panduan, *Permohonan Pembahagian Harta Pusaka Kecil, Seksyen Pembahagian Pusaka, Jabatan Pengarah Ranah Dan Galian*, p. 1.

refer to other related terms such as property, which is mentioned in the definition of the term estate. Section 2 of the Probate and Administration Act, 1959 elaborates the term ‘property’

“as includes a thing in action and any interest in movable or immovable property.”

It is to be noted that the word used in this provision is “includes” which carries a broad meaning. It means to have as a part or contain in addition to other parts.⁵² In other words, this definition of property is not restricted or limited to any specific kind of property. Included in the definition are things in action and any interest, and these two undoubtedly constitute incorporeal or intangible property.⁵³ Hence, it is submitted that the meaning of estate as applicable in the administration of Muslim estates in Malaysia may include any kind of property either corporeal or incorporeal.

3.3.3. Tangible Assets

As for the tangible property of the deceased Muslim’s estate, its heritability is certain and indisputable. Here, several decided cases will be cited to illustrate examples of tangible assets that are normally dealt with by the courts. In *Re the Estate of Tunku Mohamed Jewa Ibni AlMarhum Sultan Abdul Hamid, Deceased*,⁵⁴ the estate left by the deceased comprised 13 pieces of land, cash deposits in banks and one motorcar. These were the

⁵² The Longman Dictionary, p. 530. In Oxford Dictionary, it is stated that if one thing includes another, it has the second thing as one of its parts. See *Oxford Advanced Learner’s Dictionary*, prepared by A S Hornby, edited by Sally Wehmeir, 6th edition, Oxford: Oxford University Press, 2000, p. 605.

⁵³ See *Ree Hee Chun Meng* [1989] 2 MLJ 310. In this case the meaning of estate was discussed by referring to the definition of estate and property available in the Probate and Administration Act, 1959 by virtue of section 2. The issue is whether the chose in action is estate or not. The Court held that even though the chose in action is intangible, it is a right that could move from one person to another depending upon capacity to sue and in that sense a thing in action could be said to be movable property.

⁵⁴ [1982] 2 MLJ 44.

assets of the deceased used for the settlement of debts and liabilities including a gift *inter-vivos* of some land made in his lifetime, before the distribution in favour of the legal heirs under the *farā'id* system. In *Fazil Rahman & Ors. V AR. S. Nachiappa Chettiar*,⁵⁵ the estate of the deceased comprised pieces of land. The value of the estate was only RM14,600 and not enough for the settlement of the debts and liabilities. In other words, after paying off the debts including the interest, the legal heirs were entitled to nothing because the estate was insolvent. In *re Estate of Nik Yusoff Bin Wan Omar*,⁵⁶ the estate left by the deceased comprised 3,000 unit shares in a company to the value of RM3,600.00, 50 shares in the Cooperative Bank of Malaysia to the value of RM500.00, RM2,028.72 cash at the Bank Rakyat Malaysia in Kuala Lumpur, RM3,660.25 in the Hong Kong and Shanghai Banking Corporation, insurance policies with the Prudential Assurance Company Limited to the value of RM19,812.89 and with the Great Eastern Life Assurance Company Limited to the value of RM125,000.00.

3.3.4. The Treatment of Rights

With respect to the issue of whether a right is heritable or not according to the courts in Malaysia, cases pertaining to the purchaser's right under a contract serve as a good illustration. In *Haji Osman bin Abu Bakar v Saiyed Noor*,⁵⁷ the vendor sold a piece of land to the purchaser for RM2,250. The purchaser had paid the purchase price but the

⁵⁵ (1963) 29 MLJ 309.

⁵⁶ Files no. Pn. P.P. (KN). 100/79/1 & P.P.P (D) 214 which are available at the Public Trust Corporation, Kota Bharu Branch, Kota Bharu, Kelantan, Malaysia. In this case, the Public Trustee Corporation was appointed by the High Court as the personal representative of the deceased. The Public Trustee Corporation therefore carried out the administration and the distribution of the estate including the settlement of debts and liabilities. Although the Court did not decide the case, its administration was under the supervision of the Court.

⁵⁷ [1952] MLJ 37. In *Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97, Thomson J stated: "Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires right *ad rem*, which is also a right in *personam*."

transfer of ownership of the land was not presented for registration until some six months after the vendor's death. It was held that the death of the vendor did not avoid the contract; the personal legal representative of the deceased was trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, was entitled to the land and to possession of it.

The above decision and principle were followed in *Kersah La'usin v Sikin Menan*.⁵⁸ The plaintiff applied for a declaration that he was the beneficial owner of the piece of land in dispute. The land belonged to his mother, who had died in 1938, and he was the sole beneficiary. He agreed to sell the land to the defendant's father and a memorandum of transfer of the land was executed in the required form before an Assistant Collector of Land Revenue. The transfer could not be registered as the land was still in his mother's name. The defendant's father and his family occupied the land. The plaintiff applied for distribution of his mother's estate but at the date of the hearing he was absent and letters of administration of the estate were granted to the defendant. The plaintiff issued the writ against the defendant as administrator of his mother's estate. The defendant counterclaimed for delivery of the title deeds. It was held that the unregistered transfer of the land gave the purchaser a contractual right that on his death vested in his personal representative.

3.3.5. The Treatment of Usufruct

The case of a Temporary Occupation License (TOL) is a good example to illustrate the court's view on the question of the heritability of usufruct upon the death of a Muslim

⁵⁸ [1966] 2 MLJ 20.

holder. The TOL is a license, or permission, of a temporary nature, granted by the State Authority, for some restricted purpose, for which otherwise the occupant would have become a trespasser or an illegal squatter.⁵⁹ The purpose, nature and duration of the license are clearly prescribed in the Malaysian National Land Code. In other words, the rights granted under this license are restricted and limited in terms of its purpose, nature and duration.⁶⁰ However, section 44 of the Code stipulates the rights of the TOL holder with respect to the exclusive use and enjoyment, the right of support, the right of access, the right to extract, move or use within the boundaries of the land any rock material in or upon the land, and to fell, clear, destroy or use within such boundaries any forest produce thereon. However, he is not allowed to extract any metal or mineral from any rock material in or upon the land, nor may he remove beyond the said boundaries any rock material or forest produce extracted or taken therefrom.⁶¹ The concept of the TOL is best illustrated in *Papoo v Veriah*⁶² where Good J. stated that:

“The public...apparently continue to treat land held under TOL as if such license was capable of transferring some kind of title to the holder and as if it conferred upon the holder a right to deal in land, or in things attached to the land, which comes to the same thing, as if it was land in the ownership of the license holder. Even the administration appears to share the misapprehension of the public so far as buildings on the land are concerned.... A temporary license is exactly what the name implies. It is a license to occupy and nothing more.... The license is personal to the holder; it dies with the holder.”

With regard to issues relating to succession, section 68 of the National Land Code expressly provides that a TOL terminates upon the death of the holder. This was

⁵⁹ Buang, Salleh, *Temporary occupation licenses; some proposals for reforms* [1987] 2 MLJ ccli.

⁶⁰ Buang, Salleh, *Malaysian Torrens System*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992, p. 47.

⁶¹ Ibid, p. 48.

⁶² [1965] 1 MLJ 127.

discussed in *Fatimah v Moideen Kutty*.⁶³ In this case, the deceased was the TOL holder of a piece of land. He died in 1962 and subsequently; the license was renewed for the following year, i.e. 1963. Upon knowing of the death, the Collector of the Land Revenue refused to renew the license after the end of 1963. The appellant was the deceased's wife and was appointed as the deceased personal representative. Two houses owned by the deceased on the land were rented to the respondent at a rental of \$40 per *ensem*. After the death of the deceased, the tenant paid the rent to the appellant and until July 1964 he commenced to remit a sum of \$20 as part payment of rent, the balance being put towards alleged expenses incurred in connection with the tenancy amounting to \$2,450.35. However, the appellant, as the deceased's administratrix, denied liability and demanded payment in full and, having failed to obtain satisfaction, refused, after the 13th of March, 1965 to accept further payments of \$20 as rent. The issue in this case was whether the administratrix was entitled to maintain a claim for arrears of rent in respect of the houses that were built on State land, which was then under illegal occupation since the TOL issued to the deceased landlord had lapsed following his death in 1962. The Court held that the appellant was not entitled to the rent and Suffian F.J stated:

“Immediately before the issue of the TOL to the deceased, the land concerned was state land. After the issue of the TOL, the land was still State Land, but the deceased had a license to occupy it temporarily. By law this license was not transferable and I agree with Good J. in *Papoo v Veriah* [1966] 1 MLJ 127 that the license was not transmitted to the widow on the licensee's death and he died on 10th August 1962. Thereafter the Collector renewed the license for the year 1963 in the deceased's name. When he knew of the deceased's death, he refused to renew it after the end of 1963. Whatever may have been the deceased's or the widow's right between the deceased's death and the end of 1963, thereafter because the Government refused to renew the TOL in the name of the deceased or

⁶³ [1969] 1 MLJ 72.

any one else, neither his estate nor she had any right of any kind whatever to the land.”

The following example concerns usufruct arising under a lease or tenancy agreement. A lease or tenancy can be defined as a conveyance by which the proprietor of the land (the lessor) grants to another person (the lessee) an interest in the land less than freehold and less than that to which the lessor is himself entitled.⁶⁴ The Malaysian National Land Code stipulates in detail the conditions of a valid lease. Section 221(2) and section 222(2) state respectively that every lease or sub-lease must exceed three years. The maximum period of 99 years may be granted if it relates to the whole of any alienated land, and 30 years if it relates to a part only thereof.⁶⁵

The issue before the Court was whether the tenancy becomes part of the deceased tenant's estate upon his death and pass to his legal heirs beneficially. In *Alagappa Chettiar v Kader & Ors*,⁶⁶ the plaintiff was the landlord of premises let to the first defendant, since deceased, on a monthly tenancy. After the death of the first defendant, the plaintiff sued the personal representative of the deceased and the other defendants to recover possession of the premises occupied by them. No notice to terminate the tenancy was given. It was contended on behalf of the plaintiff that no notice was necessary. The Court held that such a tenancy is an interest that is transmitted to personal representatives and the plaintiff was not entitled to recover possession as the tenancy in dispute was still in existence at the date of the institution of the suit. It was the view of the Court that a weekly or monthly tenancy is not a succession of leases for one week or one month at a

⁶⁴ Buang, *Malaysian Torrens System*, p. 98.

⁶⁵ Section 221(3) of the Malaysian National Land Code.

⁶⁶ [1939] MLJ 304.

time but is one of indefinite duration, which exists until terminated by the act of a party or by the operation of law.

In *Kechik & Ors v Habeeb Mohamed & Anor*,⁶⁷ the issue before the Court concerned the tenancy agreement between a landlord and tenant. The landlord died intestate on 30th April 1958 and the tenant died intestate on 14th February 1958. At the time of his death, the tenant was occupying the premises in dispute as a monthly tenant of the deceased landlord. The plaintiff was the widow of the landlord and was granted the letters of administration for her husband's estate. The first defendant was the widow of the deceased tenant who had granted sub-tenancies of portions of the premises to the second and third defendants in April and June 1958, i.e. after the tenant's death. The first defendant was granted the letters of administration for her husband's estate on December 14, 1958 and extracted it on May 18, 1960. The issue before the learned judge was whether the second and third defendants were unlawfully occupying the premises. He held in favour of the plaintiff declaring that the second and third defendants were unlawfully occupying the premises and as such she was entitled to possession of the premises as well as the damages that would be ascertained on inquiry. This decision was substantially dependent on the judge's view that until her husband's estate became vested in her as administratrix, the first defendant had no power to grant sub-tenancies to the second and third defendants. The defendants appealed.

On appeal, the Court had to determine the question of whether the tenancy had become part of the tenant's estate, which upon his death would pass to his legal heirs beneficially.

⁶⁷ (1963) 29 MLJ 127.

On this issue, the Court held that the monthly contractual tenancy continued in existence after his death for the benefit of his estate and would be terminated only by a proper notice to quit. Such notice must contain at least one word that could be comprehended as putting an end to the contract. It would also be acceptable if the notice contained wording requiring the tenant to quit the premises at the expiration of a particular period of time. In this regard, the notice that had been issued by the plaintiff was not proper enough to constitute a notice to quit. As a result the tenancy remained and passed to the deceased tenant's legal heir, i.e. his wife who stood as the administratrix of the estate.

The Court also had to decide the issue of precisely when the tenancy had passed to the wife because until the wife was legally granted the letters of administration, the deceased's property was vested in the Chief Justice. In this regard, the Court held that from the period when the sub-tenancies were granted but the letters of administration were not yet approved by the court, the deceased's property was not vested in the first defendant. However, the Court insisted on stating that the right of tenancy was part of the deceased's estate and hence, even though the sub-tenancies were granted before the wife legally took out the letters of administration, the doctrine of retrospect was applicable to protect the wife. Furthermore, as the granting of the sub-tenancies was clearly for the benefit of the estate itself, once she got the title, the wife would be able to sue in the capacity of administratrix for the rents if they had not been paid.

3.4. Comparison of Islamic and Malaysian Laws

3.4.1. The Definition of *Tarikah* and Estate

The statutory definition of estate appears to emphasize the procedural matter of in whom the deceased's estate will be vested after death. If the deceased dies testate, the property is vested in the executor and if he/she dies intestate, the property is vested in the administrator. Furthermore, it emphasizes the classification of estates as movable and immovable. On this basis, it is possible to say that such a definition is completely different from the definition of *tarikah* given by the Muslim scholars. The statutory definition is appropriate as far as procedural aspects are concerned, but not for the determination of the components of heritable estate.

The definite meaning of *tarikah* as defined by Muslim scholars is necessary in order to identify exactly what is heritable and what is not from the perspective of Islamic law. Furthermore, it would help Muslims, including those who directly deal with the administration and distribution of Muslim estates, such as judges, lawyers, the Collectors as well as the officers in the Public Trustee Corporation, to identify and ascertain the interest of legal heirs in the deceased's wealth.

The Small Estate (Distribution) Act 1955 provides nothing regarding the definition of estate. This might be due to the fact that the purpose of having this Act is merely to administer and distribute the estate that falls under this category. It possibly has no intention of focusing on the disputes regarding questions of Islamic law, particularly as regards the ascertainment of the deceased's estate. As long as it is established that the

property left behind belonged to the deceased, it is the responsibility of the Collector to administer and distribute it accordingly. Mr. Mohd. Zin's opinion on the meaning of estate is significant because it elaborates further the ambiguous statutory definition. His view is based on a comprehensive analysis of the statutory provisions of the Probate and Administration Act and the Small Estate (Distribution) Act as well as his vast experience of adjudicating cases concerning the administration and distribution of small estates. Moreover, his view is relatively similar to the dominant and preferable definition of *tarikah* as elaborated by the majority of Muslim scholars.

3.4.2. The Constituents of *Tarikah* and Estate in Malaysian Law

From the above discussion, it is clear that the majority of the Muslim scholars of the Sunni schools of laws unanimously agree that the *tarikah* comprises *māl* i.e. tangible and intangible property, which includes rights and services. Only the Ḥanafīs are of the view that services are not heritable on the basis that they do not constitute *māl*. In ascertaining the components of *tarikah*, an investigation into the Islamic concept of property is important because the fundamental criterion of heritable wealth is that it must constitute *māl*.

After careful examination of the subject, it is clear that the Islamic concept of property is relatively similar to that in English law. The Islamic classification of property into three categories, namely *māl*, *ḥaq* and *manfaʿah*, i.e. tangible and intangible, corresponds with the similar classification under English law. The only difference pertains to the perspective of the *Syarīʿah* and whether or not the wealth is beneficial. Things like pigs,

wine, carcasses, blood and human bodies are not property in the eye of Islamic law because they are prohibited, and consequently not beneficial to Muslims. In contrast, they are property according to English law.

The definition of estate as found in section 2 of the Probate and Administration Act, 1959 should be read together with the other relevant provisions. Cross-references between the provisions, which elaborate further the meaning of 'intestate' as well as the meaning of 'property', are important in order to have a clear understanding of the components of estate. On the basis of these observations, it is possible to conclude that the statutory term 'estate' as applies to the process of estate administration in Malaysia, is in agreement with the meaning of *tarikah* as comprehended by the classical Muslim scholars of the Mālikīs, Syāfi'īs and Ḥanbalīs, whose definition of *tarikah* includes *māl*, *ḥaq* and *manfa'ah*; tangible and intangible assets. It is significant that it is only the Ḥanafīs who hold the view that the term *tarikah* refers only to tangible assets.

3.4.3. The Heritability of *Māl*; Tangible and Intangible Assets

In considering the court cases that have been discussed and to illustrate the examples of corporeal properties, it is clear that the courts do not deal with the aspects of the legality of property from the Islamic perspective or *Syarī'ah* compliance. It would seem that bank interest, shares and conventional insurance policies are among the issues that need to be looked at as far as *Syarī'ah* compliance is concerned. The Muslims, particularly in Malaysia, commonly utilize these three instruments. Therefore, the question pertaining to

Syarī'ah compliance should be taken into account by the courts because it is part and parcel of the requirements of an heritable estate.

It is the dominant and preferable opinion of Muslim scholars that bank interest constitutes *ribā* and is strictly prohibited.⁶⁸ Therefore, from the perspective of the Islamic law of succession, it is absolutely non-heritable. In the case of conventional life insurance, the majority of Muslim scholars have decreed its illegitimacy.⁶⁹

In the case of shares, section 103 of the Malaysian Companies Act provides for the transmission of shares from a company shareholder when he dies. This provision explains that the transmitted shares will be vested in the deceased shareholder's personal representative or the trustee in bankruptcy. The personal representative thereby becomes legal owner of the shares even though he is not registered as a member of the company.⁷⁰

Currently, there is a council that deals with the ascertainment of which shares comply with the requirements of Islamic law. The *Syarī'ah* Advisory Council of the Securities Commission, Malaysia was established in May 1996. Its members comprise individuals who are in the position to present *Syarī'ah* opinions and those who have vast experience in the application of the *Syarī'ah*, particularly in the areas of Islamic economics and finance. The Council produces quarterly guidelines listing shares that satisfy the

⁶⁸ Al-Qūsī, 'Abd al-Mun'im Maḥmūd, *Ribā Islamic Law and Interest*, unpublished Ph.D Thesis, Temple University, 1983, pp. 171- 190.

⁶⁹ This issue will be dealt with in detail in Chapter 7 because in Malaysia its application is quite complicated.

⁷⁰ Arjunan, K. & Low Chee Keong, *Lipton & Herzberg's Understanding Company Law in Malaysia*, student edition, Victoria: LBC Information Services, 1995.



principles of Islamic law and those that do not.⁷¹ Various capital market products are available for Muslims who seek to invest and transact only in the Islamic capital market, these include Islamic debt securities, Islamic unit trusts, Islamic and *Syarī'ah* Indices, warrants, call warrants and Crude Palm Oil futures contracts.⁷²

With regard to the administration of small estates, the definition of a small estate requires the existence of immovable property, which is certainly corporeal in nature. Relying upon the decisions of cases as decided by the Collector, the examples of corporeal properties normally brought forward for distribution are compensation money,⁷³ houses, motorcars, land, jewellery,⁷⁴ shares in the ASB⁷⁵ and cash in the Employer Provident Fund.⁷⁶ The parties before the Collector have not as yet raised issues of the legal character or *Syarī'ah* compliance with respect to these properties. The issue of *Syarī'ah* compliance in relation to property such as shares and life insurance policies⁷⁷ needs to be highlighted and discussed in detail.

3.4.4. The Heritability of *Haq* (Rights)

The cited cases were concerned with either the right of the purchaser under the contract, which is considered by the court as a right in *rem* as well as a right in *personam*, or the

⁷¹ The list is updated twice a year and released on the last Friday of April and October. See Securities Commission, *Frequently-Asked Question*, [online], available from http://www.sc.com.my/htm/icm/fr_icm.html [accessed on 25th August 2003].

⁷² See Securities Commission, *Frequently-Asked Question*, [online], available from http://www.sc.com.my/htm/icm/fr_icm.html [accessed on 25th August 2003].

⁷³ Files no. APKKB527/2002 and APKKB10/2003.

⁷⁴ File no. APKKB 543/2002.

⁷⁵ Files no. APKKB549/2002, APKKB.571/2002 and APKKB.575/2002.

⁷⁶ File no. APKKB 562/2003.

⁷⁷ On 15th June 1972, the National Fatwā Council issued a *fatwa* that conventional life insurance as run by the insurance companies is an invalid transaction not compatible with the Islamic principles. The contract is not free from the elements of uncertainty, gambling and interest. See Takaful Nasional, *Konsep Takaful*, [online], available from <http://www.takafulnasional.com.my/default.fm> [accessed on 2nd August 2003].

personal right of the purchaser, which is related to the property. The court's view is that such a right is heritable upon the death of the purchaser and is vested in his personal representative. This is similar to the application of Islamic law that considers that the right in *rem* is heritable. Looking into the definition of the estate as discussed previously, it can be concluded that the general definition of the estate found in the Probate and Administration Act, 1959 gives the court the discretion to determine which right is heritable and which is not.

3.4.5. The Heritability of *Manfa'ah* (Benefits or Services)

Discussing the issue of the heritability of usufruct, it seems that the courts in Malaysia have not been decisive in their decisions. In terms of nature, there is no difference between the Temporary Occupation License and the tenancy agreement. Both are agreements between two parties allowing one of them to benefit from the property on which the agreement is concluded. Both contracts confer on the holder or lessee a right in *personam* as well as a right in *rem* to occupy the premises in dispute resulting in the enjoyment of the usufruct or benefit. With regard to the TOL, the court considers it as something that is personal granted to its holder. Being personal, such a license is not transferable or inherited upon death. This principle is equivalent to the view of the Ḥanafīs that usufruct is not property and not heritable. The TOL is similar to the *iqṭā' irfāq* in Islamic law. In this case, only the ownership to the usufruct or the right to use the land is transferred to the person granted with the right.⁷⁸ The ownership of the land remains with the original proprietor. However, with respect to the tenancy agreement, the

⁷⁸ Awang, Ridzuan, *Undang- Undang Tanah Islam; Pendekatan Perbandingan*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1994, p. 202- 239.

court holds a view akin to the opinion of the majority of Muslim scholars. The Mālikīs, Shāfi'īs and the Ḥanbalīs are of the view that *manfa'ah* is property and hence is heritable.⁷⁹

3.5. Conclusion

The *tarikah* constitutes one significant element of the Islamic law of succession. Its various definitions as given by the Muslim scholars are primarily due to the two different versions of the *ḥadīth* they have referred to. Apart from this, the Muslim jurists also differ regarding the Islamic concept of *māl*. This causes divergent opinions in relation to the question of the heritability of rights and usufructs and services. Considering the contemporary development of people's financial activities, including in Malaysia, the opinion of the majority is deemed preferable.

⁷⁹ Rosman, Arief Salleh, *Harta Intelektual Menurut Fiqh Islam; Pendekatan Perbandingan Dengan Undang-Undang Malaysia*, Skudai: Universiti Teknologi Malaysia, 2002, p. 50.

CHAPTER FOUR

ADMINISTRATION OF THE *TARIKAH*: RIGHTS ATTACHED TO ESTATES

4.1 Introduction

The foremost fundamental principle of succession is that legal heirs are only entitled to the estate that is not subject to the rights and claims of others. From the perspective of the Islamic law of succession, these are known as the rights that are attached to the *tarikah*, the *al-ḥuqūq al-mutaʿlliqah bi al-tarikah*. Pearl states that these rights are carried out during the process of the administration of estates.¹ According to Nasir, they are known as charges on the estate.² Baillie names them as the purposes to which the *tarikah* is applicable.³

This chapter looks into the process of discharging these purposes from the perspective of the Islamic law of succession. The related issues that appear significant to the concept of *tarikah* are also dealt with, such as the questions of when the ownership of the wealth is transferred to the legal heirs, the accretion to the estate, the estate duty and the *locus standi* of the legal heir. A comparison with the laws applicable in Malaysia is made for the purpose of identifying whether the current Malaysian practices apply the Islamic law and if so, to what extent it is applied.

¹ Pearl, David, *A Textbook on Muslim Personal Law*, 2nd edition, London: Croom Helm, 1987, p. 138.

² Nasir, Jamal J., p. 202.

³ Baillie, Neil B.E. , *A Digest of Moohummdan Law*, Lahore: Premier Book House, 1965, p. 693.

4.2. Is there Administration of *Tarikah* in Islamic Law?

4.2.1. Brief Accounts of Estate Administration in Malaysia

The administration of estates is defined as the process whereby the personal representatives collect the assets of the estate and then meet the debts and liabilities and pay out the legacies and devises before distributing the residue, managing the estate as necessary in the meantime.⁴ It is the responsibility of the deceased's personal representatives to ascertain the extent of the assets, to call them in and have them valued, to settle any liabilities including the estate duty, to discharge all the debts, funeral and testamentary expenses and, lastly, to distribute the estate accordingly, either following the testator's instructions in the will or under the intestacy rules.⁵

In applying for a letter of representation, an applicant is required to provide in the affidavit, which is filed along with the petition, the relevant information relating to the deceased's estate. He/she needs to furnish the necessary certificates to prove the assets of the deceased and the extent of the holding at the date of death. In addition, the applicant is required to supply information relating to claims against the estate as well as all claims for the estate.⁶ The issuance of the certificates is deemed necessary as these provide documentary evidence of the deceased's ownership of the assets. Without such documents, it is very difficult to prove and ascertain the deceased's assets, and an application before the court may as a consequence be rejected. This was evident in the Court's decision in *Kutai Bin Haji Lateh; Dato' Bagindarajah Redek; Bin Keneh*;

⁴ Sawyer, Caroline, *Principles of Succession, Wills and Probate*, 2nd edition, London: Cavendish Publishing Limited, 1998, p. 329.

⁵ Raman, G., pp. 29 & 108.

⁶ Doshi, Varsha L., *Making a Will*, Kuala Lumpur: Penerbit Fajar Bakti Sdn Bhd., 1994, p. 55.

Lanjong Bin Keneh v Taensah Binti Haji Enoh.⁷ In this case, the Court rejected the claim of debt, which was not supported by any documentary evidence but rested entirely on the evidence of the interested parties.

Before the estate is distributed to the legatee under either the valid will of the testator or the intestacy rules, i.e. the *farā'id* system, all debts and liabilities attached to the estate have to be discharged. The interest of the legatee and legal heirs arises only after all debts and liabilities are discharged. Hence the estate, which is distributed to the legatee and legal heirs, is the remaining property or the residue left after the settlement of all claims and liabilities. In other words, if the estate is insolvent the legatee and the legal heirs receive nothing. Their interests in the property are not given effect if the property is sold for the purpose of settling debts and liabilities against the estate. This stance was adopted in the case of *Fazil Rahman & Ors v AR.S. Nachiappa Chettiar* where the total value of the estate was RM14,6000 and the total value of debts RM33,780. The Court held that the legal heirs, namely the children of the deceased, had no interest in the estate and the defendant was allowed to sell the estate to recover the debts.

The general power of a personal representative is illustrated in *the Official Administrator v Haji Abdul Majid Bin Shakabudin*.⁸ In this case, the deceased was indebted to a Chinese person. Some of the debt had been paid off but the sum of RM2060 was still unpaid. The Official Administrator took out an originating summons asking for an order under section 94 (iii) of the Probate and Administration Enactment giving him leave to sell the

⁷ [1934] 1 MLJ 251.

⁸ [1939] 1 MLJ 162

deceased's interest in a piece of land. The Court held in favour of the applicant allowing him to sell the deceased's interest in the land. The Court stated that whatever the deceased could have done voluntarily during her lifetime, her personal representative could do voluntarily after her death, namely sell the estate to pay a just legal debt.

According to section 67 (1) (a) of the Probate and Administration Act, the personal representative must utilize the property of the deceased to pay off all debts and liabilities:

“The property of a deceased person, to the extent of his beneficial interest therein, and the property of which a deceased person in pursuance of any general power disposes by his will, are assets for payment of his debts and liabilities, and any disposition by will inconsistent with this Act is void as against the creditors; and the Court shall, if necessary, administer the property for the purpose of the payment of debts and liabilities.”

Section 69 provides that the administration of an insolvent estate is in accordance with the rules set out in Part I of the First Schedule and if the estate is solvent, its administration is prescribed in the rules of Part II of the same schedule. In relation to the discussion on *tarikah*, these rules set out that the funeral, testamentary and administration expenses, debts and liabilities are paid out of the estate before any distribution in favour of the legatee and legal heirs under the intestacy rules. This indicates that priority, arising after the deceased's death, is given to the necessary expenses including the rights of creditors. Unless and until all the expenses are fully satisfied, the legatees and legal heirs have no interest to claim. It is important to mention here that the present research is an attempt to ascertain the *tarikah* or estate that is to be inherited by the legal heir, it does not discuss in detail the situation of an insolvent estate regarding the priorities among the creditors as this falls under the subject of Bankruptcy Law and certainly requires a

lengthy discussion. It is sufficient here to merely refer to the above statutory provision to ascertain the extent to which the laws applicable in Malaysia adopt the principles of Islamic law.

4.2.2. The Administration of *Tarikah* in the Islamic Law of Succession

It is imperative to note that as far as the Islamic administration of estates is concerned, the four Sunni schools of law hold different opinions regarding the order of priorities for meeting the rights and liabilities attached to the *tarikah*. These differences occur because of the different ways of classifying debt. According to the Ḥanafīs, Mālikīs and Syāfiʿīs, debts are classified into two groups, namely special debts and general debts. Special debts are debts that are against and attached to a particular asset of the estate such as a mortgaged property.⁹ On the other hand, the Ḥanbalīs place all debts in one category regardless of whether they are attached to the property or not.¹⁰ The charges on estates and the different opinions of the Muslim scholars regarding them are illustrated in the following table.

Order of Priorities	Mālikīs	Ḥanafīs	Syāfiʿīs	Ḥanbalīs
1	Special debts	Special debts	Special debts	Burial expenses
2	Burial expenses	Burial expenses	Burial expenses	Debts
3	General debts	General debts	General debts	<i>Waṣiyyah</i>
4	<i>Waṣiyyah</i>	<i>Waṣiyyah</i>	<i>Waṣiyyah</i>	Legal heirs
5	Legal heirs	Legal heirs	Legal heirs	

⁹ Ibn ʿĀbidīn, vol.5, p. 535, al-Dusūqī, vol. 4, p. 457 and al-Syarbīnī, vol. 3, pp. 3-4.
¹⁰ Ibn Qudāmah, *al-Mughnī wa al-Syarḥ al-Kabīr ʿalā Matn al-Muqniʿ*, Beirut: Dār al-Fikr, 1992, vol. 7, p. 5.

4.2.3. Comparison of Islamic and Malaysian Laws

On the basis of the above discussion, it is incorrect to say that the administration of estates as understood nowadays is unknown to Islamic jurisprudence.¹¹ It is unacceptable to suggest that in Islam, there is no such administration of estates but merely distribution of the property of the deceased, by the State if not by the heirs themselves.¹² It should be observed that Islamic law lays down clear principles applicable to the administration of *tarikah*. The above-mentioned rights have to be discharged and the powers and responsibilities regarding the discharging of these rights lies with the legal heirs. Furthermore, a *Qāḍī* or a *Syarīʿah* judge supervises the carrying out of these duties. This is a matter of administration involving the rights of others and hence, the participation of a *Syarīʿah* judge appointed and empowered by the State is a matter of necessity as far as the public interest, or *maṣāliḥ mursalah*, is concerned. In this respect, the legal heirs may choose a qualified person to carry out the duties on their behalf, based on the concept of *wakālah*, and his/her appointment must be duly endorsed by the State, i.e. the court.

With respect to the above table, it is not necessary to discuss the rights of legal heirs to the remaining estate under the *farāʾiḍ* law as this has been done in Chapter 2 when examining the basic features of the law. The application of this law in Malaysia has also been discussed in Chapter 2 and hence, to avoid unnecessary repetition the analysis of the extent to which the law is applicable in Malaysia is not dealt with here.

¹¹ Khan, Muhammad Mustafa, *Islamic Law of Inheritance A New Approach*, , p. 22.

¹² Ibid, p. 22.

4.3. Funeral Expenses

4.3.1. Funeral Expenses under Islamic law

There is an obligation to carry out a funeral ceremony for the deceased and the expenses of the ceremony are taken from the deceased's estate. This is based on several *ḥadīth*, one being the *ḥadīth* narrated by Khabbāb bin al-Irt that Muṣ'ab bin 'Umayr, a companion of the Prophet. He had died on the battlefield of *Uḥud* and had nothing except his garment to clothe his body. The Prophet then ordered other companions to use the garment to clothe his body.¹³

It can be argued that funeral expenses are originally a matter for the deceased individual and not a responsibility of others. Only if the deceased dies penniless should the expenses be borne by those who were responsible for providing for his/her maintenance when alive, and if none is present by the *bayt al-māl*. Therefore, if a wife dies leaving an estate sufficient to cover her own funeral expenses, it is preferable that the expenses be deducted from her *tarikah* rather than considering them as the responsibility of another.

The funeral ceremony expenses must avoid any element of extravagance, superfluity or deficiency.¹⁴ The expenses must fulfil whatever is necessarily and fundamentally needed by the deceased, which include the costs of a coffin, clothing, bathing, carrying the deceased to the graveyard and digging and covering the grave and so on. Expenditure on the unnecessary would be tantamount to the infringement of the rights of others such as

¹³ Sābiq, Sayyid, *Fiqh al-Sunnah*, 11th edition, Cairo: Dār al-Fatḥ li I'lām al-ʿArabī, 1999, vol.1, p. 359.

¹⁴ Ibn ʿĀbidīn, vol.5, p. 536 and al-Syarbīnī, vol. 3, p. 3.

creditors, legatees and legal heirs because the expenses are deducted from the total amount of the deceased's property.¹⁵

4.3.1.1. Funeral Expenses and Special Debts

A special debt is one that is specifically attached to part of the estate such as a mortgaged property. To the Mālikīs, Ḥanafīs and Syāfi'īs, funeral expenses should be paid after the settlement of these debts. This is based on the analogy that during a person's lifetime, others' rights take precedence over his/her own rights and hence, the same principle is applicable when he/she dies.¹⁶ On the other hand, the Ḥanbalīs are of the view that such expenses take precedence over all types of debt. This opinion is based on an analogy to the position of a bankrupt whose properties are sold except those considered as his necessities.¹⁷ However, the Ḥanbalīs further hold the view that as compared with general debts, this type of debt is to be settled first because of its nature, being attached to the specific property of the estate.¹⁸

In the light of the above arguments, it would seem that the opinion of the Ḥanbalīs is to be preferred. This is based on the fact that although the majority view is similarly analogous to a principle that is applicable during lifetime, the view of the Ḥanbalīs is stronger because there is an exception to the principle relied upon by the majority concerning the basic needs and necessities of the deceased as in the case of a bankrupt. It is important to note that covering the deceased's body and arranging all the necessary

¹⁵ Al-Syīrāzī, Abī Ishāq Ibrāhīm bin 'Alī ibn Yūsuf al-Fīrūzābādī, *al-Muhadhdhab fī Fiqh al-Imām al-Syāfi'i*, n.p.: Dār al-Fikr, n.d. , vol.2, p. 23 and al-Syarbīnī, p. 3.

¹⁶ Ibn 'Ābidīn, p. 536, al-Dusūqī, p. 457 and al-Syarbīnī, p. 4.

¹⁷ Al-Bahūtī, *Kasyāf al-Qanā'*, vol. 2, p. 541..

¹⁸ Ibid., vol. 4, pp. 403-404.

things related to the burial in accordance with the Islamic teachings are necessities fundamentally needed by the deceased.¹⁹

4.3.2. Funeral Expenses under the Malaysian laws

In *Jub'il Bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd*,²⁰ the plaintiff had failed to furnish any particulars proving that he had spent RM5000 on the deceased's Muslim funeral and hence the Court accepted the defending counsel's contention that the reasonable amount for the funeral expenses was RM2000. The Court refused to accept the claim of RM5000, which included the feast held by the plaintiff in honour of the deceased. In *Zulkifli Bin Ayob v Velasani a/p K Madhavan & Anor*,²¹ the amount awarded by the Session Court was RM3000. The appellant in her appeal before the High Court did not challenge this amount. The High Court in *Mariah bte Mohamad (Administratrix of the estate of Wan Salleh Bin Wan Ibrahim, deceased) v. Abdullah Bin Daud (Dr Lom kok Eng & Anor, Third Parties)*²² agreed with the widow's claim that the amount she had spent on her husband's funeral was RM500 and viewed that this amount was reasonable and appropriate for a Muslim's funeral.

¹⁹ This is known as one of the objectives of *Syarī'ah* or *maqāṣid al-Syarī'ah*, namely the necessities or *ḍarūriyyāt*, which are must and basic for the establishment of welfare in this world and the world hereafter in the sense that if they are ignored then the coherence and order cannot be established and *fasād* (chaos and disorder) will prevail. See Khan, M.Fahim and Ghifari, Noor Muhammad, "Shatibi's Objectives of Shari'ah and Some Implications for Consumer Theory", in: *Readings in Islamic Economic Thought*, edited by Sadeq, M.Abul Hassan and Ghazali, Aidit, Kuala Lumpur: Longman Malaysia, 1992, pp. 176-177.

²⁰ [2001] 6 MLJ 669.

²¹ [2000] 1 MLJ 593.

²² [1990] 1 MLJ 240.

4.3.3. Comparison of the Treatment of Funeral Expenses and Special Debts

From the above cases it can be seen that the courts have not fixed a standard amount for the funeral expenses of a deceased Muslim. The amounts considered reasonable, and therefore granted by the courts, are based on the evidence brought forward by the parties concerned. The courts have not discussed in detail the particulars that are necessary for the process of a Muslim's funeral as prescribed in Islamic law, which would determine an exact amount for funeral expenses.

However, it appears that the courts have granted the claims for funeral expenses as part of the compensation even though they are part and parcel of the expenses that according to Islamic law should be borne by the estate. It is the deceased's right against his own estate. If such compensation is granted, it implies that the funeral expenses are a duty borne by others, not the estate. However, if others have voluntarily incurred the expense no valid reason arises for such a claim because the funeral process is the right of the deceased, which must be completely performed by the survivors, taken from the estate. This claim can only be made against the estate, not against a third party. It is imperative to mention that the funeral process is the right of the deceased, and its expenses have priority over others' rights namely the creditor, the legatee and the legal heir. On the basis that it is the deceased's right, there is no valid reason to claim for such compensation.

In Malaysia, the funeral expenses of a deceased Muslim are normally settled without any dispute arising.²³ The expenses are either settled voluntarily by the deceased's legal heirs or taken from the estate. If the funeral expenses are incurred by others, such as the

²³ See APKKB.594/2000.

deceased's relatives, they are entitled to a refund deducted from the estate. Due to the lack of disputes relating to funeral expenses, there are no cases to be found pertaining to such claims made before the Collector in the process of distributing small estates.²⁴

As far as the amount of the expenses is concerned, the claims brought before the court as discussed above are regarding the claims for compensation in negligent cases. The amounts ranging from RM500 to RM3000 granted by the courts are reasonable in the context of Islamic law. According to the rule in Islamic law, the amount allocated and deducted from the estate must not exceed the prescribed limit otherwise it would be tantamount to a violation of the rights of the creditor, the legatee and the legal heirs. This means that unnecessary expenses for such as a feast in order to honour the deceased, even though recommended by the *Syarī'ah*, should not be taken from the estate. The courts have upheld the Islamic principles in the sense that the amount permitted to be deducted from the estate must only cover basic things, which are really and necessarily needed by the deceased as prescribed by the Islamic law regarding the burial process. Only those things should be paid from the estate and additional expenses for things such as feasts should not.

The Syāfi'is school of law is the dominant school in Malaysia. It appears that no issues have arisen regarding whether or not special debts take precedence over funeral expenses.

²⁴ See files 2002 on small estates distribution no. APKKB.502, APKKB.507, APKKB.508, APKKB.512, APKKB.517, APKKB.519, APKKB.521, APKKB.526 and APKKB.527 which are available at the Kota Bharu Land Office, Sapura Building, Kota Bharu, Kelantan. See also files ARB (KB)20000 299, Pn.P.P. (KN).100/79/1 and P.P.P.(D)214 which are available at the Public Trustee Corporation, Kota Bharu Branch, Kelantan.

4.4. Payment of Debts

4.4.1. Payment of Debts under the Islamic Law of Succession

This is based on the Qur'anic verse *al-Nisā`* (4): 11, which states that the distribution of the deceased's property among the legal heirs takes place after the settlement of debts and the execution of the bequests of the deceased. However, it is to be noted that the verse pronounces the execution of *waṣiyyah* first, followed by the settlement of debts. According to Muslim scholars, this sequence does not imply that *waṣiyyah* has priority over debt settlement. This is because debts are the rights of others against the estate and therefore should be paid regardless of whether it is ordained or not.²⁵ In contrast, *waṣiyyah* is the right of the deceased and hence, others' rights should have priority in terms of settlement. This is supported by the *ḥadīth* attributed to 'Alī bin Abī Ṭālib, which states that the Prophet ordered the payment of debts prior to the execution of *waṣiyyah*.²⁶

4.4.1.1. Types of Debt Liabilities

According to the four Sunni schools of law, there are two types of debt liability, namely liabilities to Allah and liabilities to creditors. Liabilities to Allah arise due to failures to perform religious duties such as obligatory prayers, pilgrimage, *zakāt* and *kaffārah* (expiation). To the Ḥanafīs, it is not a religious obligation upon the legal heirs to pay these debts from the estate. To them, mandatory devotional acts consist of two fundamental elements, namely the performance and the intention. A dead person is not

²⁵ See Quṭb, Sayyid, *Fī Ṣilāl al-Qur`ān*, translated and edited by Salahi, Adil and Shamis, Ashur, Leicester: The Islamic Foundation, 2001, p. 54.

²⁶ Ibn Mājah, vol.2, p. 906.

able to perform these requirements and hence such obligations cease upon death.²⁷ In contrast, the other three schools of law are of the view that such liabilities to Allah remain and do not lapse upon one's death. The debts must therefore be paid by the legal heirs upon the deceased's death from the estate.

Arguably, the Ḥanafīs' view can be rebutted by the fact that the *kaffārah* or expiation is comparable to the payment of debts to Allah. *Kaffārah* arises out of one's inability to perform the original mandatory act. This is supported by the *ḥadīth*, which states that debts to Allah are worthier of being paid than creditor's debts.²⁸

Liabilities to creditors include personal financial promises such as where the deceased promised a present, such as a car, to his son provided he excels in his studies. This is because a promise is an obligation that must be performed. The Qur'anic verse *al-Isrā'* (16): 34 states: "Come not nigh to the orphan's property except to improve it, until he attains the age of full strength; and fulfil (every) engagement, for every engagement will be enquired into (on the Day of Reckoning)".²⁹ It is clear that breaking a promise is considerably a religious sin. If such a promise is not fulfilled, a Muslim who undertakes it will be accountable to Allāh in the hereafter and he will be questioned regarding his failure to fulfil it. This is similar to the case of a Muslim living in the countries which do

²⁷ Ibn ʿĀbidīn, vol. 5, p. 534.

²⁸ Ibn Mājah, vol. 1, p. 559.

²⁹ There is a *ḥadīth* narrated by al-Bukhārī regarding the attitudes of a hypocrite. The Prophet said: Whoever has the four (characteristics) will be pure hypocrite, and whoever has one of the following four characteristics will have one characteristic of hypocrisy unless and until he gives it up. Whenever he is entrusted, he betrays (proves dishonest), whenever he speaks, he tells lie, whenever he makes a covenant, he proves treacherous and whenever he quarrels, he behaves in a very imprudent, evil and insulting manner. See al-Hilālī, Muhammad Taqi-ud-Din and Khan, Muhammad Muhsin, *Interpretation of the Meanings of the Noble Qur'an in the English Language*, Riyadh: Darussalam, 2000, vol. 4, p. 183.

not recognize the Islamic Law of Succession, who neglects to write a will to have his wealth distributed according to Islamic Law of Succession, as stated by Siddiqi in his *fatwā*. Hence, to release him from such a burden, the promise must be discharged and must be taken from his estate.

Even though a financial promise is normally not put into writing, a Muslim jurist could lawfully enforce it if sufficient evidence can prove of its existence before the court. This is analogous to the betrothal or promise to marry. A betrothal is not a contract of marriage, but because it is a promise to marry, the party who refuses to fulfil the promise without a valid reason is therefore liable to compensate the other party. Section 124 of the Selangor Administration of Muslim Law Enactment 1952 states that, if the other party is willing to perform the marriage, the party in default is liable to pay to the other party the sum which is agreed in the contract of betrothal.³⁰ Thus, in addition to spiritual consequences, promise, as the previous paragraph indicates, can have legal consequence too.

Liabilities to creditors also include the guarantees provided by the deceased for business loans.³¹ This falls under the concept of *kafālah* in Islamic law and hence, the deceased's estate is liable for the financial guarantee if the original debtor is unable to pay the loan.³² Other examples are ordinary loans such as personal, credit card and study loans.

³⁰ Ibrahim, *Family Law in Malaysia and Singapore*, p. 193.

³¹ Mahmood, Rosli, *Perbankan dan Pemberian Pinjaman*, Kuala Lumpur: Utusan Publications & Distributors, 1998, pp. 71-74.

³² Al-Zuhaylī, vol. 5, p. 132 and Daud, Mustafa Hj., *Perniagaan Menurut Islam*, Kuala Lumpur: Utusan Publications & Distributors Sdn Bhd, 1995, pp. 42-43.

4.4.1.2. Allah's Debts v. Creditors' Debts

To the Ḥanafīs, debts to Allah are not worthy of being paid and hence there is no issue of conflict between these and debts to creditors. However, the Mālikīs, the Syāfi'īs and the Ḥanbalīs differ in ascertaining which of the debts has priority. According to the Mālikīs, creditors' claims take priority over liabilities to Allāh on the grounds that Allāh is Benevolent and hence these debts should be discharged after the creditor's claims are fully satisfied but before the execution of any bequests.³³ The Syāfi'īs on the other hand rely on the *ḥadīth* of the Prophet, which mentions that debts to Allah should be given priority in terms of settlement over debts to human beings. Therefore, if the deceased leaves behind an estate insufficient to pay off all the debts due against him, priority is given to the payment of the debts owed to Allah; creditors' claims are only discharged if there is remaining property.³⁴ The Ḥanbalīs take the middle view, *i.e.* all debts are of equal status and none has priority over another. According to them, the word used in the relevant Qur'anic verse is "*dayn*", which implies a general meaning of debt and thus covers all types of debts with no difference between them. According to this view, all debts should be treated equally in terms of priority and furthermore, the settlement of all debts must be based on a proportional calculation.³⁵

4.4.2. Payment of Debts and Liabilities under Malaysian Laws

The personal representative is allowed by the court to sell the deceased's property for the purpose of settling claims against the estate. The interest of the legal heirs to the deceased's estate is considered only after the payment of all debts and the execution of

³³ Al-Dusūqī, vol. 4, p. 458.

³⁴ Al-Syarbīnī, vol.3, p.3.

³⁵ Al-Bahūtī, vol. 4, pp. 403-404.

any bequests. All debts, including income tax, personal loans, loans for study, business and cars and credit card debts, *etc* should be settled prior to the distribution of the estate in favour of the legatee and the legal heirs.

4.4.2.1. Estate Duty

This liability has now been abolished and is only payable on the estates of persons dying before the 1st of November 1991. The estate of a person who dies on or after this date is not liable for estate duty. Section 46 of Chapter VII of the Finance Act 1992³⁶ provides:

- (1) Subject to subsection (2), the Estate Duty Enactment 1941, the Estate Duty Ordinance of Sabah, the Estate Duty Ordinance of Sarawak, the Finance (estate Duty) 1965, the Finance (Estate Duty) Act 1971, the Finance (Estate Duty) Act 1979 and the Finance (Estate Duty) Act 1980 are repealed.
- (2) The repeal of the laws mentioned in subsection (1) shall not affect the operation of such laws in regard to any person dying before the coming into force of the repeal of such laws as if the repeal had not been made.³⁷

As far as Islamic law is concerned, according to Zulkifli Muda, the imposition of estate duty is against Islamic principles on the basis that no such imposition is found in the *Syari'ah* and, further, it is made upon a dead person.³⁸ However, Dato' Hasbullah has stated that estate duty should not be considered as against Islamic law on the basis that a government is allowed to act in the public interest.³⁹ The same opinion was given by

³⁶ Act 476.

³⁷ Section 45 of Chapter VII of the Finance Act 1993 provides: This Chapter shall be deemed to have come into force on the 1st November 1991.

³⁸ Muda, Zulkifli, interview on 12th September 2003. He is an Islamic scholar teaching subjects of Islamic law at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia.

³⁹ Dato' Haji Hasbullah, interview on 9th September 2003. He is the Mufti of the State of Kelantan, Malaysia.

Dato' Hashim Yahya who further supported it with examples of taxes imposed during the Caliph 'Umar al-Khaṭṭāb era.⁴⁰

In the light of the above discussion, the opinion that the imposition of estate duty is not contrary to Islamic law would seem the correct one. Clearly, estate duty is actually imposed on the estate, which is passed to the legal heirs. It is not an imposition on the wealth of the deceased and it is not the deceased's responsibility to pay. It is rather the responsibility of the legatee and legal heirs. This practice is relatively similar to that of *zakāt*, which is imposed on the recipients of property when the total amount received by each of them reaches the *zakatable* amount.

Zakāt is imposed not on the estate but on the individual recipients. If the amount received by a legatee or heir reaches the *zakatable* amount and it satisfies the conditions that render it compulsory, the rate of 2.5 per cent of the whole portion is deducted as the payment of *zakāt*.⁴¹ Al-Qaraḍāwī, in his Ph.D thesis on *zakaṭ*, stated that Ibn Mas'ūd, Ibn 'Abbās and Mu'āwiyah are reported as holding the view that *zakāt* is due on assets when they are acquired, without requiring the passage of a year.⁴² He further added that Ibn Rushd explains this difference on the grounds that no *ḥadīth* is authentically reported on this issue.⁴³ Bearing this in mind, it is submitted that *zakāt* becomes payable by each legal heir after they have received their full share of the estate.

⁴⁰ Dato' Hashim Yahya, interview on 11th September 2003. He is a former Muftī of Wilayah Persekutuan Kuala Lumpur. For the imposition of *kharāj*, see al-Jammāl, Muhammad 'Abdul Mun'im, *Ensyklopedia Ekonomi Islam*, translated into Bahasa Malaysia by Abdullah, Salahuddin, 2nd edition, Kuala Lumpur: Dewan Bahasa dan Pustaka, vol 1, p. 304.

⁴¹ Al-Qaraḍāwī, Yūsuf, *Fiqh al-Zakāh*, Beirut: Mu'assasah al-Risālah, 1997, vol.1, pp. 65-100.

⁴² Ibid, p. 97.

⁴³ Ibid.

4.4.2.2. Settlement of Debts

The priority of debt settlement over the rights of the legatees and legal heirs was practiced by the High Court in the case of *Fazil Rahman & Ors v AR.S. Nachiappa Chettiar*.⁴⁴ In this case the deceased died in 1959 leaving an estate comprising five pieces of land and a house. His four children survived him but none had applied for letters of administration. Neither did they attend the hearing during which Nachiappa Chettiar, the defendant, applied for the letter of representation as a creditor. As a result he was granted the letter and in his capacity as the deceased's personal representative, he applied for leave to sell the deceased's estate. The proceeds were to be applied to pay off all the debts owed by the deceased to the administrator and to meet the expenses of taking out letters of administration and the sale and payment of the estate duty. The total value of the estate was RM14,600, whereas the debts, the principal and the interest, amounted to RM33,780. The children of the deceased applied for the removal of the grant after realizing that if the administrator were entitled to recover his debt including interest there would be nothing left for any of them. The Court was of the view that there are two grounds for the removal of such a grant, namely where the administration has been improperly carried out and the interest of the deceased's children. It was found that the administrator had practiced no maladministration and further, that the interest of the children was not affected by refusing to revoke the grant. The Court relied upon Part I of the First Schedule to the Probate and Administration Ordinance 35 of 1959, which provides that after payment of the funeral, testamentary and administration expenses, "the same rules shall prevail and be observed as to ... debts and liabilities provable [against

⁴⁴ (1963) 29 MLJ 309.

the estate]... as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.”

Even though the Court allowed the sale of the deceased’s estate for the purpose of settling debts and liabilities, the interests of the interested parties, especially the rights of the legal heirs, were taken into account. Hence, where the rights and interests of the legatees and legal heirs are affected by the sale of an estate, the court will find the best possible means to settle the issue in a way that has the least affect on the rights of those interested parties.

In *Re The Estate of Tunku Mohamed Jewa Ibni AlMarhum Sultan Abdul Hamid, Deceased*,⁴⁵ the administrators applied for leave to sell a piece of land that was part of the estate. They had already made a conditional contract with the potential buyer to sell the land. The deceased’s estate mainly comprised 13 pieces of land, cash deposits in banks and one motorcar as assets. The liabilities consisted of funeral expenses and a gift-inter-vivos of some land made in his lifetime. The estate duty had been assessed at RM240,053.15 of which the sum of RM188,174.80 had been paid towards partial discharge, leaving a balance of RM90,503.16. The intention of the plaintiffs in making the application to sell the properties was with the view to settling this balance and all other liabilities incurred on behalf of the estate and thereafter to distribute the balance among the beneficiaries. The application was refused because the Court felt that it has a duty to protect the rights of all the beneficiaries who have interests in the land. The Court held that as there were better offers for the land the conditional contract should not be

⁴⁵ [1982] 2 MLJ 44

approved, but the land should be sold by way of tender in order to obtain the best possible price.

4.4.2.3. *Harta Sepencarian*, or Jointly Acquired Property; an Ordinary Debt

There are various definitions of *harta sepencarian*, or jointly acquired property, as found in the states enactments in Malaysia. Section 2 of the Islamic Family Law (Federal Territory) Act, 1984 defines it as property jointly acquired by the husband and wife during the subsistence of their marriage in accordance with the conditions stipulated by Hukum Syara'. Section 2 of the Terengganu Administration of Islamic Law Enactment, 1955 defines it as the earnings, or the property acquired, as a result of the joint labour of two spouses and includes the income derived from capital that is the result of joint labour. In summary, it is clear that the definitions of *harta sepencarian*, as available in the various states enactments, imply that it is the wealth acquired by the joint efforts of the husband and wife during their marriage.

There are differences in the interpretations of the civil court and the Shari'ah court judges on the issue of whether the concept of *harta sepencarian* is of *adat* or of Islamic law. From examinations of the cases decided by the civil courts, it appears that the judges of the civil courts have considered it a matter of Malay *adat* rather than Islamic law as discussed in *Hujah Lijah binti Jamal v. Fatimah binti Mat Diah*⁴⁶, *Roberts v. Ummi Kalthom*⁴⁷ and *Boto' binti Taha v. Jaafar bin Muhamed*.⁴⁸ On the other hand, the Syariah

⁴⁶ (1950) 16 MLJ 63. In this case, Briggs, J. held: "The rules governing *harta sepencarian* are not a part of proper Islamic law, but a matter of Malay *adat*."

⁴⁷ [1966] 163. In this case, Raja Azlan, J. held: "*Harta Sepencarian* is a matter of Malay *adat* and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her

court judges have viewed it as a matter of Islamic law as decided in *Noor Bee v. Ahmad Sanusi*⁴⁹ and *Kalthom bt Abdul Wahid v. Nordin bin Othman*.⁵⁰

Even though Muslim scholars have not discussed the concept of *harta sepencarian* in their *Fiqh* treatises, its legitimacy is largely based on several Islamic principles, which constitute it as a matter of Islamic law. It is an established and continuous *adat* practice as confirmed in the civil court decisions cited above, and hence fulfils the requirements of *‘urf*, or custom, which stands as one of the sources of Islamic law.⁵¹ It has been regarded as an established *adat* by al-Sheikh Ahmad bin Mohd Zain bin Mustafa al-Fatani in his *al-Fatawā al-Fataniah*.⁵² The legitimacy of *harta sepencarian* from the perspective of Islamic law could also be based on the Ḥanafīs concept of *syarikah al-abdān*. In summary, the right to *harta sepencarian* between husband and wife has been legally recognized and applied in Malaysia and is considered as part of Islamic law. Every enactment of the states in Malaysia contains a statutory provision regarding the existence of this right. It is therefore beyond doubt that prior to distributing the estate of

lifetime; this rule of law is local law which the court must take judicial notice of and it is the duty of the court to propound it...”

⁴⁸ [1985] 2 MLJ 98. In this case, Salleh Abbas, J. held: *Harta Sepencarian* is not so much based on Islamic jurisprudence as on customs practiced by Malays.”

⁴⁹ (1981) 1(2) JH 63. In this case, Hj. Harussani Zakaria, Chief Qadhi of Pulau Pinang stated: *Harta Sepencarian* is recognized by the Islamic law based on the services and joint life. A wife remains at home organizing the house affairs whereas a husband goes out for work.

⁵⁰ (1994) 9 JH 178. In this case, Sheikh Ghazali Hj. Abdul Rahman, J. stated : “Cases on *harta sepencarian* had been decided by the Syariah courts in Malaysia based on the opinions of Muslim jurists and *‘urf* of the state.”

⁵¹ Article 36 and 41 of the *Majallah al-Ahkam* respectively state “Custom is of force” and “Custom is only given effect to, when it is continuous or preponderant.”

⁵² His *fatwā* was cited by Haji Daud bin Muhammad, *Harta Sepencarian Dalam Hukum Syarak*, p.51. That fatwa concerns the practice of the Muslim community in the southern Thailand, where the husband and wife work together. The *fatwā* ruled that the income of the work should be divided equally between the two and if one of them dies, the estate of the deceased must be ascertained unless the living spouse agrees that such joint wealth wholly belongs to the deceased. See also Suwaid Tapah, *Harta Sepencarian dan Wang Simpanan KWSP*, p. 1.

the deceased Muslim, the deduction of the portion known as *harta sepencarian* must be taken into account.

However, it is strange that only the surviving spouse can file a claim for *harta sepencarian*. The legal heirs of the deceased have no right to claim it as part of the estate.⁵³ This means that, the existence of *harta sepencarian* is dependent on whether the spouse claims it or not. However, it has been argued that according to Islamic law the existence of *harta sepencarian* is legitimately based upon sound proofs. Therefore, such a right arises regardless of the surviving spouse claiming it or not. According to al-Zuḥaylī, a right continues to exist and is transferable to the legal heir upon death unless the rightful owner waives it prior to his death.⁵⁴ Clearly this principle should be extended and made applicable to the claim of *harta sepencarian*. Hence, as it is a transferable right nothing should prevent the legal heirs from claiming *harta sepencarian*.

4.4.3. Comparison of the Treatment of Settlement of Debts

It is significant to note that the Court in *Fazil Rahman & Ors v AR.S Nachiappa Chettiar*⁵⁵ agreed with the amount of debt claimed by the administrator. It is clear from the perspective of Islamic law that such an amount is inclusive of the interest, or *ribā*, which is absolutely prohibited. This clearly affects the rights of the legal heirs in the sense that they would receive nothing from the estate because the whole estate is subject to the payment of debt including the interest. It appears that the Court did not adopt the principle of Islamic law, which strictly prohibits interest, or *ribā*. However, it can be

⁵³ Suwaid Tapah, p. 4.

⁵⁴ Al-Zuḥaylī, vol.4, p. 2845.

⁵⁵ (1963) 29 MLJ 309.

argued that what was imposed and granted by the Court does not contradict Islamic principles. It is the deceased's responsibility to avoid any transaction involving interest from the very beginning. Once he has agreed to such a transaction he becomes accountable to his agreement until it ends.

According to Dato' Hasbullah, the *Mufti* of the State of Kelantan, a Muslim is subject to his agreement. This is stated in a *ḥadīth* and furthermore, is based on the principle of public interest, or *maṣlahah*.⁵⁶ The former *Mufti* of Wilayah Persekutuan Kuala Lumpur, Dato' Hashim Yahya, has also voiced the same opinion that a Muslim is bound by the terms of the agreement that he/she has entered into and is obliged to pay the interest, which on death is paid from the estate.⁵⁷ It is submitted therefore that this principle is applicable to all kinds of transaction that involve the prohibited element of *ribā*. Any interest or *ribā* which arises from a transaction, such as an approved bank loan, involving a Muslim, even though it is strictly prohibited, must be settled and upon death deductions must be made from the estate for the settlement of such interest, as part of the debt-financial liabilities, before it is distributed among the legal heirs.

The principle adopted in *Re Estate of Tunku Mohamed Jawa Ibni AlMarhum Sultan Abdul Hamid, Deceased*⁵⁸ sheds light on the courts' attitudes towards protecting the deceased's estate from unnecessary dealings that would cause the reduction of the estate even though they are for the purpose of settling attached debts and liabilities. In other words, even though the settlement of debts and liabilities has priority over the rights of

⁵⁶ Dato' Hasbullah, interview.

⁵⁷ Dato' Hashim Yahya, interview.

⁵⁸ [1982] 2 MLJ 44.

legatees and legal heirs, there are methods and modes that can possibly save all the interested parties from losing their rights and interests in the estate. This principle is equivalent to the principle in Islamic law regarding the duty of a representative, or *wakīl*. As a personal representative, an administrator or executor is acting as a trustee. From the perspective of Islamic law, a trustee must act in the interest of the represented parties. He/she must avoid doing anything, which is detrimental to the interest of the parties concerned.⁵⁹

With regard to *harta sepencarian*, it is important to mention that this claim should not take precedence over all other claims. However, the courts have apparently never discussed the issue of the priority of such a claim. *Harta sepencarian* is clearly wealth that exclusively belongs to the deceased's spouse, which is seemingly kept by the deceased on trust. It is absolutely a kind of ordinary debts and liabilities because it is not specifically attached to any part of the deceased's wealth. It belongs to the deceased's surviving spouse, which while she was alive he kept on trust. It is therefore submitted that a claim for *harta sepencarian* should have no priority over the payment of general debts and liabilities as well as the execution of *waṣīyyah*. This is on the basis of its being excluded from the meaning of a special debt because this property is not specifically attached to a part of the estate. This submission was agreed with by Shafaie Musa, the former Head of the Department of Islamic Law of the International Islamic University of Malaysia during a semi-structured interview conducted as part of this research.⁶⁰

⁵⁹ Al-Zuhayli, vol.4, p. 149.

⁶⁰ Shafaai Musa, interview on 5th September 2003. He is the former Head, Department of Islamic Law, Ahmad Ibrahim Kulliyah of Laws, International Islamic University.

4.5. The Execution of a *Waṣiyyah* or Bequest

4.5.1. The Execution of *Wasiyyah* under Islamic Law

The four Sunni schools of law unanimously agree that the execution of the *waṣiyyah* of the deceased should occur after the payment of the funeral expenses and all debts but prior to the distribution of the *tarikah* to the legal heirs. This is based on the Qur'anic verse *al-Nisā`* (4): 11 where Allāh commands that the distribution of property to the entitled legal heirs takes place after the execution of the *waṣiyyah*.

Waṣiyyah is another means of disbursing one's wealth upon death. According to Pearl, it is an optional testamentary succession and is different from compulsory succession that is the *farā`iḍ* system.⁶¹ This optional disposal of property upon death is an absolute right of the deceased, which, as a testamentary disposition, is not effective until the testator's death. Likewise with compulsory succession, the ownership of the property disposed of by means of a bequest is transferred only upon death.

It is to be noted that making a *waṣiyyah* is a practice recommended to all Muslims. It was originally incumbent upon every Muslim following the revelation of the Qur'anic verse *al-Baqarah* (2): 180, which apparently states that there is an obligation upon a Muslim close to death to make a bequest in favour of his parents and next of kin. However, according to the four Sunni schools of law, this original ruling was abrogated by the revelation of the Qur'anic verses *al-Nisā`* (4): 11,12 and 176 and the *ḥadīth* of the Prophet '*no waṣiyyah in favour of legal heirs*'.

⁶¹ Pearl, David, p. 138.

4.5.1.1. The Significance of *Waṣiyyah* in Islamic Estate Planning

It is important to mention that in relation to inheritance, pertaining to the aspect of procedural matters of estate administration in Malaysia, the issue of appointing an executor through the mechanism of a bequest is significant. According to Mustapha Mohamad, the Minister in the Prime Minister's Department of Malaysia, more than 90 percent of Muslims in Malaysia die without leaving wills, causing losses both to the community and the country as a whole due to unresolved property distribution.⁶² He has stated that land cannot be developed because of ambiguous ownership, particularly where the land is in a prime location like Kampung Baru in Kuala Lumpur, and delays in making claims and unclaimed pieces of hereditary land due to various factors such as unnamed heirs in the title, are all factors contributing to the problem.⁶³ He addressed the importance of making a will by stating that 90 percent of cases referred to the Federal Land and Mines Director-General's Department involved Muslims while the remainder concerned property belonging to non-Muslims. According to him, the small percentage of non-Muslim cases is due to the fact that non-Muslims usually practice property distribution through wills.⁶⁴

Furthermore, Muzammil H. Siddiqi, former President of the Islamic Society of North America, stated in a *fatwā* in response to a question regarding the significance of making a will, that in countries where the Islamic inheritance law are not recognized, a Muslim must prepare a will before his death because without having made a will, his wealth most

⁶² Utusan Online, Home News [online], 25th May 2004, available from: www.utusanonline.com. [accessed 20th June 2005].

⁶³ Ibid.

⁶⁴ Ibid.

probably will be distributed according to the state laws where he/she lived, not according to Allah's laws. A Muslim in this case may be held responsible on the Day of Judgment because of his/her negligence in a very important matter.⁶⁵

In this respect, it is important to mention that in Islamic law, the subject matter of a *waṣiyyah* is strictly limited to *māl*, *ḥaq* and *manfaʿah*. This implies that a *waṣiyyah* can not include the instructions of the testator on the manner in which the estate is to be distributed after death as suggested by Dr. Muzammil above. This is completely different from a will made under the Malaysian Wills Act, 1956. Such a testimony empowers the testator to insert anything in the will including instructions regarding the manner in which the property is to be distributed as well as the appointment of a guardian. This implies that a *waṣiyyah* is different from a will as provided for in the Malaysian Wills Act, 1956.⁶⁶ In other words, a will is broader than a *waṣiyyah* as far as the subject matter is concerned.⁶⁷

It is submitted that what concerns Mustapha Mohamad, the Malaysian Minister and Dr. Muzammil Siddique regarding the significance of having a will, as far as the Islamic inheritance law is concerned, is the *wiṣāyah* or the trusteeship.⁶⁸ This is a very wide subject and stands as one of the means of creating a specific form of trust under Islamic

⁶⁵ See footnote no. 5, p. 2.

⁶⁶ Section 2 of the Malaysian Wills Act, 1959 (Act 346) defines the will as a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will, or by writing in the nature of a will, in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child.

⁶⁷ In this respect, it is incorrect to equate a *waṣiyyah* with a will as understood in the modern law. See Doi, I., Abdur Rahman, *Shariah: The Islamic Law*, Kuala Lumpur: A.S. Noordeen, 2002, p. 293.

⁶⁸ Al-Mawrid, *A Modern Arabic – English Dictionary*, Eighth Edition, 1996, p. 1235.

law.⁶⁹ One area of concern is the appointment of a person to administer the deceased's estate, including the manner in which the estate is to be distributed.⁷⁰ In other words, Muslims are certainly recommended to use the means of a will, which is apparently a combination of the *waṣiyyah* and *wiṣāyah*, to fasten and mitigate the process of the distribution of their estates under Islamic inheritance law.

4.5.1.2. Limitation of *Waṣiyyah* on the Recipient

Even though a Muslim is allowed to dispose of his property by way of a *waṣiyyah*, and by that means he is permitted to freely select the beneficiaries and confer upon them rights to his estate effectively upon his death, such a right is not absolute. His right to make a *waṣiyyah* is subject to limitations. A *waṣiyyah* that exceeds the prescribed limits would constitute an *ultra vires waṣiyyah*, which means the consent or refusal of the entitled heirs is decisive.⁷¹

There is no single Qur'anic verse prohibiting a Muslim from making a bequest in favour of legal heirs. This limitation is therefore based on a number of sound Prophetic traditions that state that making a bequest in favour of legal heirs is not permitted.⁷² The Qur'anic verse *al-Baqarah* (2): 180, which is known as the verse of bequest, however, states that making a bequest in favour of parents and next of kin is an obligation.

⁶⁹ Ibrahim, Badruddin Hj., *The Doctrine of al-Ṭiṣā' or al-Wiṣāyah with Reference to the Appointment of Wāṣī al-Mukhtār under Islamic law*, unpublished Ph.D proposal, n.d., p. 1.

⁷⁰ Al-Zuhaylī, vol. 8, p. 131 & 137. It is defined as an instruction given to a person to carry out certain things after his death. See also al-Syarbīnī, vol. 3, p. 39.

⁷¹ Coulson, p. 242- 243.

⁷² There are a number of Prophetic traditions but with different versions that do not allow making bequests in favour of legal heirs. The difference is only in the matter of the words of the narrations. They carry the same meaning, i.e. a bequest is not allowed to be made in favour of legal heirs. See Tanzil-ur-Rahman, vol.2, pp. 457-461. Example is the *ḥadīth* 'No *waṣiyyah* in favour of *wārith*'.

However, according to the Muslim jurists of the Sunni schools of law, the ruling contained in this Qur'anic verse was abrogated by the subsequent revelation of verses of inheritance.⁷³

With careful observation, it becomes apparent that there are no conflicting messages between the Qur'anic verse of bequest and the Prophetic traditions which prohibit making bequests in favour of legal heirs, including the parents. With respect to these Prophetic traditions, the Ḥanafīs' opinion is that if the deceased makes a bequest in favour of the heir who is entitled to his property under inheritance, such a bequest, if not consented to by the other legal heirs, is invalid. This is on the basis that bequests made in favour of legal heirs need the approval of the other legal heirs. The deceased has no right to make a bequest in favour of a legal heir and if he/she does so the rights of the other legal heirs are encroached on. This is the reason for the need for the approval of the other legal heirs because their rights have been affected. The Ḥanafīs base their argument on the *ḥadīth* that narrates that if other legal heirs consent, the bequest is effective.⁷⁴ The other three schools of law hold the opinion that the bequest is void; if the other legal heirs agree, the legatee is entitled to the property bequeathed but on the ground that it is a gift or *hibah* from them. This opinion is based on the *ḥadīth* that Allah has specified the details of the rights of every legal heir, and hence they have no further right under a bequest.

⁷³ Al-Zuhaylī, vol. 8, pp. 11-12.

⁷⁴ Ibn ʿAbidīn, vol. 6, p. 656. The Ḥanafīs accept another version of the *ḥadīth*, which carries the addition of the words "except when the heirs permit the same." See al-Ṣanʿānī, Muḥammad ibn Ismāʿīl al-Amīr al-Yamanī, *Subul al-Salām Syarḥ Bulūgh al-Marām min Jamʿi Adillah al-Aḥkām*, Beirut: Dār al-Kutub, p.204.

Based on the above arguments, it is clear that the meaning of ‘*wārith*’ in that particular *ḥadīth* and those *aḥādīth* which give the same effect, is the ‘*wārith*’ who is entitled to the deceased’s property under inheritance law. If the legal heir is either *de jure* or *de facto* excluded from inheritance or is disqualified due to the presence of any impediment to inheritance that affects his/her entitlement, any bequest made by the deceased in their favour is valid. According to al-Qaraḍāwī, when the verses of inheritance were revealed, even though the entitled legal heirs’ rights to bequests were abolished, the disentitled legal heirs’ rights to bequests remained in existence.⁷⁵ Such heirs have no rights under inheritance and hence are entitled to the bequest. This is sanctioned by the *ḥadīth*, from which we can identify the reason behind the prohibition of bequests being made in favour of legal heirs, i.e. those who are entitled to the deceased’s property under inheritance law are not entitled to bequests. Since Allah has prescribed their rights to the deceased’s wealth by way of succession, they have no right to the deceased’s wealth by way of bequest.⁷⁶

4.5.1.3. Limitation of *Waṣiyyah* on the Quantum

The whole version of the *ḥadīth* is that Sa‘ad bin Abī Waqāṣ narrates that the Prophet came to visit me in the year of the farewell pilgrimage when I was afflicted with a severe illness. I said to him: “O Prophet, you see how ill I am. I have property and no heir except my daughter. Shall I then give away two-thirds of my property as alms?” He replied “No.” I said “A half then?” He still said “No.” I then asked “A third?” He replied: “A third. And a third is much. It is better that you leave your heirs rich than you should leave

⁷⁵ Al-Qaraḍāwī, *Fatwa Terkini Wanita dan Keluarga*, translated by H.Mohd. Roihan M.A, p. 172.

⁷⁶ Abū Imāmah narrated: “I heard the Prophet says: Allah has already given to each entitled relative his proper entitlement. Therefore, no bequest in favour of a legal heir.” Al-Ṣan‘ānī, p. 204.

them destitute, begging from their neighbours.”⁷⁷ Besides this version, there are different versions reported in other books of *ḥadīth*, which carry the same effect: that the quantum of bequest is limited to 1/3 of the whole estate of the deceased.⁷⁸

In this regard, there are two circumstances that need to be considered, namely the situation where the deceased leaves behind heirs and that where there is no heir. In the former case, the four Sunni schools of law hold the same opinion that a bequest exceeding the limit of 1/3 is valid provided the consent of all the entitled legal heirs is obtained. This is due to the fact that the right to the whole property, on the death of the deceased, passes immediately to the legal heirs and hence, they have absolute freedom to do as they will with such a right. If such a bequest is approved it becomes effective. If it is not, it is still valid but only up to the portion of 1/3, because the exceeding part is regarded as an encroachment on the rights of the legal heirs.

In the second situation, the Ḥanafīs, the Syāfi‘īs and the Ḥanbalīs are of the opinion that a bequest exceeding 1/3 of the whole estate is valid. The idea of limiting the bequest to 1/3 is to protect the interests of the legal heirs and hence, since no legal heir exists, the issue of encroachment does not arise. In this connection, the majority goes further, saying that there is no need to get the consent of the ruler of the state, in his position as the heir of those who leave behind no heir, because unlike the Mālikīs, they are of the view that the *bayt al-māl*, or State Treasury, is entitled to the deceased’s property not in the capacity of

⁷⁷ Khan, translation of *Ṣaḥīḥ al-Bukhārī*, p. 16. See also Coulson, N.J. p. 214.

⁷⁸ For example in another *ḥadīth* narrated by Mu‘ādh bin Jabal that Allah had conferred upon a Muslim an alms of 1/3 of his property in the time of death approaching as an addition for his good deeds. See al-Ṣan‘ānī, p. 108.

a legal heir but by way of escheat. The Mālikīs, on the other hand, hold the view that in such cases, the deceased has no right to make a bequest of more than 1/3 of his wealth because the *bayt al-māl* is regarded as the residuary heir and neither the ruler nor his representative has the right to give consent. But if the administration of the *bayt al-māl* is not as outlined by Islamic law and involves such things as corruption and the unfair distribution of property, the deceased is allowed to bequeath all his property in a manner to please Allah.⁷⁹

4.5.2. The Execution of a *Waṣiyyah* or Bequest under Malaysian Laws

4.5.2.1. The One-third Rule and the Beneficiary Must be a Non-legal Heir

A Muslim is allowed to make a will to dispose of up to one-third of his/her property. If the will is for more than one-third, the consent of all the legal heirs must be obtained in order for it to be effective. This principle was adopted in *Shaik Abdul Latif, Halima and Janiah v Shaik Elias Bux*.⁸⁰ In this case, the deceased, Shaik Baboo Bux, had disposed of all of his properties, movable and immovable. He directed that his estate, subject to certain trusts, should be distributed equally between his adopted son, Shaik Abdul Latif, his two widows, Halimah and Jainab, and his daughter, Fatimah, an infant. In addition to the above-mentioned persons the deceased left other surviving relatives, viz., a sister named Jaigun and two brothers named Shaik Elias Bux and Shaik Ali Bux. Under the Mohammedan Law, the testator's two brothers, together with Jaigun, the deceased's

⁷⁹ Barrāj, p. 133.

⁸⁰ (1915) 1 FMSLR 205. See also *Re M. Mohamed Hanifa, (the deceased)* (1940) 9 MLJ 229. In this case the Court held that the maximum portion for a bequest is one-third of the property. In *Abdul Rahim v Abdul Hameed & Anor* [1983] 2 MLJ 78, the Court declared invalid the disposition of property by way of a will by the deceased for the reason that it exceeded one-third of the estate and hence it was against the Islamic law.

sister are among the deceased's heirs and are entitled to the deceased's estate. Under the will however, they were to receive nothing and neither would the deceased's daughter receive the share due to her according to Mohammedan Law. Before the trial judge, the plaintiff, Shaik Elias Bux prayed for a judgment declaring the will inoperative in so far as it attempted to deprive the testator's daughter, the plaintiff himself as a deceased brother, the second brother and the sister of the shares they were entitled to as heirs under Mohammedan Law. There was no contention from the defendant that there had been any consent to the will from them. The trial judge held that the will was inoperative with respect to such part of the property bequeathed to the testator's adopted son as it exceeded the one-third of the estate permissible to leave to a stranger, and also inoperative in so far as it deprived the testator's two brothers and sister of their legal shares as heirs. On appeal, the Court unanimously upheld the decision of the trial judge. The Court held that under Mohammedan Law a testator has the power to dispose of not more than one-third of the property belonging to him at the time of death; and that the residue of such property must descend in fixed proportions to those declared by Mohammedan Law to be his heirs unless the heirs consent to a deviation from this rule.

A will is not supposed to be made in favour of the heirs who are entitled under the Islamic law of succession. If it is made in favour of any of them it is subject to the approval of other heirs, whose shares are affected by the will. The affected legal heirs whose consent is required in order to make the will operative must declare their consent. Mere silence does not amount to consent. According to the Court, once the other legal heirs' approval is obtained, the will is operative and the consent is regarded as their

donations in favour of the legatee. In *Amanullah Bin Haji Ali Hassan v. Hajjah Jamilah Binti Shek Madar*,⁸¹ the will executed by the deceased was for more than one-third of the property and furthermore, was in favour of the heirs. The Court held that the will was void on the basis that it purported to dispose of more than a third of the estate and to benefit the testator's heirs. The counsel for the plaintiff argued that the silence of the relatives after the will had been read should be taken as consent by the beneficiaries to the disposition by the will. Rejecting the argument, Syed Othman J. stated:

“To my mind, in Muslim law, before the court can accept that an heir consents to a will where required, it must be shown that the will was validly made and that the heir declares his approval to the disposition; and if the will is invalid the question of consent does not arise. The effect of a declaration of approval to a disposition under a properly made will, according to a jurist, is that the heir donates his share to the person taking under the disposition. See page 261 Minhaj al-Talibin. In the case here I can see no evidence that any beneficiary present declared his approval to the plaintiff taking the whole of the estate. Considering the circumstances in which the document was made, I am convinced that the plaintiff was taking advantage of the situation by exerting his status as the eldest son in the family and that he knew no one would dare to challenge him by reason of his status, and particularly at that time when the others were concerned with the deceased who was on the throes of death, all he seemed to care was to get the deceased's estate to himself by any means.”

4.5.3. Comparison of the Treatment of the Execution of *Waṣiyyah*

With respect to the consent of the affected legal heirs to the bequest made in favour of other heirs, or made in excess of the quantum of one-third, it is the opinion of the majority of Muslim scholars that the approval must be obtained after the death of the testator. Approval obtained prior to the deceased's death has no effect. The reason for this is that the will itself becomes effective only after the death and prior to that, the legal

⁸¹ [1975] 1 MLJ 30. See also *Siti bte. Yatim v Mohamad Nor bin Bujai* (1928) 6 FMSLR 135 or [1983] JH 217, and *Haji Hussain v Liah bt Lerong & Ors* (1940) MLJ 98. In these two cases, the Muslim testators had bequeathed their properties in favour of their children without obtaining the consent of the other affected legal heirs. The Court gave judgment invalidating the wills.

heirs have no right to the property. Only the Mālikīs make a distinction between the approval made during the testator's health and that made during his/her death sickness. During his/her health, the heirs have no right at all to the estate but during the death sickness, the testator is not absolutely free to make any transaction regarding his/her property. He/she is allowed to make a will within the limit of one-third and the remaining two-thirds is left in abeyance for the legal heirs. In this connection, it is not extravagant to say that the contention by the defence counsel that the heirs consented to the bequest while it was being read to them has no legal effect. This is the opinion of the majority of Muslim jurists, including the Syāfi'īs.

Moreover, the Court's refusal to accept the defence counsel's argument, that silence amounts to consent, is sound on the basis that if the heirs' consented to the bequest, according to the Court, it would amount to their donating their shares to the beneficiaries. However, in Islamic law a donation requires the donor to declare definitely the intention to donate; such a declaration can be either by word or conduct but not by mere silence.⁸² It is therefore submitted that the Court's decision to refuse to accept the argument that silence is tantamount to consent in the above case relating to the approval of the affected heirs is compliant with the principles of Islamic law.

4.5.3.1. A Nomination: Is It Typical of *Waṣiyyah*?

Nomination is a process by which an individual gives direction to the person holding the relevant funds on his/her behalf to pay the funds to a named person on his/her death.⁸³

⁸² Al-Zuḥaylī, vol.5, p. 8. Doi, Abd Rahman I., *Shariah: The Islamic Law*, p.334.

⁸³ Caroline Sawyer, *Principles of Succession, Wills & Probate*, p.13.

Likewise with a *waṣiyyah*, nomination takes effect upon the death of the nominator. In Malaysia, the National Fatwā Council issued a *fatwā* on 9th October 1973 that a nominee who is appointed by way of nomination holds such position as no more than a trustee.

The complete *fatwā* reads:

“Nominees of the funds in the Employees Provident Fund, Post Office Savings Bank, Insurance and Co-operative Societies are in the position of persons who carry out the will of the deceased or the testator. They can receive the money of the deceased from the sources stated to be divided among the persons entitled to them under the Islamic law of inheritance.”⁸⁴

In this respect, as stated in the above *fatwā*, nomination is applicable to funds such as the Employee Provident Fund, Post Office Savings Bank, Insurance and Co-operative Societies. Looking into the nature of these funds, they can be classified into two groups, namely 1) savings accounts in the financial institutions and 2) the proceeds of life insurance policies. According to Pawancheek Merican, a practicing lawyer, the former is a statutory nomination whereas the latter is a nomination that has the effect of creating a trust in favour of the nominee.⁸⁵ The second type will not be discussed here because a comprehensive discussion on the question of the heritability of the proceeds of a life insurance policy, which certainly includes the nominee, is undertaken in Chapter 7.

With respect to funds kept in financial institutions like the Employers Provident Fund and Pilgrimage Fund, there are two court cases that can be referred to. In *re Ismail Rentah*,⁸⁶ the deceased was a member of a co-operative society and had nominated his daughter as

⁸⁴ See [1974] 1 MLJ x.

⁸⁵ Pawancheek Merican, *Islamic Inheritance Law*, p. 146.

⁸⁶ [1940] MLJ 77.

nominee to receive his shares and benefits in the society upon his death. Raja Musa J. held that such a nomination would not constitute a *hibah* because there was no transfer of ownership to the nominee. The Court held that the nominee could receive the property as a trustee, in which case she would be under a responsibility to distribute it to the legal heirs under the *farā'id* law.

In this case, it appears from the judgment that the nomination by the deceased amounted to a trust document equivalent to the appointment of an executor. However, the judge came to his decision after considering the wording of the letter of nomination from which he concluded that it was apparently a bequest. It was held that since the nominee was an entitled legal heir and the other entitled legal heirs had not consented to the bequest, the bequest was invalid. The Court also considered the case from the point of view of there being a *hibah*, but due to there being no transfer of ownership to the donee, the *hibah* failed.⁸⁷ The letter reads:

“Whereas I, Ismail bin Rentah, living at Terusan.... do nominate/ appoint in the presence of two witnesses Maznah binti Ismail living at Terusan and who is related to me by way of being my child as being the person who may receive all my money in the said society if I die in accordance with the provisions of section 22 of the Co-operative Society Enactment 1922.”

A similar principle was adopted in *Wan Puziah v. Wan Abdullah bin Muda & Another*.⁸⁸

The plaintiff in this case was the adopted daughter of the deceased. She claimed her share in the deceased's savings in the Pilgrimage Fund. During her lifetime, the deceased had declared on the nomination form that upon her death, half of all her savings in the Pilgrimage Fund would be for the benefit of the plaintiff. The plaintiff contended that the

⁸⁷ [1939] F.M.S.L.R. p. 234.

⁸⁸ [2001] JH June 235.

nomination constituted a valid bequest. Her contention was, however, challenged by the defendants, who were nephews and heirs of the deceased. They contended that the nomination did not amount to a bequest and applied for the moneys to be distributed according to *farā'id* law. Ismail Yahya H held that the nomination by the deceased depositor for her savings account with the Pilgrimage Fund in favour of the plaintiff was a bequest. In his judgment, the judge initially referred to the *fatwā* issued in 1973 by the National *Fatwā* Council, but due to the absence of any stipulation regarding the nomination under the Pilgrimage Fund's regulations i.e. *lacuna*, the judge viewed that he was free to refer to the sources of Islamic law and accordingly applied his own reasoning.

Arguably, the concept of nomination is originally typical of *waṣiyyah*. It is clear that by looking at the clauses of the nominations as appeared in the above cases, there are similarities between nomination and *waṣiyyah*. Therefore, in order to fulfil the purpose of nomination, which is to smooth the process of withdrawing money after the death of the member, the institution that regulates the nomination must come up with a clear provision which clarifies the purpose and duties of the nominee. An example is the new nomination clause drafted by the Pilgrimage Fund, the Takaful Nasional Berhad and the Employee Provident Fund, which clearly states that the duty of the nominee is to distribute the money in accordance with Islamic law.

4.6. The Distribution of Estates

After the settlement of the funeral expenses, followed by the paying of all debts incurred by the deceased and then the execution of any bequests, which constitute the deceased's

right, the remaining estate must be distributed among the legal heirs in accordance with the Islamic law of succession, a full discussion of which can be found in Chapter 2 where there is also a discussion of the Malaysian laws.

4.7. The Transfer of Ownership to the Legal Heirs and the *Locus Standi*

With regard to the question of when the right of the legal heirs to the estate arises, the plaintiffs, consisting of the deceased's widow and son, in *Saeda binti Abu Bakr & Malik Bin Haji Mohamed Yusuf v Hj Abdul Rahman bin Haji Mohamad Yusuf & Osman Bin Haji Mohamed Yusuf* applied to the Court for a declaration that the will made by the deceased was invalid.⁸⁹ The Court had to decide the issue pertaining to a bequest made by a Muslim testator instructing his personal representative to administer the estate for ten years after his death, and subsequently to distribute the estate to the legal heirs in accordance with the Mohammedan law. The Court held that any instruction in a bequest which is intended to postpone the vesting of the legal heirs' right in the estate is invalid and the legal heirs are entitled to have the estate distributed immediately without any unnecessary delay.

This principle was followed in *Abdul Rahim v Abdul Hamid & Anor*⁹⁰. In this case, the Court had to decide such an issue in relation to a bequest made by a Muslim testator. Clause 7 of his will read "I declare and direct that twenty-one (21) years after the death of the last survivor of my children my trustee are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever

⁸⁹ (1918) 1 FMSLR 352; [1983] JH 53.

⁹⁰ [1983] 2 MLJ 78.

nature and where so ever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares...” The Court viewed that this clause constituted an attempt by the deceased to dispose of all his properties by his will, which rendered it invalid because it was against the principle of one-third disposal. Furthermore, the Court held that the intention of the deceased, as stated in the will, to postpone the vesting of the legal heirs’ rights in the estate until and after the lapse of twenty-one years was against Islamic law. It was the Court’s view that a testator cannot delay the vesting of such rights in an estate.

The above decisions illustrate the Court’s views on when the heirs’ right to the ownership of the estate arises. In this regard, it is the opinion of the majority of Muslim scholars, consisting of the Mālikīs, Syāfi’īs and the Ḥanbalīs, that the ownership in the estate, after the death of the deceased, is immediately transferred to the legal heirs without taking into account the debts and liabilities incurred by the deceased. According to them, debts and liabilities, which are attached to the estate do not prevent the right of ownership of the estate from being vested in the heirs. The debts and liabilities, however, remain with the estate and it is the responsibility of the legal heirs to discharge them before distributing the estate further. The Ḥanafīs, however, maintain that the rights of the heirs to the ownership of the estate arise only after all debts and liabilities attached to the estate are fully discharged.⁹¹

The discussion on this issue is significant because it relates to the issue of whether or not the heirs have the *locus standi* to bring a case before the court in order to protect their

⁹¹ Barrāj, p. 146 and Tanzil al-Rahman, p.433.

rights and interests in the estate against the conduct of personal representatives. It was held by the Shariah Appeal Court in the Juma'aton case that the heirs of the deceased had no *locus standi* in respect of the estate of the deceased on the basis that they had no letter of administration granted by the civil High Court under the Probate and Administration Act, 1959. However, looking into the facts of the case, it appears that the declaration sought by the applicant was not a claim of rights or interest in any specific property of the estate but for the inclusion in the estate of certain subject matter, which was the subject of administration, i.e. the shares in a company and the dividends and other incomes and benefits there-from. Those shares, dividends and interests were claimed by the applicants to have been held by the defendant in his own name but on behalf of their deceased father. However, the defendant denied this claim. A decision was reached by the Syariah Appeal Court referring to the decisions in several previously decided cases,⁹² one of which was *Puncak Klasik Sdn. Bhd v. Foh Chong & Sons Sdn. Bhd.*⁹³ In this case, the plaintiff had purchased a piece of land from the trustee of the estate and a third defendant, who was in occupation of a portion of that land, claimed beneficial ownership in respect of the land. The Court held that the third defendant could not be said to be the beneficial owner as there was no instrument of transfer executed in his favour and that a beneficiary has no interest in property in any specific investment forming part of the estate, or in the income from any such investment, when the administration of the estate is incomplete

⁹² *Lee Ah Thaw v Lee Chun Tek* (1978) 1 MLJ 173, *Tan Heng Poh v Tan Boon Thong* (1992) 3 CLJ 1340 and *Khoo Teng Seong v Khoo Teng Peng* (1990) 2 CLJ 233. In those cases including the Puncak Klasik case relied upon by the Shariah Court of Appeal, Mohamad Imam observes that those cases are concerned with the rights or interests claimed were not only in the undetermined residue pending completion of the administration of the estate, but they were in the specific (specie) properties whose availability to satisfy the interests or rights depended on the chance completion of the administration and the ascertainment of the residue. See Imam, Mohamad, "Probate and Administration of A Muslim's Estate In Malaysia- Legislative Competence and Shariah Civil Court Jurisdiction", *Jurnal Undang- Undang Malaysia*, 2 (1998), p. 126.

⁹³ (1998) 1 CLJ 60.

and the residue unascertained, and, consequently, none of the beneficiaries of the estate had any interest in any specific property of the said estate.

However, the High Court in Singapore took a different view regarding the *locus standi* of the deceased's heirs. This was discussed in *Omar Ali bin Mohd & Ors v Syed Jafarsadeq bin Abdulkadir Alhadad & Ors*.⁹⁴ In this case the plaintiffs sought, inter alia, declarations that the unexpired residue of the leasehold interest of 99 years in a property vested in the estate of the father of the plaintiffs (the intestate) and that the purported sale of the property by the first four defendants (who were the trustees of the estate of the holder of the reversion to the property) to the fifth defendant, in so far as it included the leasehold interest of the intestate's estate, was null and void. The defendants claimed that the plaintiffs had no legal authority whatsoever to institute the action on the basis that no one had the legal authority to act on behalf of the estate of the intestate until he/she had applied to the court for a grant of letters of administration. The learned assistant registrar held in favour of the defendants. The plaintiffs appealed. The High Court held that the plaintiffs were not suing on behalf of the estate. They were suing in their own capacity as beneficiaries of the estate for a declaration to protect the property of the estate and to prevent the sale of the property to the fifth defendant from going through. This, according to the Court, they had the *locus standi* to do as they had at least an equity in the estate.

In this connection, it is important to mention the significance of distinguishing the rights of the heirs and the rights and powers of the personal representatives. If we examine the

⁹⁴ [1995] 3 SLR 388.

purpose of appointing a personal representative and the doctrine of retrospect,⁹⁵ it can be suggested that a personal representative is the one who is responsible for administering the estate, including the discharge of debts and liabilities, as well as distributing the estate to the heirs. In the course of estate administration, the court supervises the personal representative and determines whether or not he/she is carrying out these duties diligently. It is the responsibility of the personal representative to discharge the debts and liabilities of the estate, and in the meantime the court is under a duty to protect the rights of the beneficiaries.⁹⁶ The rights and interests of the heirs in the estate are not extinguished with the appointment of a personal representative. These rights and interests remain dormant or are postponed until the administration is complete. In other words, the heirs' rights and interests in the estate remain substantive, and are therefore sufficient to render *locus standi* to the heirs in respect of the estate.⁹⁷ The legatee, beneficiary and heirs may have no interest or right in any specific property of the estate but they still have rights and interests in the overall, or the totality, of the estate.⁹⁸

4.8. Conclusion.

The four Sunni schools of law unanimously agree that after the death of the deceased, deductions should be made from the estate for the funeral rites and ceremonies. This is regarded as the deceased's right, which constitutes a religious necessity after death. The deceased needs clothes to cover his/her body as well as other necessary things. On this

⁹⁵ The doctrine of retrospect states that even though the property of the deceased is vested in the administrator only after the High Court issues the grant, he may still bring action against the wrongdoer to recover what has been taken into his/her possession illegally prior to the conferment of such grant. See *Meyappa Chetty v Subramaniam* (1916) AC 603.

⁹⁶ See *Fazil Rahman & Ors v Nachiappa Chettiar* [1963] MLJ 309.

⁹⁷ See Imam, Mohamad, p. 127.

⁹⁸ *Ibid*, p.127.

ground the funeral expenses are given preference over other rights. The settlement of debts becomes the second priority. This is regarded as the creditors' rights against the deceased's property. When compared with the funeral expenses, this right is less important on the basis that funeral expenses are a necessity of the deceased, which should be given priority. This follows the same principle as in the case of a bankrupt, where all his/her property, apart from what is necessary for his/her basic needs, is taken to pay the debts. After the settlement of the deceased's debts, if there is remaining property and if the deceased has made a bequest, it is the responsibility of the legal heir to execute it, although this depends on its validity and effectiveness. The deceased is allowed to make a bequest of up to one-third of the remaining property, if it exceeds that limit, the consent and approval of other legal heirs is needed on the grounds that it encroaches on their rights. After the execution of the bequest, the remaining two-thirds is distributed among the legal heirs. The chapter *al-Nisā'* verse 11 clearly sanctions the distribution of the deceased's estate only after the rights of the creditors to the deceased's property are settled and after the execution of the deceased's bequest.

The Probate and Administration Act, 1959 and the Small Estate (Distribution) Act, 1955 govern the administration of Muslim estates. The personal representative of the deceased, either the executor or the administrator, and the Collector at the Land Office are under a duty to administer and distribute the property to the parties who have rights and interests in the estate according to Islamic law. The Islamic law is the personal law of the Muslims in Malaysia and hence it is their right that, in personal matters such as succession, the decisions regarding any dispute are based on their personal law. This is very important to

them because it is their personal religious duty and, as regards the disposal of property, Muslims are subject to reward in the hereafter.

CHAPTER FIVE

THE *HIBAH HARTA* OF THE BUMIPUTRA-COMMERCE

TRUSTEE BERHAD

5.1. Introduction

The *Hibah Harta* is an Islamic estate-planning instrument. It is also known as a *Hibah Trust* or *Amanah Hibah*. For the purpose of this research, the term used throughout the writing is the *Hibah Harta*. An exemplary sample of the Trust Deed Agreement of the *Hibah Harta* can be found in the appendix. The idea behind the introduction of this instrument is to assist Muslims in Malaysia, in terms of estate planning, by offering them an alternative way to distribute their wealth upon death. Unlike the distribution under *farā'id* and *waṣiyyah*, which serves the purpose but carries strict restrictions, this alternative enables Muslims to freely choose the recipients as well as to fix the quantum of wealth, which they wish to dispose of.

The *Hibah Harta* was launched by Mr. Azmi Abdullah, the executive director of the Bumiputra-Commerce Bank Berhad (BCB), Malaysia on 14th of February 2001,¹ and is currently run by the Bumiputra-Commerce Trustee Berhad (BCT), a wholly owned subsidiary of the BCB.² Its operation and *modus operandi* have been allegedly approved by the *Fatwā* Council of the Federal Territory of Kuala Lumpur, through a *fatwā*

¹ Utusan Online, *BCB Lancar Produk Amanah Berkembar*, [online], 15th February 2001, available from <http://www.utusanonline.com> [accessed on 4th April 2005].

² Ibid.

legalizing it from the Islamic point of view.³ This product is undoubtedly the result of the research conducted relentlessly by Tuan Haji Othman bin Yaacob during his service at the BCT.⁴ He is currently a consultant at the Darul Hibah Consultant Sdn. Bhd, Kuala Lumpur, a firm that he set up after retiring from the BCT.⁵

It is indisputable that the introduction of this instrument is an excellent idea. It offers Muslims, particularly those in Malaysia an alternative way to dispose of their property upon death. Arguably, there should be similar efforts on the part of Muslim scholars to conduct research into other matters of Islamic law and develop instruments and modes that are practicable and suitable for the changes and needs of Muslims in this modern world. Since its emergence, the *Hibah Harta* has received encouraging recognition from the public. Many Muslims have used it to dispose of wealth ranging from cash, land, shares, stocks, life insurance and *takāful* policies etc. amounting to millions of Malaysian *ringgits*.

However, there appears to be some dispute among Malaysian Muslim scholars regarding the *Hibah Harta*, particularly in terms of its *Syarī'ah* compliance. The *Muftī's* Office itself, which declared the validity of the instrument from the perspective of Islamic law, has subsequently issued an official letter to the BCT, reminding them not to manipulate

³ Utusan Online, Skim Hibah Harta Dapat Sambutan, [online], 25th August 2002, available from <http://utusanonline.com> [accessed 24th April 2005].

⁴ Aimi Zulhazmi Abdul Rashid, the Manager of Business Development, Bumiputra-Commerce Trustee Bhd., interview on 16th October 2003 in his office located at D-0-6, Megan Phileo Promenade, 189 Jalan Tun Razak, 50400 Kuala Lumpur, Malaysia.

⁵ Ibid.

the *fatwā* while promoting the product.⁶ The present research has undertaken an in-depth study of the product and analyzed its compliance with Islamic law principles. To this end, the *fatwā* issued by the *Fatwā* Council of the Federal Territory of Kuala Lumpur is scrutinized and the issue concerning the question of its heritability from the Islamic perspective is examined in depth. It is worth noting that this topic is related to the discussion of the concept of *tarikah* because, according to Dato' Ismail Bin Yahya, a *Syarī'ah* Judge at the Syariah High Court of Terengganu, among the rights and liabilities that must be settled prior to the distribution of estates among the legal heirs, is the property which is disposed of by way of *hibah*.⁷

5.2. The Concept of the *Hibah Harta*

The unpublished article⁸ by Tuan Haji Othman Bin Yaacob, a *Hibah* consultant at Darul Hibah Consultant Sdn Bhd. and the information obtained during an interview with Mr. Aimi Zulhazmi Abdul Rashid, the Manager of Business Development, Bumiputra-Commerce Trustee Berhad, form the basis for the discussion on the concept of the BCT's *Hibah Harta*.

⁶ Dato' Hashim Yahya, interview. He is the former Mufti of the Wilayah Persekutuan Kuala Lumpur, and the *fatwā* was issued during his tenure as *Muftī*.

⁷ Yahya, Ismail, *Perlaksanaan Wasiat di Mahkamah: Teori dan Praktis*, seminar of *Pemakaian Undang-Undang Hibah di Malaysia*, held on 27th September 2003, at the Moot Court, Ahmad Ibrahim Kulliyah of Laws (AIKOL), International Islamic University of Malaysia (IIUM), jointly organized by Klinik Bantuan Guaman Syarie, AIKOL, IIUM and Yayasan Asnita with the cooperation of Kementerian Pembangunan Wanita dan Keluarga, Malaysia, pp. 3-4.

⁸ This paper was presented to the *Fatwā* Council of the Federal Territory of Kuala Lumpur, Malaysia by the author asking it to endorse the instrument regarding its *Syarī'ah* compliance. This was to enable the Darul Hibah Consultant Sdn. Bhd. to promote it throughout the country. According to Ustazah Siti Nor Badar, in an interview on 17th August 2003 in her office, the Council had refused to issue such a verdict fearing that it would be misused for commercial purposes. See also Yaacob, Othman, *Pengurusan Trust Hibah Menggunakan Fungsi Dan Tanggungjawab Pemegang Amanah Untuk Menjamin Kepentingan Pihak-Pihak Serta Pelaksanaan Syarat Hibah*, unpublished paper, p. 4.

The *Hibah Harta* is defined as an Islamic instrument designed to assist Muslims to better manage their assets and distribute them among beneficiaries in the proportion he determines with minimum effort.⁹ In other words, it is a mode of creating a gift in favour of heirs, relatives or next of kin. The gift is a gift without consideration. This new concept of *hibah* adopts the medium of trust, which is created through a trust deed.¹⁰

5.2.1. The Offer and Acceptance and the Appointment of the Trustee

In Islamic law, there are five pillars of *hibah* that must be fully met in order to make the *hibah* contract valid, namely the donor, the donee, the offer, the acceptance and the asset. These basic requirements are completely satisfied by the parties to the contract at the primary stage. The offer and acceptance, or *ṣīghah*, include the pronouncement of transference of ownership to the donee by the donor and the taking possession of the ownership by the donee.

After the completion of the *ṣīghah* pronouncement, both then mutually agree upon the appointment of the BCT as the trustee.¹¹ At this stage, the two parties have to come to an agreement on the stipulation of some conditions, which are purposely designated for their benefit and protection.¹² In other words, there are two stages that must be met by the donor and the donee. The first stage is the completion of the offer and acceptance and the

⁹ Brochure on *Hibah Harta*, Bumiputra-Commerce Trustee.

¹⁰ Ibid.

¹¹ Aimi Zulhazmi, interview.

¹² Ibid.

taking possession between them, and at the second stage they jointly appoint the BCT as the trustee to the subject matter of the contract.¹³

At the second stage, while appointing the BCT as the trustee, the donor and the donee are required to agree to the insertion of the conditions of *‘umrā* and *ruqbā*.¹⁴ The stipulation of such conditions is merely for the sake of protecting their mutual interest and benefit in the property. The agreement on the appointment of the trustee and the conditions are documented in the Trust Deed, which is signed by the donor, the trustee and the donee.¹⁵ In general, the *‘umra* and *ruqbā* conditions denote that after the demise of the donor, the property under the *Hibah Trust* is transferred to the beneficiary, namely the donee. If the donee dies prior to the donor, the property returns to the donor.¹⁶ However, in certain cases the appointment of the BCT as trustee solely by the donee is made prior to this stage for the purpose of representing the donee in making the acceptance of the donor's offer and also to accept the delivery of possession of the gifted property.¹⁷

It is clear that the *Hibah Harta* instrument involves three parties, namely the donor, the donee and the trustee. The presence of the *‘umrā* and *ruqbā* conditions is relatively significant. According to Othman Yaacob, the appointment of the trustee is primarily for the purpose of carrying out the conditions of *‘umrā* and *ruqbā* or to revoke the contract.¹⁸

¹³ Ibid.

¹⁴ Ibid.

¹⁵ See the sample of a Trust Deed, which was given by Aimi Zulhazmi during the interview.

¹⁶ The Bumiputra-Commerce Trustee brochure on *Hibah Harta*.

¹⁷ Othman, p. 8.

¹⁸ Ibid, p.5.

Hence, the *‘umrā* and *ruqbā* conditions are part and parcel of the contract without which the need and purpose of having the product are defeated.

5.2.2. The Delivery of the Subject Matter

The handing over of the property by the donor to the donee takes place directly and during the lifetime of the donor.¹⁹ This handing over occurs immediately after the completion of the offer and acceptance. However, the donee is allowed to appoint the trustee (the BCT) to receive the *hibah* property on his/her behalf.²⁰ It is worth mentioning that the handing over of the property by the donor to the donee may take place either actually or constructively.²¹ An actual acceptance occurs when the donee him/herself accepts the property. A constructive acceptance occurs by way of appointing a trustee to receive the property and the property is then registered under the trustee's name.²² The donee is required to take ownership of the property, on the same occasion and with the permission of the donor. If the donee does not do this, the *hibah* is not complete and is revocable by the donor. The basis of such revocation is that the donee has refused to accept the gift.²³ However, if the donee takes possession him/herself the property is still required to be registered under the trustee's name.

The handing over of the property or the transfer and registration of ownership to and under the donee's name normally takes place only after the donor dies. However, it may

¹⁹ Ibid. 4.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid, p. 5.

occur while he is still alive if his/her permission has been obtained. This clearly shows that the donee has no absolute legal right to deal with the property. This restriction fulfils the purpose of having such a contract, which is to prevent the donee from carrying out any malicious act on the property.

5.2.3. The Basic Conditions of the Contract

It is a condition that for the contract to be valid, the donor must be *sui juris* and not a bankrupt or unable.²⁴ Also, the donee must be alive at the time of the contract. In addition, at least two qualified males or one qualified male and two qualified females must witness the offer and acceptance by the donor and the donee, and the offer and acceptance pronouncement must be documented in the Trust Deed.²⁵ As regards the property intended for *hibah*, there is a condition that it must be within the donor's absolute ownership and *ḥalāl*, saleable or transferable immovable property such as houses and land and movable property such as cash in the Employee Provident Fund, a bank or the Pilgrimage Fund, furniture, trust shares and stock shares from Islamic counters, insurance *takāful*, conventional insurance and the like.²⁶

5.2.4. The Distinctive Features of the *Hibah Harta* Instrument

This contract is irrevocable unless it is a gift from parents or grandparents to children or grandchildren.²⁷ The contract is revocable only with the consent of the donee or with a

²⁴ Ibid, p. 4.

²⁵ See the sample of a Trust Deed, p. 1.

²⁶ Othman, p.4.

²⁷ Utusan Online, *Hibah Harta: A Muslim's Way to Prove One's Eternal Love*, [online] 23rd April 2001, available from <http://www.utusanonline> [accessed 20th April 2005].

court order. The donee has no absolute right to deal with the property because it is registered under the trustee's name. By registering the title of the property under the trustee's name, the interest of the donor is protected in the sense that the donee is prevented from selling, mortgaging or undertaking any other mode of dealing with the property that may defeat the intention of the donor in making such a gift.²⁸ Only after the demise of the donor or with his permission, is the ownership of the property permissibly transferred to the donee.²⁹ By stipulating the conditions of *ʿumrā* and *ruqbā* in the trust deed, there is the legal possibility that the gift may be returned to the donor and never inherited by the donee's legal heirs under the *farāʿid* law.

The donor is lawfully permitted to appoint the recipients as well as to fix the amount to be disposed to them. As this instrument is based on a *hibah* contract, it is permissible for the donor to have his wealth distributed equally among his heirs regardless of their positions such as son, daughter, father and siblings. The distribution of property under the inheritance law gives the deceased no choice other than to distribute the estate in accordance with the *farāʿid* law. This results in female heirs, especially daughters, receiving less than the males. Adopted children and non-Muslims, who are absolutely not entitled under the inheritance law, can be included as recipients under the *Hibah Harta*.

According to Othman, although the transfer of ownership is done during the donor's lifetime, the donor can still enjoy the proceeds from his assets.³⁰ This is based on the

²⁸ Othman, p.5.

²⁹ Ibid.

³⁰ Utusan Online, *Hibah Harta: A Muslim's Way to Prove One's Eternal Love*.

principle that a conditional *hibah* is valid as long as it does not transform or diminish the original condition or monetary value of the gifted property.³¹

5.3. The *Hibah* and the Ownership Arising from a *Hibah* Contract from the Perspective of Islamic Law

The *hibah* is a mode of property disposal according to Islamic law. Unlike *farā'id* and *waṣiyyah*, which become effective immediately upon the death of the deceased or the testator, a *hibah* is operative during the lifetime of the donor.³² The Arabic term of *hibah* literally means *ʿaṭiyyah* or gift.³³ It is technically defined as a contract voluntarily made during the lifetime of the donor vesting the ownership of the corpus of property to a person without consideration.³⁴ It is different with *hadiyyah* and *ṣadaqah*. *Hadiyyah*, or present, is a gift based on respect or love, and *ṣadaqah*, or donation, is a gift to a person who is in need of the gift with the intention of gaining reward from Allah.³⁵ It is therefore understood that *hibah*, or gift *inter vivos*, in Islamic law, is a contract whereby the donor voluntarily agrees to transfer the absolute ownership of the gifted property in favour of the donee. Furthermore, such a transaction requires no return or exchange. *Hadiyyah* and *ṣadāqah* are components of *hibah*, though they are more specific in the sense that they require precise intention and reason from the donor.

³¹ See Question-Answer paper annexed to the article on *hibah* by Othman, p. 4. The example given in the paper is "A, (the donor) owns RM100,000 in trust shares and gives, by way of *hibah*, the whole 100,000 shares to B with the condition that the dividends, bonuses and *right issue* are to be payable to A every year." This *hibah* is valid because the capital RM100,000 is not affected.

³² Carroll, Lucy, "Definition and Interpretation of Muslim Law in South Asia: The Case of Gifts to Minors", *I.L.S.*, 1:1 (1994), p.8.

³³ Al-Mawrid, p.1201 and al-Munjid, p. 920.

³⁴ Al-Syarbīnī, vol.2, p.396.

³⁵ Ibid, p. 397. See also al-Zuhaylī, vol. 5, p. 5.

Making a *hibah* contract is recommended based on the Qur'anic verse (2:215), which encourages Muslims to offer gifts among themselves.³⁶ There are also *ḥadīths* that read: “exchange gifts among yourselves so that love may increase among you”³⁷ and “if any one seeks to take back a gift he is like a dog who returns to its vomit.”³⁸ The recommendation of making a *hibah* contract is unanimously agreed on by Muslim scholars as it is an act of helping each other in the course of righteousness and piety as inspired by the Qur'anic verse (5:2).³⁹

Making a gift by way of *hibah* is an agreement, and hence the general principle applicable to the contract is that it needs the pronouncement of an offer and acceptance from the donor and the donee respectively.⁴⁰ This is to ensure that the contract is based on the mutual consent of both parties.⁴¹ The donor must be the legal owner of the gifted property, in good health, sound mind and possess legal capacity and the legal power of disposal. The donee must possess legal capacity to accept the offer otherwise the acceptance is not valid. However, a guardian can undertake the acceptance and taking possession in the case of minors, those of unsound mind or those who have no legal capacity.⁴²

³⁶ The Qur'anic verse al-Baqarah (2:215) reads: “They ask thee what they should spend (in charity). Say: “Whatever ye spend that is good, is for parents and kindred and those in want and for wayfarers, and whatever you do that is good- Allāh knoweth it well.”

³⁷ Al-Ṣanʿānī, vol.3, p. 92 and al-Syawkānī, vol. 5, p 347.

³⁸ Al-Ṣanʿānī, vol. 3, p. 93.

³⁹ See al-Zuhaylī, vol. 5, p. 7. The relevant Qur'anic verse al-Mā'idah (5:2) reads: “Help ye one another in righteousness and piety, but help ye not one another in sin and rancour.”

⁴⁰ Ibn Rusyd, vol. 2, p. 329 and al-Syarbīnī, p. 397.

⁴¹ In case of a dumb person, a sign is acceptable if it is understood and indicates the intention. See al-Syarbīnī, p. 397.

⁴² See al-Zuhaylī, vol. 4, pp. 143- 145. This is a general principle applicable to the contracting parties of all types of contract.

The Syariah High Court of Terengganu followed the above principles in the case of *Harun bin Muda and others v. Mandak binti Mamat and others*.⁴³ In this case, the Court scrutinized in depth all the essentials of a *hibah* contract, i.e. the donor, the donee, the offer and acceptance and the subject matter, from the Syāfi'īs' point of view by referring to several Syāfi'īs' books. It was found that there was no retraction or revocation of the *hibah* by the father. On that basis, the Court held that the *hibah* made by the father to his sons and daughter was valid.

5.3.1. Taking Possession of the Gifted Property

Taking possession of the property by the donee is necessary in order to prove the transfer of ownership. Muslim scholars differ on the issue of whether the ownership is transferred with the mere acceptance of the offer or when possession is taken of the property. The Ḥanafīs and the Syāfi'īs hold the view that taking possession by the donee is a condition to make the contract *luzūm*, or binding. This is based on the practice of the Righteous Caliph Abū Bakr. In the *Muwaṭṭa'* of Imām Mālik, there is a report from 'Ā'isyah, which states that Caliph Abū Bakr made a gift in favour of 'Ā'isyah of 20 *wasaq* (a weight) of dates. The dates had not been plucked from the trees by the time Abū Bakr was approaching death. Abū Bakr said to 'Ā'isyah, "if you had taken possession of the dates they would have been yours. Now you shall distribute them in accordance with the law of inheritance among all the heirs."⁴⁴ It is also narrated that the Caliph 'Umar said, "What is the matter with some men who make gifts to their sons and then hold on to them. When the son of one of them dies he says that my wealth is in my hands, I did not give it to

⁴³ [1999] 1 JH 63.

⁴⁴ Ibn 'Ābidīn, vol. 4, p.533 and al-Syarbīnī, vol. 2, p. 400.

anyone. If his (own) son is dead he would say I had given this to my son. He who makes a gift and then does not permit it to the donee, retaining it till such time that he dies so that it is given to the heirs, then, such a gift is void.”⁴⁵ The non-binding effect of the contract means the ownership of the property remains with the donor and the contract is not binding on him/her.

In relation to this, it is imperative that the taking possession of the property by the donee is with the permission of the donor. If possession is taken without such permission, the transfer of ownership is invalid and as a result, the ownership remains with the donor.⁴⁶

However, to the Mālikīs, possession is a condition for the completion of *hibah*. It is not a condition of its validity. This opinion is based on the analogy with a sale contract.⁴⁷ Taking possession is the right of the donee. The mere acceptance by the donee renders the contract complete and the ownership is therefore transferred to the donee. Once the contract is concluded by the mere acceptance of the donee, he may be compelled to take possession.⁴⁸ Furthermore, even though taking possession is the right of the donee, if he delays it until possession is lost through the illness or insolvency of the donor, his right is annulled.⁴⁹ In consequence of this, there is no need to obtain permission from the donor for the possession of the property because the transfer of ownership occurs with the mere acceptance of the donee.

⁴⁵ See Ibn Rusyd, *Bidayah al-Mujtahid*, translated into English by Nyazee, Professor Imran Ahsan Khan and reviewed by Rauf, Professor Mohammad Abdul, Reading: Garnet Publishing, 2003, vol.2, p. 400.

⁴⁶ Al-Syarbīnī, p. 400.

⁴⁷ Ibn Rusyd, p. 399. In a contract of sale, when the contract is valid, the ownership is therefore transferred to the purchaser. The seller is under obligation to transfer the possession of the property to the purchaser.

⁴⁸ Ibid.

⁴⁹ Ibid. 400.

It is submitted that taking possession of the property is necessary for the transfer of ownership. It is not the purpose of *hibah* that the donor remains in control of the property.⁵⁰ Looking into the literal and technical definitions of *hibah* itself, the transfer of ownership appears to be the most significant factor of establishing the contract. Mere acceptance of the offer becomes futile if the donor remains the owner of the property. The analogy made by the Mālikīs seems incorrect because the *hibah* contract is a contract of donation whereas a sale contract is a contract of exchange. In a sale contract, the seller is compelled to deliver the goods purchased in return for the consideration paid by the buyer, whereas in a *hibah* contract, the donor should not be compelled because he will not receive any consideration in return.

Therefore, the opinion of the majority, which is based on strong arguments, is to be preferred. The ownership of the *hibah* property under a valid *hibah* contract is completely transferred to the donee only when the donee has taken possession of it. Prior to that, the contract remains incomplete. Without such delivery of possession, the donor remains the owner of the property.

The Malaysian Supreme Court applied this principle in the case of *Tengku Jaafar v. Government of Pahang*.⁵¹ In this case, the Court decided that for a *hibah* contract to be valid, three conditions must be fulfilled, namely 1) the donor's intention to make the *hibah* 2) the donee's acceptance and, 3) the taking possession of the gifted property

⁵⁰ Carroll, "Lucy, Life Interest and Inter-Generational Transfer of Property Avoiding the Law of Succession", *I.L.S.*, 8:2 (2001), p. 265.

⁵¹ [1987] 2 MLJ 74.

physically or constructively. The Court rejected the appeal because the third condition had not been fulfilled.

In the case of *Salmiah binti Che Mat v. Zakaria bin Hashim*,⁵² the Syariah Subordinate Court of Bukit Mertajam Pulau Pinang viewed the significance of documenting the transfer of ownership of the property as proof of taking possession and obtaining the donor's permission by the donee, such as form 14A of section 215 of the National Land Code. Even though the donee had already built a house and carried out some renovation on the property, which would seem as if he had already accepted the offer, the Court held that he failed to meet the requirement of obtaining permission from the donor. On that basis, it was held that the *hibah* was invalid.

However, in the case of *Awang bin Abdul Rahman v. Shamsuddin bin Awang and another*,⁵³ the Syariah High Court of Terengganu held that acceptance could also be in the form of the donee having physical control over the gifted property. When the donee has started benefiting from the property in ways such as building a house or planting trees, these acts are sufficient to constitute acceptance of the offer by him/her. The Court was also of the view that when a gifted property is subsequently mortgaged by the donor after the completion of a *hibah* contract, that would imply that there is no transfer of ownership and hence, the *hibah* is not validly constituted.

⁵² [2000] 1 JH 79.

⁵³ [1997] 2 JH 193.

As far as the term possession is concerned, the view that physical control over the gifted property by the donee is sufficient to constitute the acceptance is to be preferred because the documentation of permission is a matter of administration only. It should suffice that the donee can provide sufficient evidence of the *hibah* and the permission given by the donor.

It is therefore essential that the donor renounces completely his title and rights to the property. If the donor continues to exercise the rights of ownership in the property, the *hibah* will be considered null and void.⁵⁴ This was applied in the case *Re Rosmawati binti Sharibun & Another*⁵⁵ regarding the position of the monies held jointly by the deceased and his third wife, Latifah, in accounts in the Standard Chartered Bank (SCB) and the Bumiputra Commerce Bank (BCB) and whether they constituted part of the estate of the deceased or were absolutely given to her by the deceased as *hibah*. The evidence showed that the cheques had not been signed solely by Latifah, but included the signature of the deceased. In addition, the facts showed that prior to the insertion of Latifah's name as the joint account holder, the deceased had transferred the monies in the SCB that had been under his and his second wife, Buruk binti Abdullah's, name solely to his name and then replaced the name of Buruk with that of Latifah. In the light of this evidence, the Court held that the *hibah* was not complete, as the deceased as the donor did not perfect the transfer of ownership.

⁵⁴ Tanzil -ur-Rahman, p. 2.

⁵⁵ [2002] 4 AMR 4913.

When the *hibah* contract has been validly executed and the donee has taken possession of the gift, the ownership is completely transferred to him/her. As a result, the donor has no right at all to ask for the return of the gift. Where either the donor or the donee dies prior to the taking possession, their heirs are entitled to the right to give permission for possession and the right to take possession.⁵⁶

5.3.2. Retraction of *Hibah*

When the donee has accepted the gift and has also taken possession of it, the donor has no right to ask for its return. This is a general principle agreed upon by the Mālikīs, Syāfi'īs and Ḥanbalīs.⁵⁷ This is based on the sound *ḥadīth*: “The person, who takes back his gift, is like the one who swallows up what he vomits.”⁵⁸ However, the Ḥanafīs are of the opinion that the donor is entitled to ask for the return of a gift. This opinion is based on the *ḥadīth*: “The donor is more deserved to the gifted property as long as he does not receive any in exchange of it.”⁵⁹

The majority opinion appears preferable because when the contract is complete and the donee has taken possession of the gift, the ownership is transferred to the donee completely. Moreover, this is supported by the *ḥadīth*: “It is not lawful for the donor to retract his gift except a father who takes back the gift he makes to his son.”⁶⁰ From this

⁵⁶ Al-Syarbīnī, p. 401.

⁵⁷ Al-Dūsūqī, vol. 4, p. 110, al-Syarbīnī, vol. 2, p. 401 and Ibn Qudāmah, vol. 6, p. 279.

⁵⁸ Al-Ṣanʿānī, p. 90.

⁵⁹ Al-Zuhaylī, vol. 5, p. 28.

⁶⁰ Al-Ṣanʿānī, p. 90.

hadīth, the majority makes an exception to the general principle stating that a father is permitted to retract his *hibah* made to his son.

The majority opinion was adopted in the case of *Eshah binti Abdul Rahman v. Azuhar bin Ismail*.⁶¹ The Syariah High Court of Kuala Terengganu decided that retraction of *hibah* property is against Islamic law. The learned Hakim Syarie, Ismail Yahya pointed to the above *hadith* that clearly prohibits a Muslim from retracting his *hibah* except where it is a gift by a father to his son.

5.4. The Trust and the Issue of Ownership

5.4. 1. The Trustee in the Instrument

In the case of *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd*,⁶² according to Hashim Yeop Sani J, a trust is defined as:

“the relationship which arises wherever a person called the trustee is compelled in equity to hold property, real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one) or for some objects permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.”

Under Malaysian laws, trusts can be classified into statutory trusts, public trusts, private trusts, resulting trusts, constructive trusts, express trusts and implied trusts.⁶³ However, it is clear from the above definition that where there is a trust no issue of transfer of ownership arises. The complete transfer of ownership to the beneficiary depends upon the

⁶¹ [1997] 2 JH 219.

⁶² [1990] 3 MLJ 493.

⁶³ George, Mary. *Malaysian Trust Law*. Subang Jaya: Pelanduk Publications, 1999, pp. 38- 42.

intention of the settlor. For instance, under the resulting trust, the trust property results back to the settlor because of the presence of the incomplete transfer of the beneficial interest of the subject matter to the beneficiary. It is also understood that a trustee is under a responsibility to hold the property for the benefit of the beneficiary, and that the donee can appoint the trustee (the BCT) to accept the offer and to take possession of the gifted property on his/her behalf.⁶⁴ Furthermore, at the second stage, the donor and the donee are required to agree on the appointment of the BCT as the trustee to hold the property.

In Islamic law this arrangement falls under the principle of agency, or *wakālah*.⁶⁵ There is no specific discussion on the issue of trust in Islamic law as it appears in Malaysian civil law. Under Islamic law, a trust can be made, but it is subject to the principles of *waṣiyyah* and *hibah*, especially regarding the questions of when the transfer of ownership takes place and the quantum and beneficiaries of the trust property.

From the perspective of Islamic law, the rightful party to the matter for which the agency is constituted is the only one that can appoint an agent.⁶⁶ He/she is responsible for keeping and dealing with the trusted property based on the concept of *amānah*. The command to carry out a trust is found in the Qur'anic verse *al-Nisā`*(4): 58.⁶⁷ Here it is reported that the Arabs, during the *jāhiliyyah* period, used to leave their properties in the hands of the Prophet Muḥammad. Before he migrated to Medina, the Prophet gave all the

⁶⁴ Othman, p. 4.

⁶⁵ See al-Zuḥaylī, vol. 4, p. 150.

⁶⁶ Ibid.

⁶⁷ The verse reads, "Allah doth command you to render back your trusts to those to whom they are due."

trust properties to ʿAlī Ibn Abī Ṭālib, who was asked by the Prophet to hand them over to the rightful owners.⁶⁸

According to Othman, such a representative can be appointed by the donor himself to accept the offer. His conclusion is based on his understanding that according to the Ḥanafīs, only the offer of the donor constitutes the essential of a *hibah* contract, whereby the acceptance by the donee is merely to confirm the transfer of ownership, i.e. the effect of the contract. Based on this, he asserts that it is permissible to make a *hibah* without the knowledge of the donee, and the agent (the BCT) can be appointed by the donor to accept the offer on behalf of the donee.⁶⁹

His opinion was applied and inserted in the Trust Deed, one of the documentations of the *Hibah Harta* instrument. There is a clause stating the appointment of the agent (the BCT) by the donor, the purpose of such appointment being to accept and administer the gifted properties on behalf of and in the interest of the beneficiaries.⁷⁰ In addition, both the donor and the donee sign a power of attorney document, which specifies the duties of the BCT as the trustee. This reflects that it is the donor who appoints the trustee, not the donee.

These arrangements are clearly against the principles of Islamic law because the donee is the only rightful party who can appoint an agent to accept the offer and to receive the

⁶⁸ Al-Būṭī, Saʿīd Ramadān, *Fiqh al-Sīrah al-Nabawīyyah*, Damshiq: Dār al-Fikr, 1996, p. 133.

⁶⁹ Othman, p. 17.

⁷⁰ See the sample of Surat Ikatan Amanah, which was given by Aimi Zulhazmi during the interview.

gifted property. Similarly, only he/she can appoint an agent as trustee to administer his/her property, i.e. the gifted property.

5.4.2. The Ownership of the Donee

Looking into the clauses in the sample Trust Deed Agreement, which was given by the manager of the Bumiputra-Commerce Trustee Berhad during an interview undertaken as part of this research, it appears that the donor remains in control of the property. Even though the document is signed at the second stage, i.e. after the completion of the *hibah* contract or after the transfer of ownership, there is a clause stating that the donor is the owner of the property. The clause reads:

“WHEREAS:-

B. The Donor is the owner of the property listed under the Schedule C hereto (hereinafter referred to as the “Trust Asset” and reference to the Trust Asset shall be construed as reference to all or any or more of them).”

There is also a clause stating that it is the donor who agrees to the property being registered under the trustee’s name. The relevant provision reads:

“NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the Donor agrees to execute such further instruments as shall be necessary to vest the Trustee with full title to the property, and agrees to hold the Trust Asset, IN TRUST...”

Only upon the death of the donor, i.e. where the donee survives, does the donee become absolute owner of the trust asset. Clause 5.4 states:

“If any Donor and the Donee should die under such circumstances as would render it doubtful which of them survived the other, this clause shall, notwithstanding any rule of law to the contrary, have effect as if the Donee had survived the other. The Trust Asset thus becomes

absolute ownership of the Donee as such the distribution of the Trust Asset shall be according to Clause 1.1. (d).”

In the light of the above information, it seems that the donee has no right at all over the property. The appointment of the trustee is apparently intended to prevent the donee from dealing with the property. It would appear that the donor has not yet renounced absolutely his right to the property; this may possibly invalidate the contracts in the *Hibah Harta*.

5.5. The ‘*Umrā* and *Ruqbā*

Al- Syarbīnī states that the ‘*umrā* and *ruqbā* conditions were practiced by the Arabs during the *jahiliyyah* or “ignorance period”.⁷¹ These two conditions are inserted at the second stage of the whole process of making the *Hibah Harta* instrument. This is done after the donor and the donee have each completed their respective offer and acceptance. At this stage both also agree on the appointment of the BCT as the trustee who will temporarily keep the *hibah* property.

Both conditions restrict the donee’s right of ownership of the gifted property. The application of the ‘*umrā* condition means that the donee remains the owner of the property only for his lifetime, after his death the property returns to the donor. The term itself originates from the root word ‘*amara*, which means to live long.⁷² An example of ‘*umrā* is where the donor pronounces “I give the house for you for your life time”. If this is valid, the effect is that the gifted property returns to the donor when the donee dies.

⁷¹ Al-Syarbīnī, p. 399.

⁷² Al-Mawrid, p. 780.

The *ruqbā* condition is, on the other hand, stipulated in order to ensure that either the donee or the donor becomes the owner of the *hibah* property when the other party dies. An example is where the donor pronounces, “If I die before you, this property is yours and if you die before me it is mine.” The term originates from the root word *raqaba*, which literally means to observe.⁷³ Both the donor and the donee are considering the death of the other. This means that, even though the donee has taken possession of the property, it will return to the donor if the donee dies first.

The stipulation of the conditions in the *Hibah Harta* instrument is significant. It is one of the duties of the trustee to carry out the conditions and to revoke the *hibah* contract if necessary.⁷⁴ This means that if the donee dies before the donor, the trustee must return the gifted property to the donor and the *hibah* is automatically revoked. Furthermore, it is important to note that the property is not registered under the donee’s name but the trustee’s name. This is to ensure that the donee cannot deal with the property prior to the donor’s death. Applying the *ruqbā* condition, where the donor dies first, the trustee transfers the ownership to the donee.

5.5.1. The Perspective of Islamic Law

5.5.1.1. *‘Umrā*

In *Fiqh* terminology, *‘umrā* is a gift for life. The Ḥanafīs, Syāfi‘īs and Ḥanbalīs are all of the opinion that the contract is valid but the *‘umrā* condition is void.⁷⁵ Al-Syarbīnī is even

⁷³ Ibid, p. 592.

⁷⁴ Othman, p. 21.

⁷⁵ Al-Syarbīnī, vol. 2, p. 398. He states that al-Sabkī and al-Bulqaynī, two prominent Syāfi‘īs scholars, hold the same opinion, i.e. the contract is valid but the condition is void. See also al-Bahūtī, *Kashāf al-Qina’*^{‘an}

of the view that the pronouncement of “if I die, this property is yours” is in essence a *waṣiyyah*.⁷⁶ To the Mālikīs, the *‘umrā* condition is valid on the basis that it is a gift of *manfa‘ah*, i.e. the contract of *‘āriyyah*.⁷⁷ The donee is only entitled to the usufruct, the corpus of the property remains in the ownership of the donor.

There are several Prophetic Traditions or *ḥadīth* on which the majority opinion is based:

- a) It is reported by Jābir bin ‘Abdullāh that the Prophet said, ‘If a property is given in gift to a man for his lifetime it shall become his property and it shall not return back to the donor (after his death).’⁷⁸
- b) It is reported from Jābir that a woman in Medina gave a garden to her son as a gift for life (*‘umrā*). The latter thereafter died leaving behind several children. The woman also died afterwards. She left behind several children and a brother. The children of her son said that the garden belonged to their father during his life as well as thereafter. Both the parties took their dispute to Ṭāriq, the freed slave of the Caliph ‘Uthmān. He sent for Jabir, who bore testimony to the statement of the Prophet. Ṭāriq thereafter wrote to ‘Abd al-Mālik b Marwan. Therein he also mentioned about the testimony of Jābir. ‘Abd Mālik said, “Jābir has spoken truly.” Ṭāriq thereupon issued his orders and the garden continued to be in the possession of the children of that son.”⁷⁹
- c) *‘Umrā* gift is subjected to inheritance in favour of the donee’s legal heirs.⁸⁰
- d) The Prophet had decided that the *‘umrā* gift is for whom it is made.⁸¹

Matn al-Iqnā‘, vol. 4, p. 300 and Ibn Qudāmah, p.282. According to the Ḥanbalīs, the *ḥadīth* that prohibits *‘umrā* and *ruqbā* “do not make *‘umrā* and do not make *ruqbā*” is to inform those who make both contract that the property would never be returned to the donor. See also Ibn Qūdī, Syamsuddīn Aḥmad, *Natā’ij al-Aṣkār fī Kasy al-Rumūz wa al-Asrār*, Egypt: Sharikah Maktabah wa Maṭba‘ah al-Bābī al-Ḥalabī wa Awlādihi, 1970, vol.9, p.25 and al-Jazīrī, ‘Abd Raḥmān, *Kitāb al-Fiqh ‘alā al-Madhhab al-Arba‘ah*, n.p.: Dār al-Manār, 1999, vol. 3, p. 334.

⁷⁶ Al-Syarbīnī, vol.2, p. 399.

⁷⁷ Ibn Rusyd, vol.2, p. 334. If it is stated to those of your dependants after your (donee’s) death, it would then be for the dependants and would only return to the donor when the donee’s dependants stop or finish. It is also stated that *‘umrā* is a gift of usufruct, which means that when the donee dies, the property returns to the donor. If it is pronounced further that “for your dependants as well”, when the donee dies, it (the usufruct) passes to the donee’s heirs by succession. See Imām Mālik bin Anas, *al-Mudawwanah al-Kubrā*, Beirut: Dār Ṣādir, n.d., vol.6, pp. 199-200.

⁷⁸ See al-Syarbīnī, vol.2, p.398.

⁷⁹ Al-Nawawī, Yaḥyā ibn Syaraf, *Syarḥ Ṣaḥīḥ Muslim*, Beirut: Dār al-Qalam, 1987, vol. 11, p. 69-72.

⁸⁰ Al-Syarbīnī, p. 398. He states that Bukhārī and Muslim reported this *ḥadīth* in their *Ṣaḥīḥayn*.

Al-Zuḥaylī is of the same opinion. He states that an *ʿumrā* gift is valid but the time limit is null and void based on the sound *ḥadīth*: “anyone who makes an *ʿumrā*, it is for whom it is made” and the principle that *hibah* is not invalid with the presence of an illegitimate condition. This is different from contracts of exchange such as sale contracts, which become void with the presence of an illegitimate condition.⁸²

5.5.1.2. *Ruqbā*

This is a kind of gift that is attached with the condition that the gifted property returns to the donor if the donee dies first. According to Abū Ḥanīfah and Muḥammad, such *hibah* is void. Furthermore, they are of the view that this is a contract of *ʿāriyyah*. In this regard, the donor is allowed to ask for the return of the property whenever he wishes.⁸³ To the Mālikīs,⁸⁴ Syāfī⁸⁵ and Ḥanbalīs⁸⁶ it is a *hibah* contract but the *ruqbā* condition is void. Their opinion is based on the *ḥadīth*: “do not grant it for life and do not turn it to a *ruqbā*. One who grants it for life or turns it into *ruqbā*, it belongs to his heirs.”⁸⁷

⁸¹ The *ḥadīth* was narrated by Bukhārī and Muslim. See al-Bahūtī, p. 300.

⁸² Al-Zuḥaylī, p. 9. This is different from a contract of exchange such as sale contracts, which become void with the presence of illegitimate condition.

⁸³ Al-Zuhayli, p. 9.

⁸⁴ Ibn Rusyd, English translation, 402.

⁸⁵ Qalyubī wa ʿUmayrah, p. 169. It is stated that the *ruqba* is valid according to the *qawl jadid*, but the condition is *fāsīd*. See also al-Sharbīnī, vol. 2, p. 399. He states that the *ruqbā* is valid according to the *qawl jadīd* but the condition is ineffective. To the *qawl qadīm*, it is absolutely void.

⁸⁶ Al-Bahūtī, vol. 4, p. 301.

⁸⁷ Ibid. See also Ibn Rusyd, English translation, vol.2, p. 402. That *ḥadīth* is related from Jābir.

5.5.2. 'Umrā and Ruqbā in the Instrument

It is clear from the above discussion that the four Sunni schools of law unanimously agree on the invalidity of the 'umrā and ruqbā conditions. However, according to Othman, the validity of the conditions is based on the opinion of the two Syāfi'is scholars, al-Subkī and al-Bulqaynī.⁸⁸ He also referred to the books of Ahmad Ibrahim, *Islamic Law in Malaysia* and Tyabji's *Muhammadan Law, The Personal Law of Muslims*, in which he claims they state that Imam al-Syāfi'ī agreed with the ruqbā condition.⁸⁹

It is important to note that the opinion on the invalidity of the conditions is based on the sound *ḥadīths*, which stand as one of the primary sources of Islamic law. Moreover, the conditions clearly contradict the concept of *hibah*, i.e. the absolute ownership of the gifted property is transferred to the donee. Therefore, in light of the above arguments, it is submitted that although the conditions are null and void, the *hibah* contract remains valid and effective. This is supported by the *ḥadīth* that clearly prohibits the donor from retracting his *hibah*, as discussed previously.

It is clear from Othman's study that he merely relied on the opinions of the scholars without studying the basis on which these opinions were founded. In this regard, it is not an exaggeration to say that his research is not based on the sound methodology of Islamic research and as a consequence there is a possibility that his findings are based on an unacceptable proof. On the basis of the observations of the present research, it is argued

⁸⁸ Othman, p.10.

⁸⁹ See Ahmad Ibrahim, *Islamic Law in Malaysia*, p. 297 and Tyabji, *Muhammadan Law, The Personal Law of Muslims*, 3rd edition, Bombay: N.M. Tripathi & Co., Law Publishers, 1940.p. 516.

that Imām al-Syarbīnī states that Imām al-Subkī and Imām al-Bulqaynī propound the invalidity of the condition of *‘umrā*, but the validity of the *hibah* contract.⁹⁰ With respect to Othman’s references to Ahmad Ibrahim’s⁹¹ and Tyabji’s⁹² books, from which he concluded that Imām al-Syāfī⁹³ validated the condition of *‘umrā*, after due investigation into these two books, along with *Minhāj al-Ṭālibīn* by al-Nawāwī⁹³ and its translation by E.C. Howard,⁹⁴ the opposite conclusion can arguably be reached. There is nothing in these treaties that states Imām al-Syāfī⁹⁵’s views on the validity of the *‘umrā* condition. The main concern of the discussion is whether the contract of *hibah*, not the *‘umrā* condition, is valid or not. There is no dispute on the invalidity of *‘umrā*.

Othman further states that because of the grave disagreement on the validity of the *‘umrā* and *ruqbā* conditions among the Muslim scholars, such conditions should not be inserted alongside the pronouncement of offer and acceptance of the *hibah*. Instead, he suggests that they are stipulated in the trust deed and stand as an agreement between the donor and the donee.⁹⁵ According to him, Islamic law permits the insertion of any conditions to a validly completed contract as long as the parties to the contract consent and such conditions do not contravene Islamic law.⁹⁶

⁹⁰ Al-Syarbīnī, vol. 2, p. 398.

⁹¹ Ahmad Ibrahim, *Islamic Law in Malaysia*, p. 297.

⁹² See Tyabji, Faiz Badruddin M.A., *Muhammadan Law The Personal Law of Muslims*, p. 516.

⁹³ Al-Nawāwī, Abī Zakariyyā Yahyā ibn Sharaf, *Minhāj al-Ṭālibīn*, n.p: n.p., n.d., pp. 81-82.

⁹⁴ Al-Nawāwī, *Minhaj et Talibin A Manual of Muhammadan Law According to the School of Shafii* by al-Nawāwī, translated into English from the French Edition of L.W.C. Van Den Berg, by E.C. Howard, Adam Publishers & Distributors, Delhi, First Edition, 2001, p. 234.

⁹⁵ Othman, p. 8.

⁹⁶ Ibid.

However, it would seem clear that if such conditions were inserted after the completion of the contract of *hibah*, this would amount to *waṣiyyah* because the effectiveness of the *hibah* conditions is subject to the occurrence of death. It is a well-known principle in Islamic law that a *waṣiyyah* made by a Muslim testator is only effective upon his/her death. Therefore, the agreement of the donee to the condition that the property would return to the donor if he/she dies prior to the donor, is *waṣiyyah*. These conditions clearly contradict the opinion of the four Sunni schools of law who unanimously agree on the transfer of absolute ownership of the gifted property to the donee. The conditions clearly contravene the Islamic principles of *farā'id* and *waṣiyyah*, and hence they are absolutely null and void.

5.6. Analysis of the *Fatwā*

The *Fatwā* Council of the Federal Territory of Kuala Lumpur allegedly approved the BCT's *Hibah Harta* in terms of *Syarī'ah* compliance when it issued its *fatwā* on 14th November 2000.⁹⁷ However, in issuing the *fatwā*, the Council relied merely on the information presented by Tuan Haji Othman, a BCT *hibah* consultant and two *hibah* experts appointed by BCT. Satisfied with the explanation of the nature and process of completion of the contract, including the stipulation of the *ʿumrā* and *ruqbā* conditions, the Council passed a resolution stating its satisfaction with the product provided that several conditions were strictly and fully complied with.

⁹⁷ Bumiputra-Commerce Trustee Berhad brochure on Amanah Hibah.

The religious ruling of the *Fatwā* Council states that the Council agreed with the *Hibah Harta* instrument run by the Bumiputra-Commerce Trustee Berhad on the condition that:

- 1- The delivery of possession is directly made to the donee and the documents pertaining to the changes of names and others are kept by the Bumiputra Commerce-Trustee Berhad.
- 2- The agreements and conditions between the donor and the donee must be made after the completion of the offer and acceptance.
- 3- The trust property must be kept in an Islamic Bank account such as those at the Bank Islam Malaysia Berhad, the Bank Muamalah or at Islamic counters of conventional banks.

Looking into the Council's resolution, it is important to clarify the first two points because they are directly related to the issue of the validity of the product from the perspective of Islamic law. The third element regarding the place where the trust property should be kept does not fall within this context because it has nothing to do with the issue of *Syarī'ah* compliance. It does not relate to the process of the completeness of the contract but rather is a matter of administration.

Regarding the first issue, based on the information pertaining to the process leading to the completeness of the *hibah* contract it is clear that the delivery of the *hibah* property is not directly made to the donee. The *hibah* property is registered in the name of the trustee, i.e. the BCT. It is registered in the donee's name only upon obtaining the donor's

permission or after the donor's demise. These facts show a contradiction between the *fatwā* and the practice as applied by the instrument.

With respect to the second issue, it appears that the Council agrees with the inclusion of the *‘umrā* and *ruqbā* conditions provided they are inserted after the completion of the *hibah* contract. It seems that to the Council, both conditions are acceptable in Islamic law as long as they are inserted afterwards. This means that the Council agrees that whenever the donee dies prior to the donor, the donee's heirs will not inherit the trust property, it will return to the donor as prescribed by the conditions. This means that even though the property has already been validly given to the donee, the donor still has the right to claim it or to take it back and the donee's heirs are left with no entitlement. This is clearly against the principles of *fara'id* and *wasiyyah* as explained above. It appears, therefore, that the Council has made a mistake in endorsing the instrument.

Moreover, there is another problem that is important to mention here. This concerns the enforcement of the *fatwā*. It is a well-known fact that the Bumiputra-Commerce Trustee is a large company that operates throughout the region of Malaysia. It is therefore understood that the product would be promoted to other states in Malaysia, and for commercial purposes it would not be a good idea to confine it to the Federal Territory of Kuala Lumpur. When this is taken into account, it can be seen that a problem may arise in that every state in Malaysia has its own *Fatwā* Committee. Each *Fatwā* Committee has its own mechanisms and methods as well as different opinions when issuing a *fatwā*.⁹⁸

⁹⁸ It is the standard practice of the Fatwa Committee of every state in Malaysia, except Perlis, that reference is made to the prevailing views of the Syāfi'īs. If it would lead to a situation, which is repugnant to the

What will happen if the *Fatwā* Committees of the other states issue *fatwās* that are against the product?

It is therefore suggested that the National *Fatwā* Council, which is responsible for all Muslims throughout Malaysia, recognizes the product.⁹⁹ The *fatwā* issued by the Council could be streamlined throughout Malaysia and be accepted and gazetted by every state in order to have legal effect.¹⁰⁰ It is important to mention that differences between *fatwās* are very difficult to resolve except through legal processes. A *fatwā* binds only the state where it is issued and gazetted, and hence only binds the Syariah courts of that state. Furthermore, the civil courts are not bound to follow *fatwās*.

5.7. The *Tarikah* and the Entitlement of the Donor's and the Donee's Heirs

Another dispute that may arise as a result of the uncertainties concerning the validity of the instrument in terms of its *Syari'ah* compliance concerns the entitlement of the legal heirs of the donor and the donee to the trust property. Based on the concept of the *Hibah Harta* instrument, it is unclear who actually possesses the ownership of the property. It is based on the *hibah* contract but the donor remains entitled to enjoy the proceeds accrued

public interest, the Mufti may follow the prevailing views of the Ḥanafīs, Mālikīs or Ḥanbalīs. If it is still against the public interest, then the Mufti may exercise his own *ijtihad*.

⁹⁹ Among the functions of the National Fatwa Committee is the discussion of any major issue at national level and eventually issue a fatwa on it and to unify or standardize contradicting *fatwās* in Malaysia, if any. See Farid Suffian, *Administration of Islamic Law in Malaysia, Text and Material*, p. 271. However, it has been confirmed by Ustazah Hajjah Siti Nor Badar at the Mufti Office, Wilayah Persekutuan Kuala Lumpur during the interview that Othman had submitted an application to get the product endorsed by the National *Fatwā* Council so that it could be promoted throughout the region but, it was very unfortunate that his application was rejected.

¹⁰⁰ The Administration of Islamic Law (Federal Territories) Act 1993, section 34 states: Upon publication in the Gazette, a *fatwa* shall be binding on every Muslim resident in the Federal Territories as dictate of his religion and it shall be his religious-duty to abide by and uphold the fatwa, unless he is permitted by Islamic Law to depart from the fatwa in matters of personal observance, belief, or opinion. The similar provisions are found in the enactments for the administration of Islamic Law of other states.

from the property. Furthermore, the donee is absolutely impeded from any kind of dealing with the property that is supposed to be his/hers. Clearly, it is futile to give someone the corpus of the property but forbid him/her to utilize the *manfa'ah* or the usufruct of the corpus. Without usufruct, the corpus stands unproductive.

Having said that, it should be highlighted that the absolute ownership of the property is part and parcel of inheritance. If such an absolute ownership is not established, the legal heirs are not entitled to claim their inheritance under *farā'id* law. In this regard, if the property returns to the donor after the demise of the donee following the *ʿumrā* or *ruqbā* condition, as stipulated in the *Hibah Harta* instrument, the legal heirs of the donee have no entitlement to the trust property under inheritance.

However, it is submitted that the *ʿumra* and *ruqba* conditions are against the *Syarīʿah*, though they are inserted after the completion of the *hibah* contract. The majority of Muslim scholars, consisting of the Ḥanafīs, Mālikīs and Syāfiʿīs, nullify the conditions stipulated in a contract that defeat the purpose of the contract.¹⁰¹ The Ḥanbalīs however, especially Ibn Taymiyyah and Ibn al-Qayyim allow the absolute freedom of stipulating conditions as long as they do not contradict the *Syarīʿah*. However, they hold the same view as the majority if such conditions contradict the *Syarīʿah*.¹⁰² In relation to this, the *hibah* contract in the *Hibah Harta* instrument is still valid but the conditions are null and void. Therefore, the property is absolutely within the donee's ownership and can never

¹⁰¹ Al-Zuhaylī, p. vol.4, p. 202. Hamid, Mohamed El Fatih, "The Freedom to Make Stipulations in the Islamic Law of Contract", *JICL*, 6(1976), pp. 22.

¹⁰² Mūsā, Muḥammad Yūsuf, "The Liberty of the Individual in Contracts and Conditions according to Islamic Law", *I.Q.*, 2:4 (1995), p.257.

return to the donor. When the donee dies, even if it is prior to the donor's death, his legal heirs inherit the property.

5.8. Conclusion

The issue of *Syarī'ah* compliance is an important consideration. Even though a religious authority, i.e. the *Fatwā* Council of the Federal Territory of Kuala Lumpur, endorsed the *Hibah Harta* prior to its launch, there remain questions and debates over its validity in terms of its conformity with the principles of Islamic law. This problem becomes obvious primarily due to the concept of ownership adopted in the contract and the stipulation of the *‘umrā* and *ruqbā* conditions. Clearly, the issue of ownership and the insertion of such conditions are the main factors that attract the public to the instrument. In other words, the public is allured to dispose of their wealth through the instrument primarily because their interest in the subject of the arrangement is well protected. Their right to the property remains in existence and the donee is absolutely prevented from taking ownership.

CHAPTER SIX

FAMILY *TAKĀFUL*, CONVENTIONAL LIFE INSURANCE AND GOVERNMENT RETIREMENT BENEFITS

6.1. FAMILY *TAKĀFUL* AND CONVENTIONAL LIFE INSURANCE

6.1.1. Introduction

Takāful and the conventional insurance business have become increasingly important for Muslims in Malaysia, as elsewhere. The basic aim of *takāful* and insurance is to mitigate the financial burden suffered by its members. Each member contributes a specified amount of money to a common fund to provide for protection against specified risks that may occur in the future.

This sub-section will embark on a discussion in particular on the issue of the heritability of the proceeds payable under family *takāful* and conventional life insurance policies upon the death of the participant or the insured from the perspective of the Islamic law of succession. This research will focus solely on these two policies or plans due to the fact that they are connected to death, which is an essential element of inheritance law. The issue focused on is the position of the money paid by the company on the death of the policyholder and whether it should be distributed in accordance with the *farā`iḍ* law or by another mode. In order to come to a conclusion, an elaboration on the nature of the contracts concerned is necessary as well as their compliance with the *Syarī`ah* principles,

as these are part and parcel of the process of determining the question of the heritability of one's wealth.

6.1.2. The Concept of *Takāful*

Takāful insurance was introduced for the purpose of serving the Muslim as an alternative¹ to conventional insurance, which it can be said does not operate fully in line with Islamic teaching.² In Malaysia, the Syarikat Takaful Malaysia Sendirian Berhad was the first *takāful* operator to be established and begin operating in August 1985.³ The concept of Islamic insurance or *takāful* is based on mutual help and cooperation as well as on the concept of *tabarru'āt*, which literally means sincere donation. The word *takāful* itself literally means joint guarantee⁵ and this literal meaning portrays the nature of its operation, which is mutual help and assistance to ease the burden suffered by fellow friends. The contract governing each of the participants is a contract of gratuity or *tabarru'āt*. This contract is incorporated merely to eliminate the element of uncertainty or *gharar*, which would invalidate the contract.

¹ Billah, Maasum, *Quantum of Damages In Takaful (Islamic Insurance) In the Contemporary Economic Reality*, [online], n.d., available from: <http://islamic-finance.net/islamic-insurance/article/t-quantum%28> [accessed 17th December 2004].

² Takaful Nasional Sdn. Bhd., *Konsep Takāful*, [online], n.d., available from: <http://www.takafulnasional.com.my/default.fm> [accessed 2nd August 2003].

³ Yusof, Mohd Fadzli, *Takaful; Sistem Insurans Islam*, Kuala Lumpur: Utusan Publications & Distributors Sdn. Bhd., 1996, p. 5.

⁵ Yusof, Mohd Fazli Yusof, Brief Outline On the Concept and Operational System of Takaful Business (Islamic Insurance), in *Takaful (Islamic Insurance) Concept and Operational System From the Practitioner's Perspective*, Kuala Lumpur: BIMB Institute of Research and Training Sdn. Bhd., n.d., p.8.

⁷ Yusof, Mohd. Fazli, *Takāful: Sistem Insuran Islam*, p. 23. Family *takaful* is similar to the life insurance policy whereas the general *takaful* is similar to the general insurance policy. Both types of *takaful* plans fully meet the Syarī'ah principles. See also Takaful Nasional Sdn Bhd [online], <http://www.takafulnasional.com.my/default.fm>

The *takāful* insurance business classifies its policies into two sections namely the Family *Takāful* Business (Islamic life insurance) and the General *Takāful* Business (Islamic general insurance).⁷ Generally speaking, a *takāful* plan provides a long term financial facility with two primary aims; gradually depositing money into the account for the purpose of gaining the protection benefit against death or any loss of human limbs and secondly saving the money to gain a return on the savings plus the profit from investment. The Family *Takāful* Plan is a long-term *al-muḍārabah* (profit and loss sharing) contract and basically provides cover for mutual aid among its members or participants expressed in the form of financial benefits paid from a defined fund should any of its members suffer a tragedy.⁹ Apart from this, it also enables the participant to save regularly for a fixed period as well as invest with a view to earning profits. The General *Takāful* Plan is usually a short-term plan and basically provides protection in the form of mutual financial help to compensate its members or participants for any material loss, damage or destruction.

In order to realize the objective of the financial assistance facility among the participants,¹¹ the contribution that is required to be paid by the participant on a regular basis as in consideration for participation is credited to the Family *Takāful* Fund and subsequently channelled into two separate accounts, namely the Participant's Account

⁹ Ibrahim, Ahmad, "The Philosophy of Islamic Insurance – Shariah Concepts and Principles", *JUUIKIM*, 2:1 (1998), p.11.

¹¹ Yusof, *Brief Outline On the Concept and Operational System of Takaful Business*, p. 11.

¹³ Ibrahim, p.12.

(PA) and the Participant's Special Account (PSA).¹³ Moneys deposited in the PA are invested based on the principle of *al-murābahah*. On the other hand, the PSA is solely for the purpose of *tabarru'āt* or donation and is used to help fellow participating members in covering any loss or damage.¹⁴

The PA is exclusively for the purpose of savings and investment. The substantial proportion that is deducted from the total instalment as well as the profit from investment belong exclusively to the participant and are not used for donation purposes. In this regard, if a participant discontinues his participation before the maturity of the plan, he is fully entitled to the whole amount contained in that account despite his discontinuance. This account serves as a deposit account and hence the participant is absolutely free to withdraw his money from the account whenever he wishes to do so. This money is therefore clearly heritable when he dies.¹⁵

The remaining amount of the total instalment after the deduction of the proportion payable to the PA is on the other hand credited to the PSA. Monetary contributions to this account are perceived as donations from the participant and are used for *tabarru'āt* purposes. This accumulated money is not returned to the participant if he ceases his participation. As it is a donation that he or she intended to be used specifically for *tabarru'āt* it is prohibited in Islamic law to ask for its return.¹⁶ In other words, the amount channelled to this account is exclusively for providing financial assistance and is

¹⁴ Abu Bakar, Abu Bakar, "Family Takaful Plan: Concept, Operation, Underwriting", in: *Takaful (Islamic Insurance) Concept and Operational System from the Practitioner's Perspective*, p. 28.

¹⁵ Yusof, *Takaful: Sistem Insuran Islam*, p.31.

¹⁶ Yusof, p.31.

specifically utilized to pay the *takāful* benefits to the heirs of any fellow participant who may die before the maturity of the *takāful* plan.¹⁷

From the above explanation, it is clear that the *takāful* operation works on the principles of both *al-muḍārabah* and *al-tabarruʿāt*. In an *al-muḍārabah* contract, the participant (the *ṣāhib al-māl*) provides capital (*raʿsu al-māl*) in the form of *takāful* instalments or *takāful* contributions (premiums) and the investor (*al-muḍārib*), which in this case is the *takāful* operator, invests the capital in commercial businesses that are run according to the principles approved by the Shariʿah. The profit or surplus gained from this investment is shared according to the agreed ratio between the participants and the *takāful* operator. It is worth noting here that the main objective of *takāful* is to help fellow participants who have suffered from any loss. It is for this reason that the payment of profit from investments is made only after objective assistance to fellow participants has been made.¹⁹

6.1.3. Conventional Life Insurance from the Perspective of Islamic Law

An insurance contract is defined as a contract for the payment of a sum of money for some corresponding benefit to become due on the happening of an uncertain event of a character adverse to the interest of the person affecting the insurance.²⁰ It is also defined as an agreement between two persons (the insurer and the assured) that in consideration of a relatively small payment (a premium) paid by the assured, the insurer will, on a

¹⁷ Yusof, p.31.

¹⁹ Ibid, p.9.

²⁰ Afzalurrahman, *Banking and Insurance*, London: The Muslim School Trust, 1979, p. 122.

certain event happening during the given time, pay to the assured either an agreed sum, or the amount of the loss caused to the assured by the event.²¹

This is regarded by the majority of Muslim jurists as a contract of exchange rather than a contract of donation or *tabarru'āt*. It is submitted that such an interpretation is in parallel with the underlying principles laid down in English common law regarding the formation of a contract of insurance. Under English common law, there are four requirements to be met in order to establish a contract of insurance, namely an offer and an acceptance, the subject matter and the element of consideration.²² The premium paid by the insured is in consideration of the subject matter that is the risk to be run by the insurer.²³ With regard to life insurance, it is a specific kind of policy providing for the payment of a specified amount on the insured's death either to his estate or to a designated beneficiary.²⁴

According to the majority of Muslim jurists, there are three elements that, from the Islamic point of view, invalidate the conventional insurance contract, including the life insurance contract, and these are: *riba* (interest), gambling and uncertainty.

It is claimed that the element of *ribā* is present when the insurance company pays the claim far in excess of the amount paid in premiums by the insured. This is based on the

²¹ Jowitt, Earl and Walsh, Clifford, *Jowitt's Dictionary of English Law*, 2 London: Sweet & Maxwell, 1959, vol.2, p. 985.

²² Poh Chu Chai, *Law of Insurance*, Singapore: Malayan Law Journal, 1986, p. 51-55.

²³ Ibid, p. 55.

²⁴ Geranmayeh, Ahmad, "Life Insurance in Islam", *the 1st International Islamic Insurance/ Takaful Summit*, Dubai, United Arab Emirates, November, 1996, p. 1.

²⁶ Hariati, Sharifah, *Islamic Insurance (Takaful) in Contemporary Malaysia with Special Reference to Takaful Act, 1984*, unpublished dissertation of Master of Comparative Law, International Islamic University Malaysia, 2000, p.51. This claim is based on the notion that every incremental payment is interest.

assumption that every incremental payment is tantamount to *ribā*.²⁶ Likewise in life insurance, the beneficiaries of the assured will gain more than the assured has paid to the insurer in the event of his or her death, and therefore such additional gain is considered as *ribā*.²⁷

Some Muslim jurists believe that there is an element of *maysir* or gambling to the insurance contract, including life insurance, where one party (the insurer) agrees to pay the other (the insured) a pre-determined amount of money on the happening of an indefinite event in consideration of a sum of money (a premium) which the latter agrees to pay to the former. Thus, the insured is exposed to risk on the basis of chance, which makes it similar to *maysir*.²⁸ This kind of game of chance²⁹ happens once the insured enters into a contract for life insurance and pays the agreed premiums, his beneficiaries are simultaneously hoping for the chance to gain a large amount of money after the demise of the assured. Hoping for such a chance is prohibited by the injunction against *maysir*.³⁰

Some Muslim jurists argue that there is the element of *gharar* or uncertainty in the insurance contract relating to what the insured buys with his premium, as when one buys something uncertain. When the insured buys a special plan of insurance and at the end of the contract there is no claim, it leads to the conclusion that the money paid in premiums

²⁷ Rashid, S.K., "*Insurance in Islamic law*", Kulliyah of Laws, IIUM, Malaysia. (n.d. and unpublished), p. 8, cited in Billah, Mohd. Masum, *Life Insurance: An Islamic View*, *A.L.Q.*, 8:4 (1993), p. 315.

²⁸ Khan, Muhammad Akram, *Economics of the Quran: A Study of Surah al-Maidah and Surah al-Nahl*, Lahore: Library Information and Management Academy, Lahore, 1994, p.30.

²⁹ Muslehuddin, Muhammad, *Insurance and Islamic Law*, 4th edition, Lahore: Islamic Publications Limited, 1982, p. 143.

³⁰ Billah, Mohd. Masum, "Life Insurance: An Islamic View", p. 316.

³² Geranmayeh, *Life Insurance in Islam*, p.3.

did not provide any benefit.³² The contract is therefore based on uncertainty and probability as well as the date of the risk happening also being uncertain.

According to Siddiqi regarding the presence of the *ribā* element, such a contention is baseless on the grounds that the Sharīʿah does not consider absolutely every increment to be interest. Money paid as interest is not in the nature of a loan, the payment of a claim does not amount to returning the loan with an increased amount that may be considered as interest, rather the premium payment is a kind of co-operative contribution towards the availability of a useful social service.³³

It can be argued that such excess payment does not necessarily amount to *ribā* because the recipient of the payment is either the insured himself or a third party. The payment is solely made by the insured and the third party pays nothing. The third party receives the amount only when the insured dies prior to the maturity of the policy, and furthermore the payment is solely based on the concept of financial assistance. Therefore, it can not be considered as an exchange of *ribawī* items because it does not involve that kind of exchange as such. The insurance company is bound to pay the claim because it is a promise legally inserted and agreed upon in the contract.

Rebutting the claim regarding the existence of gambling, Siddiqi as before responded by stating that the concept of life insurance revolves around the transaction of depositing a certain amount of money with a particular company with the intention of helping the

³³ Siddiqi, Muhammad Nejatullah, *Insurance in an Islamic Economy*, Leicester: Islamic Foundation, 1985, p. 38.

depositor's family with future risk after the demise of the depositor.³⁴ Thus, the element of gambling does not exist. It would seem that when the idea underlying the contract is financial assistance for a third party, the issue of gambling does not arise. If the insured is from the outset looking forward to gaining a huge amount of money by entering the contract on the occurrence of certain events, the blame is upon him not the transaction.

With respect to the element of *gharar*, Siddique as before argued that the rights and obligations of the insuring company and the insured are well known and certain, although the financial implications depend on events that are subject to uncertainty. Added to this, he stated that some contemporary Islamic thinkers have pointed out that the Sunnah prohibits transactions only where *gharar* is present to an excessive degree.³⁶ Arguably, the issue of *gharar* or uncertainty does not arise here because the insurance contract is one of donation rather than sale. As a result, the uncertainty that does exist in the contract does not affect its validity because the uncertainty is relatively minor.³⁷

6.1.4. Is there a Substantial Difference between *Takāful* and Conventional Insurance that Results in Differences in the Court Rulings?

It is not the aim of this research to discuss in detail the legitimacy of conventional life insurance from an Islamic perspective. It is sufficient to cite the various opinions of Muslim scholars, along with their arguments regarding the question of legitimacy. From

³⁴ Siddique, p. 35.

³⁶ Ibid, p. 43.

³⁷ Abd. Rahman, Zainal Azam, "Modern Takaful, Commercial and Mutual Insurance (A Short Analysis)", *JUUIKIM*, 4:1 (2000), p.62.

³⁹ Billah, Mohd. Maasum, "Islamic Insurance: Its Origins and Development", *A.L.Q.*, 13 (1998), p.410.

the Islamic rulings or *fatwās* released by Muslim scholars, it appears that no conclusive decision has yet been made regarding this issue in the eyes of Islamic law.³⁹ Even though it is the view of the majority of Muslim scholars that the conventional insurance contract, including the life insurance contract, is contrary to Islamic law, the contentions put forward by the minority on its validity seem equally convincing and hence should not simply be dismissed.

The question of illegitimacy is still debatable. It seems that conventional insurance, including life insurance, may be Islamically legitimate. It is significant to note that the insurance contract is a new transaction that is quite alien to the time of the Prophet Muḥammad. However, it should not be dismissed simply because of its non-existence in the time of the Prophet Muhammad. Furthermore, it should not be confined to the requirements applicable to the commonly known transactions, which have existed since the time of the Prophet Muḥammad.

In Malaysia, on 15th June 1972, the National *Fatwā* Council of Malaysia decided on the illegitimacy of the conventional life insurance contract based on the reason that as a transaction it is not free from the elements of uncertainty, gambling and interest or *ribā*.⁴⁰ This *fatwā* appears to serve as a carbon copy of the *fatwā* previously issued by Muslim jurists internationally and seems to offer nothing new to the debate. There is none of the detailed elaboration or reasoning on which such a *fatwā* is usually based.

⁴⁰ <http://www.takafulnasional.com.my/default.fm>. See also Billah, Mohd Maasum, "Islamic Insurance: Its Origin and Development", pp. 410- 415.

It appears that the alleged presence of the three forbidden elements is primarily due to a common understanding of the nature of the transaction underlying the conventional insurance contract, which, it is argued by its opponents, is a contract of exchange rather than a contract of donation. Hence, all the general requirements of a contract of exchange, such as a sale contract, as laid down by the Muslim jurists must be fully met. The contract is labelled as a sale contract rather than a donation or *tabarru'āt* contract.

However, there appears to be no substantial dissimilarity between *takāful* and conventional insurance. The only difference pertains to their labelling; the former is a *tabarru'āt* contract, whereas the latter is a sale contract.⁴² The focus should, therefore, be on the essence of the contract rather than the label.

In this regard, it is quite obvious that the purposes of conventional insurance and, therefore, the essence of the contract is the concept of mutual help among the participants or the insured. Hence, regardless of its being called a contract of sale, the primary objective that moulds the contract, which is the intention of sharing risk and providing financial help, should be emphasized. It should therefore be specified as a contract of donation or *tabarru'āt*, rather than a contract of exchange.

As regards *takāful* operations, the participant is similarly given an amount of money that exceeds the amount he or she has paid in premiums. However, even though at the outset of their participation every participant has an expectation of their entitlement to these

⁴² Yusof, *Takaful; Sistem Insuran Islam*, p.32.

benefits, because it is called a donation the exceeding amount is not equivalent to *ribā*. The *takāful* participant could also be said to participate in gambling as he or she is hopeful of receiving this excessive amount only upon the occurrence of death or some other loss and this potential gain is certainly based on chance. The element of uncertainty similarly exists. However due to the fact that it is a *tabarru'āt* contract this is permissible, unlike uncertainty in sale or exchange contracts.

The differences between conventional and Islamic insurance are therefore primarily due to the nature of their contracts. The conventional insurance contract is, according to many Muslim scholars a contract of sale between the seller and the purchaser.⁴³ The seller is the company selling the insurance policy and the purchaser is the one who buys the policy and in return for his purchase is entitled to the benefits provided by the company.⁴⁴ Islamic insurance or *takāful* is on the other hand based on the principles of *al-takāful* and *al-Murābahah*.⁴⁵ It should be noted, therefore, that the primary reason behind the refusal of the majority of Muslim jurists to accept the validity of conventional insurance arguably rests on the basic nature of its contract. In *takāful*, unlike in conventional insurance, the participant is said to participate in the arrangement instead of buying the policy and for that reason the contracts executed in a *takāful* operation are not contracts of sale.⁴⁶

⁴³ Nor, Hardinur Mohd, Introduction to General Takaful Business, in: *Takaful (Islamic Insurance) Concept and Operational Systems From the Practitioner's Perspective*, BIRT, p. 46.

⁴⁴ Insurance Info, *The Policy Contract*, [online], n.d., available from: <http://www.insuranceinfo.com.my/index.php?ch> [accessed 9th July 2003].

⁴⁵ Nor, Hardinur Mohd, Introduction to General Takaful Business, p. 46.

⁴⁶ Yusof, *Takaful: Sistem Insuran Islam*, p.32.

Arguably these facts point strongly to the legitimacy of the conventional insurance contract. However, an important thing to take into consideration is the fact that the premiums paid by the insured are possibly invested in businesses that contradict Islamic principles. It is only at this stage, as stated by Siddique as before that the factor of interest enters into the insurance scheme⁴⁷ and hence makes the money not fully clean of *haram* elements. However, this does not affect the validity of the contract.

6.1.5. The Heritability of the Proceeds

This discussion is focused solely on the Family *takāful* and conventional life insurance because both types of policy are singularly related to death. In this regard, the question is raised as to whether the money paid by the insurance company or the *takāful* operator on the death of the participant before the policy matures constitutes the participant's estate or not.

It is the opinion of prominent Muslim jurist Muṣṭafā Aḥmad Zarqā' that the issue of the money payable under conventional insurance is still open for discussion and debate.⁴⁸ This means that there is as yet no conclusive decision from the Muslim scholars regarding the position of the money and whether it is heritable or not. He says:

“If it is stipulated as a condition by the participant that the money payable is for his heirs, that money is therefore heritable and distributable according to the *farā'id* law. However, there exists room for discussion and opinions in relation to the nature of the money whether it constitutes *tarikah* of the dead insured (which is subjected to the payment of debts to creditors) or it is not related at all to *tarikah* and this implies the possibility

⁴⁷ Siddique, p.37.

⁴⁸ Al-Zarqā', Muṣṭafā Aḥmad, *Nizam al-Ta'miin*, Beirut: Muassasah al-Risalah, 1994, p. 143.

to insert conditions relating to the payment in favour of persons other than heirs on the consideration of it being a donation from the insured.”⁴⁹

It is clear from the above statement that the position of the proceeds of conventional life insurance is debatable. It is not a unanimous agreement among the Muslim scholars that such proceeds must be distributed according to the Islamic Law of Inheritance. The similar position should be applicable to the proceeds of Family *Takāful*. It appears that the proceeds could arguably be considered as not part of the *tarikah* of the deceased and accordingly, could be distributed according to the agreement between the participants and the insurer.

6.1.5.1. The Proceeds and the Nominee

In Malaysia, the *fatwās* issued by the Islamic Religious Council appear to be inconsistent. There have been *fatwās* issued on the illegitimacy of conventional life insurance but at the same time, there is a *fatwa* stating that money paid by conventional insurance must be distributed among the insured's legal heirs. On 15th June 1972, the National *Fatwā* Council issued a *fatwā* invalidating the conventional life insurance contract. However, on 20th September 1973, the same council issued a *fatwā* that clearly states that it is the responsibility of the nominee appointed by the insured to distribute the money according to the *farā'id* law.⁵⁰

⁴⁹ Ibid.

⁵⁰ [1974] 1 MLJ x.

However, the Malaysian High Court in the case of *Re Bahadun bin Haji Hassan* did not follow the later *fatwā*.⁵¹ In this case, the Court decided that it was a complete gift from the insured to the nominee when he nominated the latter in his life insurance policy. The principle of binding precedent was strictly applied and the Court followed the principle laid down in *Re Man Bin Minhat*,⁵² even though the case was decided prior to the issuance of the *fatwā*. In this case, the High Court decided that when a person takes out a life insurance policy amounting to RM40,000 and nominates his wife as the receiver of the benefit, the wife is fully entitled to the insurance money when the insured person dies.

Analysing the judgments in the above cases, it appears that the judges understood that the insurance money belongs to the insured. Rather than it being divisible according to the *farā'id* law because it constitutes part of the insured's estate. The judges decided that the money should pass in its entirety to the nominee on the basis that it is a complete gift or *hibah* made by the insured to the nominee prior to his or her death. From these facts it can be seen that there is indeed no difference in essence between the 1973 *fatwā* and the judges' understanding. According to the 1973 *fatwā*, the nominee must distribute the money to the insured's heirs and this means that the money is part of the insured's estate. In other words, the *fatwā* and the judges are of the common opinion that the insurance money belongs to the insured.

In May 1996, an announcement was made by the former Minister in the Prime Minister's Department, YB Datuk Dr Abdul Hamid Othman, that the *farā'id* principles had been

⁵¹ [1974] 1 MLJ 4.

⁵² [1965] 2 MLJ 1.

incorporated in the Insurance Bill, which had been previously tabled in the Dewan Rakyat.⁵³ Section 167(1) of the Malaysian Insurance Act 1996⁵⁴ therefore provides that when a Muslim nominee receives the policy moneys upon the death of the policyholder, he or she receives it as an executor and the money payable constitutes part of the estate of the policyholder which is subjected to the payment of any debts. Furthermore, section 167(2) provides that the nominee is under a responsibility to distribute the policy moneys in accordance with Islamic law. Here, it is not clear whether the 'Islamic law' stated in section 167(2) is the Islamic law of succession as no further statutory explanation is given. However, taking into account the statement of the former Minister as well as the position that the money payable is part of the estate of the deceased policyholder as stated in section 167(1), it is reasonable to assume that the term refers to the Islamic law of succession.

With regard to the Family *takāful* policy, the earlier discussion on the concept of *takāful* is sufficient to provide a complete understanding of the *takāful* transaction. It seems there is a consensus among Muslim jurists on the legitimacy of this type of transaction from the perspective of Islamic law. No single opinion can be found opposing the validity of the money paid by the *takāful* operator to participants suffering loss. However, the question regarding the heritability of the money remains the same as for the money payable under conventional life insurance. The important factor here is that the money payable under the *takāful* policy is slightly different from the money payable under

⁵³ See *The Sunday Star*, 26th May 1996.

⁵⁴ The Insurance Act, 1996. (Act 553)

conventional life insurance due to the difference in the nature of the transactions in terms of their operation.

As previously mentioned, with the Family *takāful* there are two accounts, namely the Participant Account and the Special Participant Account. The premium paid by the participant is paid into both accounts based on a ratio agreed by the *takāful* operator and the participant. The Participant Account is considered to be the deposit account of the participant whereas the Special Participant Account is for the sole purpose of making donations. When a participant dies, there is therefore no question regarding the heritability of the money in the Participant Account as it is part of the deceased's estate. However, with regard to the money payable by the *takāful* operator taken from the Special Participant Account, it appears that it is similar to the money payable by the conventional insurance company and hence is open for discussion.

It is standard practice in Malaysia that when a participant of an Islamic insurance policy dies, the participant's legal heirs inherit the money paid by the *takāful* operator. In other words, the payment of the money by the *takāful* operator to the nominee appointed by the deceased participant is subsequently distributed among the participant's legal heirs in accordance with the *farā'id* law. This arrangement takes place even though there appears to have been no Islamic legal ruling or *fatwā* issued by any *fatwā* council in Malaysia either at national or state level regarding the position of the money payable as compensation by the *takāful* operator on the occurrence of the death of a participant.

The distribution of the proceeds among the legal heirs of the deceased participant has seemingly become standard practice in Malaysia despite no clear injunction in the Qur'an and the Prophetic Traditions. Section 65(1) of the Malaysian Takaful Act, 1984 stipulates that the payment of *takāful* benefits is made to the proper claimant. Section 65(4) explains that the 'proper claimant' is a person who claims to be entitled to the sum in question as executor of the deceased or who claims to be entitled to that sum under the relevant law. Unlike the proceeds of conventional life insurance, which is clearly regarded as '*tarikah*' by section 167(2) of the Insurance Act, 1996, the above statutory provision provides an unclear position regarding the status of Family *takāful* benefits, and whether they are heritable or not. Arguably, the practice is relatively the same as for the proceeds of the life insurance policy. As an example, in the present Family *Takāful* application form of the Takaful National Sdn. Bhd., there is a provision regarding the obligation of the nominee appointed by the participant. The relevant provision reads:

“2. The Applicant hereby declares that both the First Nominee and the Second Nominee have been instructed to, and, to the best of the Applicant's knowledge shall, distribute the Benefits to the Applicant's legal beneficiaries under the applicable *Syariah* rulings.”

It is submitted that the compulsory insertion of this clause, which strictly imposes the obligation upon the nominee to distribute the money among the heirs is not based on sound argument. It appears that the status of the money whether heritable or not is still arguable. With the insertion of this clause, every participant is necessarily forced to ascertain the receivers of the money and as a result, it becomes clear that the money is considered part of the '*tarikah*' of the dead participant.

The discussion on the heritability of *takāful* and insurance money revolves around four arguments, namely the legitimacy of the proceeds from an Islamic perspective, the deceased's efforts, the payment of *diyyah* or blood-wit, *damān* or monetary compensation and the objectives of the *takāful* and conventional insurance policies.

a) The Legitimacy of the Proceeds from the Perspective of Islamic Law

The question of legitimacy has been discussed in detail while examining the concepts of *takāful* and conventional insurance. This question of legitimacy is significant because if the proceeds are not legitimate, no question of heritability will arise, as illegitimate or unlawful wealth is not subject to inheritance from the perspective of Islamic law. From the arguments presented in the above discussion, it is submitted that the proceeds of the life *takāful* policy and the conventional life insurance policy are legitimate and lawful. This being the case, the proceeds are subject to inheritance law.

b) Is it the Financial Right of the Policyholder?

It could be contended that without the participation of the policyholder, the insurance company or the *takāful* operator would never pay the money.⁵⁵ On this basis, the effort of the participant by joining the policy and paying the monthly premium suffices to constitute the proceeds as *tarikah*. In other words, it is the contract entered into by the policyholder either for family *takāful* or life insurance, which generates the benefits. This contention is based on the fact that one's effort becomes a justification for ownership. As

⁵⁵ Dato' Hasbullah, interview.

a result, the money is divisible among the heirs of the policyholder according to the law of *farā'id*.

The payment of *takāful* and insurance benefits upon the death of the policyholder before the maturity of a plan seemingly belongs to the deceased policyholder's legal heirs on the grounds that it is the product of the deceased's effort and hence is part of his *tarikah*. Even though the money comes into existence only after the participant's demise, it is the effort of the participant by entering into the contract, which realizes the financial assistance in favour of his legal heirs upon his death. This is relatively analogous to the case of the fish netted by the deceased or the animal caught in the trap fixed by the deceased, which occurs after his death.⁵⁶ The fish or the animals are part of the deceased's *tarikah* because it is the deceased's effort that has caused the ownership.

Having said that, it should be noted that there are differences between the cases of animals or fish trapped after the deceased's death and the concept of financial assistance in the family *takāful* and life insurance business. The animal or fish trapped or netted is the immediate product of the deceased's effort. This is a kind of activity that directly generates wealth in favour of the deceased.

The proceeds of family *takāful* and life insurance can not be treated as being exactly the same as the above examples. *Takāful* and insurance contracts realize the obligation upon the company to pay. They do not create wealth in the insured's ownership, but rather they

⁵⁶ Al-Syarbīnī, p. 3.

create an obligation to ease the burden suffered due to the losses of fellow participants.⁵⁷ The participant's contribution is his or her donation for the good of others, not for himself and is therefore different from the case of a trap, which is deliberately fixed by the deceased for his own gain.⁵⁸ The proceeds payable belong to the participants, not the *takāful* operator.⁵⁹

Therefore, even though it is the deceased's effort, the money is more appropriately to be regarded as an obligation upon the *takāful* operator or the insurance company to pay, as financial assistance to the insured's family in case of death. This monetary obligation is directly based on the agreement or promises stated in the contract. In other words, the *takāful* operator or insurance company agrees to pay the proceeds, and the matter of to whom they are paid should be freely and totally left to the agreement between the policyholder and the company.

If the participation in the *takāful* and insurance activity renders the participant the right to the proceeds as his financial right, as claimed by some Muslim scholars,⁶⁰ it would mean

⁵⁷ Yusof, Mohd. Fazli, *Takaful; Sistem Insurans Islam*, p. 7.

⁵⁸ Bakar, Mohamad Daud, interview on 11th September 2003. He is the President/CEO of International Institute of Islamic Finance (IIIF) Inc. (BVI) and Amanie Business Solutions Sdn. Bhd. Prior to this he was the Deputy Rector of Student Affairs and Development and an Associate Professor at the International Islamic University Malaysia. He is the authority in Islamic Legal Theory and Islamic Finance in Malaysia. He is currently a member of the Central Syari'ah Advisory Council of the Central Bank of Malaysia and Securities Commission of Malaysia. He is also a member of Syari'ah board of Accounting and Auditing Organization for Islamic Financial Institution (AAOIFI) (Bahrain), International Islamic Financial Market (IIFM) (Bahrain), and Dow Jones Islamic Market Index (New York). See International Institute of Islamic Finance, Inc., Events [online], available from: http://www.iiif-inc.com/iiif/cvc_04.php [accessed 31st October 2005].

⁵⁹ Ibid.

⁶⁰ Ibid. According to Mohamad Daud Bakar, there are some Muslim scholars who claim that the right to the proceeds is a financial right of the policyholder. In his article, he argued that the family takaful benefits constitute the participant's estate on the ground that sections 65(1) and (4) of the Takaful Act, 1984 state that the proper claimant would claim the money on his capacity as an executor and not as the beneficiary. See Bakar, Mohd Daud, "Kedudukan Hibah Di Dalam Perundangan Islam dan Sivil (Rujukan Khas Untuk Takaful Keluarga)", *the closed seminar on Hibah: It's Model and Application in Takaful Perspective*, on 12th March 2003 at Parkroyal, Kuala Lumpur.

that by merely joining the insurance or *takāful* plan, the participant is engaging in a business which entitles him or her to financial benefits in terms of wealth creation in his or her or the family's favour. This would also mean that simply by joining the scheme, the participant is entering into a contract that would in return provide an amount of money exceeding the amount contributed.

If this argument is accepted, it is worth noting that it would amount to a *ribāwī* transaction and undoubtedly be unlawful. This in turn would make the whole *takāful* or conventional insurance contract invalid according to Islamic law. Being a *ribāwī* transaction, there would be no issue regarding the succession of the money payable because the money received by the participant or his beneficiaries clearly constitutes '*ḥaram*' and therefore not subject to inheritance, apart from the premiums the participant has paid. At the same time, it would be equivalent to a gambling activity in the sense that the policyholder enters into the contract with the hope of gaining more than he or she contributes based on chance.

c) The Analogy to the Payment of *Diyyah* or *Ḍamān*

It is assumed that the payment of money in favour of the dead insured's or participant's legal heirs as compensation is analogous with the payment of *diyyah* in the case of murder in Islamic law. The *diyyah* (blood-wit) or monetary compensation imposed against the murderer is paid in favour of the legal heirs of the victim.⁶²

⁶² Al-Quran al-Nisā' (4): 92 which reads "Never should a believer kill a believer, but (if it so happens) by mistake, (compensation is due); if one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely."

It should be noted that the payment of *diyyah* to the heirs of the victim in the case of an intentional killing for example, is based on an Qur'ānic injunction and is apparently different from the payment of benefits under the Family *takāful* or conventional life insurance policy. The entitlement of legal heirs to the *diyyah* is based on their relationship with the victim, whereas the objective of the *takāful* or insurance policy when paying benefits is to provide financial help and assistance for the purpose of easing the burden of the insured's dependants. In other words, if the money payable by the *takāful* policy is distributed among the legal heirs following the *farā'id* law, the basic purpose and objective of *takāful* might be defeated because the money could possibly be distributed in favour of heirs who are not really affected financially by the insured's or participant's demise.

It should be observed that a legal heir is not necessarily dependent on the policyholder. The dependants of the deceased are normally those who depended financially for their lives and maintenance on the deceased. This may include adopted sons and daughters who might be in real need of the deceased's financial support for things such as education. It may also include relatives who are not heirs but, due to his or her generosity, the deceased voluntarily supported them especially in terms of education. These are examples of people who are *de jure* excluded from inheritance according to the *farā'id* law. If the payment is distributed according to the *farā'id* law, these people would receive nothing whereas they are the people who are most affected by the demise of the policyholder. In other words, excluding these dependants from receiving any benefit from

the payment, and including those who are not affected financially by the death would contradict the purpose of the *takāful* or insurance activity.

According to Tanzil al-Rahman, the monetary compensation conferred by the government in favour of the family of a dead employee, a person who dies in an accident due to the negligent conduct of a motorist or a one who dies in a riot, should be distributed following the *farāi`d* law as applicable to the blood-wit under the Islamic law of *diyyah*.⁶³ He states that even though the compensation money payable in the above-mentioned cases does not belong to the deceased and does not constitute the deceased's '*tarikah*', it is distributed among the deceased heirs as prescribed in the Qur'ān.⁶⁴

There appears to be no Qur'anic injunction or Prophetic Tradition stating that monetary compensation must be distributed according to the *farā`iḍ* law.⁶⁵ In the case of compensation paid by a government or employer to the employee's family upon his or her death, it is in the nature of financial help rather than a legal obligation. If all kinds of compensations regardless of their underlying nature are divisible according to the *farā`iḍ* law, it might prevent a government or employer from paying such compensation due to the fact that the money would not necessarily reach the actual affected people. It is not an exaggeration to note in this context that the same idea should apply to the *takāful* or

⁶³ Rahman, Tanzil-ur, p. 407.

⁶⁴ Ibid.

⁶⁵ There was a *fatwā* issued by the National Fatwa Council of Malaysia on 19th September 2000 that monetary compensation does not constitute a part of the deceased's estate. A similar fatwa was issued by the Terengganu *Fatwā* Council stating that monetary compensation does not constitute the estate of the deceased. See www.islam.gov.my in the category of Wang Pampasan and also Wang Ganjaran Perkhidmatan.

insurance benefit in the sense that it is a kind of financial help and hence limiting its distribution to the heirs of the deceased would defeat the purpose of the activity.

d) The Objectives of the *Takāful* and Conventional Life Insurance Policy

The primary objective of the *takāful* and life insurance policy is to provide financial assistance to the participant's or insured's family. If the payment is payable strictly only to the heirs of the participants or insured, it implies that it is the property of the deceased. If this is so, the money is subject to the fulfilment of certain rights that must be carried out before distribution to the heirs, such as the payment of burial expenses and the deceased's debts. This would mean that the compensation is not being used to ease the burden of the family but rather it seems that other fellow participants are under an obligation to settle the debts of the dead participants. In this regard, the creditors would have prior rights over the participant's dependants. The dependants would only receive the benefits after the creditors' claims have been satisfied.

Furthermore, by considering it an estate for inheritance purposes, the *takāful* and insurance activity becomes a source of income. This is contradictory to the purpose of *takāful* and insurance: mutual cooperation to ease a burden. Moreover, rendering it a source of income may encourage a participant to deliberately undertake activities that could endanger his or her life in order to realise the income. This is in fact an attitude that clearly contradicts the aim of insurance. A life can not be exchanged for money.

6.1.6. Conclusion

Considering the above arguments, it is submitted that the money payable by the *takāful* operator and the insurance company in the case of the death of a participant or insured should not be distributed among his legal heirs. The analogy between such payments and the payment of *diyyah* in the case of a trapped animal or fish, and the payment of monetary compensation based on the doctrine of *ḍamān* seems incorrect. Inserting a clause legally and strictly imposing a duty on the appointed nominee to distribute the money among the legal heirs of the dead participant seems to contradict the objective of both the *takāful* and insurance activity. Inserting such a clause as currently practiced in Malaysia is not based on valid arguments.

6.2. THE GOVERNMENT RETIREMENT BENEFITS

6.2.1. Introduction

The Government of Malaysia provides a retirement benefits scheme for pensionable officers in government service who have retired in accordance with Malaysian pension laws. These benefits are granted only in favour of government employees who have gained permanent employment status. In order to qualify for this status, a government employee must have been confirmed in his employment and must have completed not less than 3 years of reckonable service.⁶⁸

This research is an attempt to analyse the related issues of the scheme in order to answer the question regarding its heritability in the case of Malaysia. The current position is rather confusing because of the differences in opinion among Muslim scholars regarding whether or not the scheme is heritable upon death. Some jurists are of the view that the Malaysian Government's current implementation of this scheme by imposing strict rules regarding the entitlement of specific persons to the benefits after the death of a pensionable officer does not meet the *Syarī'ah* principles, whereas according to others it does. This is a contemporary issue, and an answer can not be found by simply referring to the Qur'an, the Prophetic Traditions and the classical writings of Muslim scholars. Thus, this research will analyse in depth the nature of the retirement benefits scheme, as well as the legal contract of service between the Government and the officer. The issue of heritability can only be addressed after gaining a comprehensive understanding of what

⁶⁸ <http://www.jpa.gov.my/jpai/sistem/pencen/default.htm> [accessed 20th January 2004].

the scheme is. The difference in opinion of Muslim scholars on this issue are studied and it will be seen that, unfortunately, these opinions are not based on convincing facts, and, furthermore, are not informative enough to allow Muslims an in depth understanding of the verdicts.

6.2.2 Differences of Opinion among Muslim Scholars Regarding the Heritability of Government Pension Benefits

There are various opinions among Muslim scholars regarding the question as to whether or not retirement benefits, in particular the pension, are heritable by the legal heirs upon the pensioner's death. Looking into these opinions, the main issue that creates disagreement is to do with whether the scheme is the right of a pensionable officer or not. In other words, the determination of the heritability of the scheme depends primarily on whether it is the pensioner's right or not.

According to Tanzil al-Rahman, the pension is a right of the deceased officer, and hence it is part of his or her estate.⁶⁹ He argues that the pension is in fact an additional benefit of the employee that arises from the terms of service. As it is included in the terms of service, it is therefore held to be a justifiable right of the employee upon the completion of the period of service as stipulated under the service regulations. He added that without any valid reason, an employee should not be deprived of such a right.⁷⁰ However, his opinion is based on his analogy to the monthly salary following his reference to the

⁶⁹ Rahman, Tanzil-al, p. 400.

⁷⁰ Ibid.

decision of the Supreme Court of Pakistan in the case of A.W.Issac.⁷¹ In this case, the Court held that the salary paid by the Government to a government servant is the right of the latter.⁷² Based on this, he asserts that the only difference between the right to a salary and the right to a pension is merely that the right to a salary is an existing right, whereas the right to a pension as a gratuity is a contingent, deferred and conditional right which, on arising out of the contingency or fulfilment of the condition comes into existence and becomes enforceable in law against the employer.⁷³

It should be noted that Muda points to the opinions of Zaid Muhammad and Abdullah Abu Bakr, two prominent Muslim scholars at the Ahmad Ibrahim Kulliyah of Laws, the International Islamic University of Malaysia. According to Zaid Mohammad, a pension paid by the Government in favour of the pensionable officer is part of the estate of that officer after he or she dies.⁷⁴ In other words, after the pensionable officer dies, the pension must be paid in accordance with the *farā`id* law. The argument here is that such an entitlement is deliberately allocated by the Government and hence, it is the pensionable officer who owns the original title to the pension and not the spouse or children. Abdullah Abu Bakar shares the same view and focuses on the question of ownership. He further suggests that the distribution of the pension should be made in accordance with the *farā`d* law at the time it is paid.⁷⁵

⁷¹ PLD 1948 P.C.150, cited in Tanzil-ur-Rahman, p.400.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Muda, Zulkifli, *Hak-Hak Akibat Pertukaran Agama Dan Mazhab*, unpublished Ph.D thesis, University Kebangsaan Malaysia, 1999, p. 426-427.

⁷⁵ Muda, pp. 426-427.

Tanzil al-Rahman writes that, according to Mawlana Mufti Muhammad Sabir in his book *Mishkāt al-Sirāj*, the pension is not the right of a pensioner but a reward and therefore it is not the estate of the deceased. In contrast, Zulkifli Muda in his thesis disagrees with the opinions of Zaid Mohamad and Abdullah Abu Bakr. To him, the pension is not an estate of the deceased on the grounds that it is a kind of reward from the Government.⁷⁶ His argument is that the calculation used for ascertaining the amount of the pension is made at the time it is received and not at the beginning of the retirement. Furthermore, it is a kind of financial assistance from the Government to the pensionable officer and his or her family.⁷⁷

A *fatwā* issued by the Terengganu Fatwa Council stated that a government officer's pension entitlement is not heritable. This *fatwā* is based on the notion that the scheme is similar to a reward and compensation arrangement. However, unfortunately, the *fatwā* does not discuss the issue comprehensively. It fails to cite arguments and reasoning to support the ruling. Furthermore, this *fatwā* is clearly confined merely to pensions and does not cover other kinds of benefits under such schemes.

6.2.3. The Significance of Government Retirement Benefits

It is well understood that when a person retires, they lose a significant source of earnings, which not only affects them but also the family. When an employee retires from a job that has been their only source of income, they and their family are left in a very vulnerable situation. As a government servant, an officer is offered two types of

⁷⁶ Ibid.

⁷⁷ Ibid.

retirements, known as the compulsory retirement and the optional retirement.⁷⁸ It is a matter of fact that a government officer has to retire from his job once the age of compulsory retirement is attained, which is fifty five, or whenever required to do so by law⁷⁹ and hence, has no choice except to lose the source of income on which he or she and the family have depended on.

The introduction of government retirement benefits for its officers is therefore quite useful. It seems that this scheme allows the financial burden of retired officers to be released. It is among the objectives of the pension schemes introduced by the government to provide financial security for its retired officers and their dependants.⁸⁰ Besides providing this financial facility upon retirement, the benefits are also intended as a reward from the Government to the retired officers in terms of recognition of their loyalty and dedication during their service.⁸¹ It is also regarded as compensation from the Government to officers who are forced by law to retire or who die due to injuries or sickness in the course of performing their official duties.⁸²

⁷⁸ <http://www.jpa.gov.my/jpai.sistem/pencen/default.htm>

⁷⁹ Besides the attainment of the compulsory age of retirement, the other grounds for compulsory retirement are medical, the abolition of the office held by the officer, reorganization of the department for the purpose of facilitating improvement in the organization, the termination of the officer's employment in the public interest, the officer has voluntarily acquired citizenship of another country (effective for officers appointed on or after 16 May 1986) and that the officer has provided false information for the purpose of his appointment to the public service or the service of a statutory or local authority (effective for officers appointed on or after 12 April 1991. See Ibid.

⁸⁰ Other objectives of the pension scheme are as a reward from the Government in recognition of the officer's loyal and dedicated service, as an inducement to officers to remain in the Government's service and to provide compensation to officers who are forced to retire or die due to injuries or sickness in the course of performing their official duties. See *ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

The permanent Government officers and their dependants are constitutionally granted retirement benefits. Their rights to these benefits are well protected and enshrined in article 74 of the Federal Constitution as well as in paragraph 6(d) of List 1 of the Ninth Schedule of the Federal Constitution, which among other things states that pensions and compensation for loss of office; gratuities and conditions of service are federal matters.

Article 147(1) further reads:

“The law applicable to any pension, gratuity or other like allowance (in this article referred to as an “award”) granted to a member of any of the public services, or to his widow, children, dependant or personal representatives, shall be that in force on the relevant day or any later law not less favourable to the person to whom the award is made.”

The Government introduced the scheme to protect retired government officers and their dependants upon retirement in terms of financial facilities. By virtue of the abovementioned constitutional statutory provisions, the Federal Government enacted several Acts and statutory regulations to govern matters relating to retirement benefits. These are the Pensions Act, 1980 (Act 227), the Pensions Re-Computation Act, 1980 (Act 228), the Pensions Adjustment Act, 1980 (Act 238), the Statutory and Local Authorities Pensions Act, 1980 (Act 239), the Pensions Trust Fund Act, 1991 (Act 454) and the Pensions Regulations, 1980.

The government retirement benefits are covered by the public sector pension scheme. This scheme covers such benefits for officers in the Public Service, employees of Statutory and Local Authorities, Members of Parliament and the Administration, Political Secretaries, Judges and the Armed Forces. The scheme is administered by the Pension Division of the Public Service Department, which is entrusted with the responsibility for

administering retirement benefits efficiently and effectively in accordance with the regulations currently in force, to ensure that eligible pensioners enjoy the benefits of retirement promptly.

6.2.4. Types of Retirement Benefits

It is important to note that the retirement benefits⁸³ are mainly for the benefit not only of the retired officers but also their dependants. In this regard, there are benefits allocated in favour of the officer and benefits that are specifically for dependants. The service pension and the service gratuity are solely for the pensionable officer. The service pension is granted to the officer who retires in accordance with the provisions in the pensions laws whereas, the service gratuity is a lump sum payment granted upon retirement. The former is paid every month after retirement and the latter is paid once upon retirement.

The pensionable officer is also entitled to a disability pension, an alimentary allowance and a cash award in lieu of accumulated leave. The disability pension is granted to an officer who is required to retire as a result of sustaining an injury in the course of performing an official duty or because of a travel accident or from contracting a disease to which he was exposed to by the nature of his duty. This benefit is in addition to the service pension. However, it is only granted if the injury sustained or disease contracted is not directly attributable to the officer's negligence or misconduct. The alimentary allowance is a monthly payment and may be granted when a pensioner is adjudged a bankrupt or convicted and sentenced to a term of imprisonment or death, whereupon his pension ceases with immediate effect. The cash award in lieu of accumulated leave is for

⁸³ <http://www.jpa.gov.my/jpai.sistem/pencen/default.htm>

officers in the Public Service and is given in exchange for leave not taken on account of exigencies of service whereby the officer is permitted to accumulate up to half of his vacation leave eligibility subject to a maximum of 15 days in any one year.

A derivative pension, a derivative gratuity and a dependant's pension are especially allocated to the dependants of the pensionable officer. A derivative pension is granted to the widow, widower or child of a permanent and confirmed officer who dies in service or during retirement. On the other hand, a derivative gratuity is a lump sum payment granted to the widow, widower, child or dependant parent of the deceased or the legal personal representative of the deceased officer if the officer dies in service. A dependant's pension is granted to the dependants (widow/widower, child or dependant parent, whichever applicable) of the officer who dies as a result of sustaining injuries in the course of performing his official duty or in a travel accident or from contracting a disease to which he is exposed to by the nature of his duty or dies within 7 years of sustaining the injury or contracting the disease. This dependant's pension is in addition to the derivative pension payable to the widow, widower or child.

All these benefits payable to the dependants of the pensionable officer are made only after his or her death. In other words, these payments seem merely to replace the benefits that are received by the pensionable officer during retirement. After the pensionable officer dies either during service or after retirement, the dependants, including any adopted children and pensionable parents, are paid all these benefits.

6.2.5. Do the Retirement Benefits Constitute an Absolute Right of a Pensionable Officer?

It is to be noted that the objectives of the government retirement benefits, they come into existence as a result of an initiative taken by the Government. By offering such benefits, the Government can attract officers to stay in the public sector considering the fact that such benefits will protect them and their families in terms of financial resources after retirement. It is also a way for the Government to demonstrate its appreciation of the loyalty and dedication shown by pensionable officers during their service. In this regard, these benefits are not considered as an entitlement of the pensionable officers. They are merely acts of generosity on the part of the Government in conferring rewards or assistance to their former staff after they retire. This is supported by the statutory provision of section 3(1) of the Pensions Act 1980:

“(1) No officer shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act.”

Section 3(1) of the Statutory And Local Authorities Pensions Act 1980 also states to similar effect:

“No employee shall have an absolute right to compensation for past service or to any pension, gratuity or other benefits under this Act.”

In *Haji Wan Othman & Ors v Government of the Federation of Malaya*,⁸⁴ the Court was asked to declare the entitlement of several government pensioners to the full money value of the full pension for the remaining period of their lives after ten years of retirement.

⁸⁴ [1965] 2 MLJ 31

The Court decided that the pension scheme is not an absolute right of a government officer and as the pensioners had been paid the gratuity in lieu of their pension they had forfeited their eligibility for the full pension. The Court therefore refused to make a declaration in the pensioners' favour.

There are some circumstances that prevent pensionable officers from receiving the benefits. If it were an absolute right of the pensionable officers, there should be nothing that could bar them from receiving these benefits. However, as it is a mere creation of the Government, there are limitations that may hinder the pensionable from enjoying these benefits. Such a hindrance is stated in section 3(2) of the Pensions Act 1980 that reads:

“Where the Yang di-Pertuan Agong is satisfied that an officer has been guilty of negligence, irregularity or misconduct, the Yang di-Pertuan Agong may reduce or withhold a pension, gratuity or other benefit for which the officer would have been eligible but for the provision of this section.”⁸⁵

It is therefore understood that because these benefits are a mere product of the Government to fairly treat its former employees, the Government is free to insert any rules and regulations pertaining to the entitlement. On the other hand, if it were an absolute right of the pensionable officers, the Government certainly would have no right to add any conditions restricting or preventing the officers from exercising their rights. Furthermore, the amounts received from these benefits are decided unilaterally by the Government and based on a mathematical calculation exclusively and solely prepared by

⁸⁵ The similar effect is stated in section 3(2) of the Statutory And Local Authorities Pensions Act 1980 which reads: “Where it is established to the satisfaction of the Minister by an appropriate authority that an employee has been guilty of negligence, irregularity or misconduct, the Minister may reduce or withhold the pension, gratuity or other benefit for which such employee would be eligible but for this section.”

the Government. The pensionable officer receives the benefit without contributing any money; his contribution is merely his long, loyal and dedicated service.

With regard to pension adjustments, a restriction is imposed whereby these are only granted to pensioners who are resident in Malaysia.⁸⁶ Again, this supports the contention that it is not an absolute right of the pensioner. This regulation rules out the entitlement to the pension adjustment of a pensioner who is not resident in Malaysia. In *Dato' Ahmad Bin Yunus v Kerajaan Malaysia*,⁸⁷ the plaintiff, a retired government servant, sought a declaration that he, for the purpose of ss 1(2) and 2 of the Pensions Adjustment Act 1980, was a 'resident of Malaysia' and therefore entitled to all adjustments made and /or to be made in favour of pensioners resident in Malaysia under the Act. The defendant argued that the plaintiff had ceased to be a resident of Malaysia and hence was not entitled to the pension adjustment. The Court however held that since the plaintiff had initially stayed in the United Kingdom only in order to protect the Malaysian Government's interest, he should not be in any way penalized for obtaining the permanent residence status in the United Kingdom. The Court further ruled that to deprive him of his pension adjustment benefits would be unfair and unjust.

Similar restrictions can be found when one observes any of these benefits. For example, in the case of a derivative pension, which is payable to the widow, widower or children, if the widow or widower remarries, or the child attains the age of 21 years, the derivative pension ceases to be payable. The same applies to a child who is pursuing education in an

⁸⁶ <http://www.jpa.gov.my/jpai/sistem/pencen/default.htm>

⁸⁷ [2002] 1 MLJ 288

institution of higher learning leading to a first degree, the derivative pension ceases to be payable upon their completion of the course, if they cease to receive such education or if they marry. In the case of a disability pension, an officer who has already been awarded compensation under the Workmen's Compensation Act 1952 is not eligible for a disability pension.

6.2.6. Do the Retirement Benefits Arise from the Terms of the Contract of Service?

To further analyze the nature of the retirement benefits, it is best to consider the agreement between the Government i.e. the employer, with the employee that determines the rights and benefits as well as the duties of both parties. The significant issue to be discussed here is whether the contract of service between both parties gives rise to the retirement benefits in favour of the employee. In this regard, if the contract obliges the employer to provide all these benefits, it would seem that the benefits are the rights of the employee and if not, the statutory provisions mentioned previously are supported and they are not the absolute right of the employee.

In Islamic law, the contract of service is a type of contract of hire or *ijārah*.⁸⁸ The four Sunni schools of law, in their respective definitions of the contract of hire unanimously agree that it is a contract exclusively based upon usufruct or *manfa'ah*.⁸⁹ The Mejlle defines *ijārah* as the sale of a known benefit in return for its known equivalent.⁹⁰ In other words, it is a type of sale contract in which the subject matter is the usufruct or

⁸⁸ Mahmood, Nik Ahmad Kamal Nik, *Kontrak Pekerjaan: Satu Analisa Perbandingan*, Al-Ahkam, Jilid 7, Dewan Bahasa Dan Pustaka, Kuala Lumpur, 2000, p. 97.

⁸⁹ Al-Zuhaylī, vol.4, pp. 730-731.

⁹⁰ The Mejlle, article, 404.

manfaʿah.⁹¹ Unlike the corpus of the thing that exists at the beginning of the contract, the usufruct, which becomes the subject matter of the contract of hire, comes into existence only after the completion of the contract.⁹² With regard to the contract of service, this is a contract whereby one party contracts to provide the usufruct in terms of providing a service to the other party.⁹³ In other words, it is a contract of hiring a party for employment purposes.⁹⁴

The contract of hire does exist in Islamic law and is based on the Qurʾānic verse al-Ṭalāq (65): 6. This verse expresses the necessity of a father to give wages to the mother who offers to breast-feed his child. A similar idea is found in verses al-Qaṣaṣ (28): 26 and 27 regarding the appointment of a person as a shepherd where in return, the promise of the daughter's hand in marriage was made in favour of the shepherd. There are also several *ḥadīths* that explain the necessity of giving wages to workers for their services, which support the existence of the contract of hire in Islamic law as prescribed in the Qurʾān. Abū Hurayrah stated that the Prophet Muhammad ordered the giving of wages to the worker before the worker's sweat becomes dry. In another *ḥadīth*, the Prophet Muḥammad mentioned the significance of stipulating in the contract of service the amount of wages to be paid for the service rendered.⁹⁵

⁹¹ Al-Zuhaylī, p. 730.

⁹² Ibid, p. 736.

⁹³ Teng Kam Wah, *Who is an employee?*, [1997] 2MLJ ci.

⁹⁴ The Mejelle, article 421.

⁹⁵ Al-Zuhaylī, pp. 730-731

For a contract of service to be valid, there are four essentials that must be fulfilled according to the majority of Muslim scholars: the Mālikīs, Syāfī'īs and Ḥanbalīs. The four essentials are that there must be two parties to the contract as well as an offer and an acceptance and the wage and usufruct.⁹⁶ The Ḥanafīs on the other hand consider only the hire pronouncement and the wage as the essentials of the hire contract.⁹⁷ Regardless of this difference, the most significant element to be discussed is the right of the employee to receive a wage for services rendered. The wage in favour of the employee is unanimously agreed upon by the four Sunnī schools of law as an essential of the contract of service; without the element of a wage the contract of service does not exist.

In this regard, the entitlement to a wage arises out of the service offered by the employer. It is stated in article 424 of the Mejlle that the right of the common employee to pay arises as a result of the work being done. This means that once the employee resigns, he is no longer entitled to a wage. However, if it is a condition stipulated in the contract and agreed upon by both parties that there is a continuity of the entitlement to the wage after the expiration of the contract, the employee is still entitled to the wage.

It is important to note that the only absolute right of an employee that arises from his contract of service is the wage. It is submitted that other employee entitlements to payment and benefits are completely dependent upon the conditions agreed upon by both parties. The contract of service is equivalent to any other commercial contract such as a contract of sale. In this contract, there is an exchange of things that constitute both the

⁹⁶ Ibid, pp. 731.

⁹⁷ Ibid.

subject matter and the consideration of the contract. The service rendered by the employee is the subject matter of the contract and the wage paid by the employer to the employee is the consideration. As with the contract of sale, the seller is entitled to the proceeds of the sale and the buyer is entitled to the goods delivered. Besides this, any conditions inserted in the contract for the benefit of either party and mutually agreed upon by them are lawfully binding upon them as stipulated.⁹⁹

In *Haji Wan Othman & Ors v. Government of the Federation of Malaya*,¹⁰⁰ the Court stated that the right to the pension scheme does not arise from the contract of service:

“In determining this question it is in my opinion sufficient only to examine the nature of Government pensions. There is no doubt that it is in Government’s interest to pay pensions because they ensure devoted service and the retention of the service of experienced and skilled officers, but pensions are not payable by Government because of a contract with its employees; they are payable by virtue of the Pensions Ordinance, 1951, and its predecessor from which it departs little if at all. The Ordinance does not say that when a public servant has worked so many years at such and such a salary he shall be entitled to receive so many pension a month from Government.”

6.2.7. The Difference between the Government Retirement Benefits Scheme and the Employee Provident Fund (EPF)

The Employee Provident Fund is a government statutory body that provides financial security for its members, especially after retirement, through a compulsory savings scheme. Under section 6A (1) of the Pensions Act, officers are given the option of

⁹⁹ Al-Zuhaylī, p.736. The mutual agreement of both parties to the contract is a condition necessary to make the contract valid. This is based on the Qur’ānic injunction which prescribes the mutual agreement of the parties to the contract in al-Nisā’ (4): 29.

¹⁰⁰ [1965] 2 MLJ 31

choosing either the government pension scheme or the Employees Provident Fund Scheme:

“An officer appointed on or after the commencement of this section shall, before being confirmed in his appointment, be entitled to opt for the Employees Provident Fund Scheme.”

This scheme was introduced on 1st October 1951 under the Employee Provident Fund Act 1951.¹⁰¹ The Act has been amended several times and the current Act is the Employee Provident Fund Act 1991. Unlike the Public Service Pension scheme, which is a pension scheme governed by the Government, the EPF is a kind of savings scheme. Being a savings-based scheme, the EPF allows the contributors to withdraw their EPF savings at age 55 and enjoy a comfortable life without worrying about not having a regular income upon retirement.¹⁰² As supplementary benefits, members are also allowed to utilize part of their savings for house ownership, children’s education and healthcare.

The employer and the employee contribute to the EPF member’s account every month. These contributions are based on the remittance of a percentage of the employee’s monthly salary; currently employers contribute 12 per cent of the employee’s salary while the employee contributes 11 per cent.¹⁰³ This combined contribution is then deposited in various banks where it is invested to accumulate interest or dividends. By

¹⁰¹ http://www.kwsp.gov.my/english/body_epf_frequently_asked_questions.html [accessed 8th August 2003]

¹⁰² Ibid.

¹⁰³ Ibid.

the time a member retires, he has a considerable amount of savings, with compounded dividends, which he can withdraw to provide for his financial needs.¹⁰⁴

There is an important difference between the pension scheme and the EPF. The retirement benefits that provide financial facilities for the pensionable officer come from a fund to which the Government is the sole contributor. There is no monetary contribution from the employee into the fund that is in turn used to pay these benefits. On the other hand, the EPF is a savings-based scheme and the members of the scheme are the absolute owners of the money in their account. The payment made by the employer to the employees' accounts can therefore be regarded as a gift *inter vivos*, which entitles the member to full ownership. In other words, no question is raised in terms of the heritability of the EPF member's account. The money belongs solely to the EPF member and therefore, when he or she dies the money in the EPF account should be distributed in accordance with the law of *farā'id*.

6.2.8. Conclusion

To sum up, based on the contentions discussed above, it is submitted that the Government retirement benefits are not heritable. The current practice adopted by the Government of granting such benefits to certain persons upon the death of the pensionable officer does not apparently contradict the principles of the *Syari'ah*. The Government is therefore free to determine in whose favour the benefits may be granted. When deciding who the rightful recipients are the Government should certainly take into account appropriate

¹⁰⁴ Ibid.

criteria such as the level of dependency of the recipients upon the dead pensionable officer.

CHAPTER SEVEN

THE JURISDICTION AND FUNCTIONS OF THE SYARIAH COURTS AS REGARDS THE ISLAMIC LAW OF SUCCESSION

7.1. Introduction

The State List in the Ninth Schedule of the Federal Constitution lists the matters pertaining to Islamic law, including the Islamic law of succession, that are within the power of the State Legislative Assembly and hence, it is the Syariah courts which should have exclusive jurisdiction to deal with these matters. However, looking into the way the administration of deceased Muslims' estates is undertaken at present, it is apparent that the opposite phenomenon is currently and legally practiced.

This chapter undertakes to analyze and examine the current jurisdiction of the Syariah courts over matters pertaining to the Islamic law of succession in Malaysia. The relevant statutory provisions of the Federal Constitution, federal Acts, state enactments and the Malaysian case law are analyzed, examined and commented on. This study is necessary because it presents the judicial discussion on the statutory task carried out by the Syariah courts pertaining to Muslim succession. These courts are supposed to be the most appropriate forum for the administration and adjudication of such cases. As a personal law of Muslims, its position in the Federal Constitution and the interest of Muslims must

be taken into serious consideration in the current implementation and future legislative reforms of the law.

7.2. State Legislative Powers and the Establishment of the Syariah Courts

The federation system as applied in Malaysia characterizes the division of power between the Federal Government and the state governments. The power of governing the country is centralized under the Federal Government. The states' powers are confined to the individual territorial states and no state has jurisdiction beyond its own territory.¹ The Federal Constitution is the supreme law in Malaysia.² It distinguishes the scope of legislative powers conferred upon the State Legislative Assembly from those of the Federal Legislative Assembly i.e. the Parliament. Article 74 (2) of the Federal Constitution provides:

“Without prejudice to any power to make laws conferred on it by any other Article the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.”

The State List of the Ninth Schedule of the Federal Constitution spells out in detail the matters that fall within the State Legislative Assembly's power to enact laws. The Syariah courts, which are regarded as religious courts³ were accordingly established by virtue of Item 1 of the State List. The State List provides that the constitution, organization and procedure of the Syariah courts are within the jurisdiction of the State

¹ Hashim, Tun Mohamed Suffian, *An Introduction to the Constitution of Malaysia*, Kuala Lumpur: Government Printer, 1972, p. 10-17.

² Article 4 (1) states: “ This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

³ According to Mahmud Zuhdi, the present Malaysian Syariah courts do not qualify as Syariah courts according to the Syariah law, but are religious courts as far as secular thought is concerned. See Zuhdi, Mahmud, *Pengantar Undang- Undang Islam di Malaysia*, Kuala Lumpur: University of Malaya, 1997, p. 155.

Legislative Assembly with the exception of the Federal Territories. Matters pertaining to the administration of Islamic law are also within the State Legislature's jurisdiction. The State List (List II) of the Ninth Schedule of the Federal Constitution states that:

“Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic Law and the personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; *wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; *Zakat*, *Fitr*ah and *Baitulmal* or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and the doctrine of Malay custom.”

Malaysia is divided into thirteen states and the Federal Territory, which consists of Kuala Lumpur, Putrajaya and Labuan. As far as Islamic law is concerned, there are fourteen enactments containing provisions for its administration⁴, each state having its own enactment. These enactments contain relatively similar provisions. The state of Selangor

⁴ a) The Administration of Islamic Law Enactment, 1989 (Selangor), b) The Administration of Islamic Law Enactment 1955 (Terengganu) c) The Administration of the Religion of Islam and Malay Custom Enactment 1982 (Pahang) d) The Administration of Muslim Law Enactment 1959 (Pulau Pinang) e) The Administration of Muslim Law Enactment 1960 (Negeri Sembilan) f) The Administration of Muslim Law Enactment 1965 (Perak) g) The Administration of Islamic Law Enactment 1978 (Johore) h) The Administration of Muslim Law Enactment 1977 (Sabah) i) The Administration of the Syariah Court Enactment 1982 (Kelantan) j) The Administration of Muslim Law Enactment 1962 and Mahkamah Syariah Enactment 1983 (Kedah) k) The Administration of Muslim Law Enactment 1959 (Malacca) l) The Laws of the Sarawak Malay Court 1915 and the Majlis Islam Ordinance 1978 (Sarawak) m) The Administration of Muslim Law Enactment, 1963 (Perlis) and n) The Islamic Law (Federal Territory) Act, 1993.

was the first state to introduce such legislation with its Administration of Islamic Law Enactment of 1952. This was subsequently followed by other states.⁵ The present constitution of the Syariah Court of Selangor is stated in section 37 of the Administration of Islamic Law Enactment 1989 (Selangor):

“His Royal Highness the Sultan may, on the advice of the Majlis by notification in the Gazette, constitute Syariah Subordinate Courts, a Syariah High Court and Syariah Appeal Court for the State at such places as he considers fit.”

In the federal territories of Kuala Lumpur and Labuan, the Syariah courts were established by section 40 of the Islamic Law (Federal Territories) Act 1993:

- (1) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the Gazette constitute Syariah Subordinate Courts for the Federal Territories at such places as he considers fit.
- (2) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the Gazette constitute a Syariah High Court for the Federal Territories.
- (3) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the Gazette constitute a Syariah Appeal Court for the Federal Territories.

7.3. Jurisdiction of the Syariah Courts pertaining to Muslim's Succession

It is significant to note that, as the Syariah courts are subject to the state governments, their jurisdiction is confined to the territorial state in which it is established. Furthermore, as they work as Islamic religious courts, they are not empowered to adjudicate disputes that involve non-Muslim parties and are also limited to the matters enumerated in the State List.⁶ In other words, the jurisdiction of the Syariah court is confined to hearing

⁵ Yaacob, Abdul Monir, “Syariah Courts in Malaysia: Past, Present and Future”, in: Ibrahim, Ahmad & Yaacob, Abdul Monir, eds., *The Administration of Islamic Laws*, Kuala Lumpur: IKIM, 1997, pp. 23-29.

⁶ See item 1 of the State List of the Federal Constitution which provides: “...the constitution, organization and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of

cases concerning Muslims who reside in the state where it operates. Their primary functions are to enforce the Islamic religious observances and implement the Islamic laws relating to the matrimonial matters of Muslims.⁷ The criminal and civil jurisdictions of the Syariah courts are stated in enactments or Acts of administration of Islamic law. An example is the Administration of Islamic Law (Federal Territories) Act 1993.

Section 46 of the Act provides that:

- (1) A Syariah High Court shall have jurisdiction throughout the Federal Territories and shall be presided over by a Syariah Judge.
- (2) A Syariah High Court shall:
 - (a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under the Enactment or the Islamic Family Law (Federal Territories) Act 1984, or under any other written law prescribing offences against precepts of the religion of Islam from the time being in force, and may impose any punishment provided therefore;
 - (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:
 - (i) betrothal, marriage, *ruju*^c, divorce, nullity of marriage (*fasakh*), *nusyuz*, or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife;
 - (ii) any disposition of, or claim to, property arising out of any of the matters set out in subparagraph (i);
 - (iii) the maintenance of dependants, legitimacy, or guardianship or custody (*hadanah*) of infants;
 - (iv) the division of, or claims to, *harta sepencarian*;
 - (v) wills or death-bed gifts (*maraqd-al-mawt*) of a deceased Muslim;
 - (vi) gifts *inter vivos*, or settlements made without adequate consideration in money or money's worth, by a Muslim;
 - (vii) *waqf* or *nazr*
 - (viii) division and inheritance of testate or intestate property;
 - (ix) the determination of the persons entitled to shares in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or
 - (x) other matters in respect of which jurisdiction is conferred by any written law.

Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law ..."

⁷ See Ibrahim, Ahmad and Joned, Ahilemah, *The Malaysian Legal System*, p.331.

As regards the Islamic law of succession, in light of the above statutory provisions, it is submitted that matters pertaining to Muslim succession either testate or intestate are undoubtedly within the jurisdiction of the Syariah courts. It is to be observed that the State Legislature enacts the laws pertaining to the matters enumerated in the State List and hence, the appropriate courts, which are empowered and competent to decide such issues, are the state courts i.e. the Syariah courts. In other words, the Federal Constitution confers exclusive jurisdiction upon the Syariah courts to adjudicate on matters concerning the deceased Muslim's estate by the inclusion of: "Islamic law and personal and family law of persons professing the religion of Islam relating to succession, testate and intestate", in the State List. In connection with this, it is submitted that in dealing with the matters of Muslim succession, the decisions of the Syariah courts are not subject to any limitation or review by any civil courts. This is pursuant to article 121(1A) of the Federal Constitution, which enumerates:

"The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."⁸

7.4. The Conflict of Jurisdiction with the Civil High Court

The establishment of the High Court is pursuant to article 121(1) of the Federal Constitution. Its criminal and civil jurisdictions are stated in the Courts of Judicature Act (CJA), 1964 and they constitute original jurisdiction,⁹ appellate jurisdiction,¹⁰ supervisory

⁸ Article 121(1) states: There shall be two High Courts of co-ordinate jurisdiction and status namely- (a) one in the states of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang diPertuan Agung may determine; and such inferior courts as may be provided for by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

⁹ See sections 22 and 23 of the CJA.

jurisdiction, and jurisdiction to review and revise cases in respect of criminal and civil proceedings of subordinate courts.¹¹ By virtue of section 3(1) of the Civil Law Act, 1956, the written laws in force in Malaysia are the laws applied by the High Court and if there is no such law, the common law of England and the rules of equity as administered in England as at 7th April 1956 are applied.¹²

Despite the unambiguous enumeration in the Federal Constitution, conflict arises as to whether the Syariah courts are competent to determine disputes pertaining to Muslim succession or whether this falls under the civil courts' jurisdiction. This is due to the presence of similar wording in the Federal List of the Ninth Schedule of the Federal Constitution with regard to matters of succession.¹³ Article 74 (1) of the Federal Constitution confers power to the Parliament to make laws in respect of matters listed in the Federal List and the Concurrent List. Paragraph (4) (e) of the Federal List states:

“Subject to paragraph (ii), the following:

(i) Contracts; partnership, agency and other special contracts; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and hypothecation, except land; *bona vacantia*; equity and trusts; marriage, divorce and legitimacy; married women's property and status; interpretation of federal law; negotiable instruments, statutory declarations, arbitration; mercantile law; registration of businesses and business names, age of majority; infants and minors; adoption; succession, testate and intestate; probate and letters of administration; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence;

(ii) the matters mentioned in paragraph (i) do not include Islamic personal laws relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate;”

¹⁰ See Ibid, sections 26 and 27.

¹¹ See section 32, 35, 37, 31, 32, 33 and 35 of the CJA.

¹² Pursuant to section 3(1) (a) and (b) respectively, the common law of England and the rules of equity applicable in England as at 1st December 1951 for Sabah and as at 12th December 1949 for Sarawak.

¹³ The clause “succession, testate and intestate” is mentioned in both lists.

Relying on paragraph (i), which refers to “succession, testate and intestate, probate and letters of administration”, the Parliament enacted laws regarding the probate and administration of estates inclusive of deceased Muslims. The primary statute is the Probate and Administration Act 1959 and is applicable throughout the country, irrespective of religion. This statute regulates the procedures pertaining to the administration of non-small estates, namely estates where the total value is more than RM600,000. Consequently, the administration of such an estate clearly falls under the jurisdiction of the High Court.

Another federal statute, the Small Estates (Distribution) Act, 1955, is also applicable throughout the country, to Muslims and non-Muslims alike. This Act is especially designated for the purpose of the administration and distribution of small estates, namely where the total value of the estate, comprising movable and immovable property, does not exceed RM600,000.¹⁴ The administration and distribution of these estates is within the jurisdiction of the Collector at the Land Office.¹⁵

By virtue of section 23(f) of the Court of Judicature Act, 1964, the High Court is empowered to grant probates of wills and testaments and letters of administration of the

¹⁴ Section 3 (2) of the SEDA, 1955 provides that a small estate means an estate of a deceased person consisting wholly or partly of immovable property situated in any state and not exceeding six hundred thousand ringgit in value.

¹⁵ Section 11A of the SEDA, 1955 states that the Collector shall, in relation to the hearing of a petition for distribution, have all the powers of a Magistrate's Court in the exercise of its civil jurisdiction for the summoning and examination of witnesses....

estates of deceased persons leaving property.¹⁶ Apart from that, pursuant to section 4 (2) of the Small Estates (Distribution) Act, 1955, the Collector of the district where the greater part in value of the property is situated has exclusive jurisdiction to deal with the distribution and administration of the whole estate wherever situated. The Collector also has exclusive jurisdiction to order distribution of the estate and if necessary, to grant letters of administration thereof.¹⁷ In other words, looking at these statutory provisions, the Syariah courts, which stand as state courts have no such jurisdiction.

7.5. The Function of the Syariah Courts as Currently Practiced Pertaining to Muslim Estates

Section 50 of the Administration of Islamic Law (Federal Territories) Act 1993 enumerates that:

“If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or a Syariah Subordinate Court, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the Syariah Court may, on the request of such court or authority, or on the application of any person claiming to be a beneficiary or his representative and on payment by him of the prescribed fee, certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and as the shares to which they are respectively entitled.”

With regard to the practical aspects of the Islamic Law of Succession in Malaysia, by virtue of the above provision and the similar provisions of other enactments concerning the administration of Islamic Law in the other states, the Syariah courts' statutory

¹⁶ Section 23 of the CJA provides that the specific civil jurisdiction of the High Court includes: (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants.

¹⁷ Section 4 (2) of the SEDA, 1955 provides that the Collector of the district where the greater part in value of the property is situated shall have exclusive jurisdiction to deal with the distribution and administration of the whole estate wherever situated...; and the Collector shall thereupon have exclusive jurisdiction to order distribution of the estate and, if necessary, to grant letters of administration thereof.

function pertaining to Muslim succession is confined to the determination of the legal heirs of the deceased and the issuance of the inheritance certificate. The Syariah courts are conferred with the functions of certifying the quantum of shares and determining in whose favour such quantum are distributed.¹⁸ In other words, the statutory duties of the Syariah judges throughout the country in matters of Muslim succession are very limited. It is therefore submitted that the above provision actually contradicts the clause in the State List containing the words: “Islamic law relating to succession, testate and intestate”.

Reading through the provision of section 50, it appears that it does not define the duty of the Syariah courts in dealing with matters regarding the deceased Muslim’s estate. It only provides that they may determine the entitled legal heirs and the quantum of shares each is entitled to, upon the request of the civil court and the Land Office, or of any person claiming to be a beneficiary or his representative. Since the word used in this provision is ‘may’, it appears that the Syariah courts are not duty bound to issue opinions in response to such requests; they have the discretionary power to either respond or simply ignore a request.

Moreover, the provision does not mention the effect of an issued certificate of *farā’id* and whether it is legally binding. This means that the civil court, the Land Office or any person claiming to be a beneficiary of the estate, is free to choose whether to follow the decision of the Syariah court as stated in the certificate or to merely ignore it.

¹⁸ Ibrahim, Ahmad, “The Future of the Shariah and the Shariah Courts in Malaysia”, in: Shuaib, Farid Sufian, et.al. *Administration of Islamic Law in Malaysia Text and Material*, Kuala Lumpur: Malayan Law Journal, 2001, p. 177

Furthermore, the wording is “upon the request of any court other than the Syariah High Court or a Syariah Subordinate Court”. This means that courts other than the Syariah courts, for instance a civil court, can also deal with matters of Muslim succession. In other words, this provision shows that the Syariah courts have no exclusive jurisdiction to deal with such matters.

Another issue is whether or not it is statutorily compulsory for the civil courts and the Collectors at the Land Office to request the Syariah courts for the certificate of *farā'id*. There is no statutory provision to be found either in the Probate and Administration Act, 1959 or the Small Estates (Distribution) Act, 1958, which enumerates the statutory duty of such institutions to refer the matter to the Syariah courts.

According to the above explanation, it can be seen that in practice the Syariah courts function in a very limited sphere as far as the deceased Muslim's estate is concerned. They only have the power to ascertain the legal heirs of the deceased and certify their portions of the estate, and this task only arises upon request without which the Syariah courts do not have any statutory right to contribute. This brings into question the validity of this provision because it apparently contradicts the provisions of the Federal Constitution, which confer exclusive jurisdiction on the Syariah courts regarding matters of Muslim succession.

However, it is important to clarify that the Syariah courts are conferred with original exclusive jurisdiction over several related matters, namely *waṣiyyah*, *hibah*, *waqf*, jointly

acquired property or *harta sepencarian*, the determination of the legitimacy of the heirs and the subsistence of a valid marriage contract between husband and wife. These matters are exclusively under the jurisdiction of the Syariah courts and article 121 (1A) gives them protection from any kind of interference by any civil court. These matters, if raised by the parties interested in the estate of the deceased, must be adjudicated prior to the distribution of the estate to the entitled legal heirs.¹⁹

7.6. Interpretations of Article 121(1A) of the Federal Constitution

The amendment to article 121 in 1988, with the inclusion of article 121(1A), had a significant and historical effect on the jurisdiction of the Syariah courts in Malaysia. The amendment may be said to have enhanced the status of the Syariah courts and they can no longer be regarded as inferior to the civil courts²⁰ that can no longer amend the decisions of the Syariah courts. They are empowered by having exclusive jurisdiction, which prevents the civil courts from interfering.

¹⁹ See *In the Estate of Tunku Abdul Rahman* where the Civil High Court stayed the questions of legitimacy of children and the validity of marriage to be referred to the Syariah Court.

²⁰ Ibrahim, Ahmad, "The Amendment to article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law", *M.L.J.*, 2 [1989], p. xvii. The inferiority of the Syariah Courts prior to the amendment is evidently noticed in section 4 of the Court of Judicature Act, 1964 which provides "In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail." Further, section 45(6) of the Administration of Muslim Law Enactment of Selangor, 1952 provides "Nothing in this Enactment contained shall affect the jurisdiction of any civil court and in the event of any difference or conflict arising between the decision of a court of the Kathi Besar or a Kathi and the decision of a civil court acting within its jurisdiction, the decision of a civil court shall prevail". The similar provision is available in section 25(b) of the Administration of Muslim Law Enactment of Terengganu, 1955 and section 40(3)(b) of the Administration of Muslim Law Enactment of Malacca, 1959. In addition to that, the Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984 provides that the criminal jurisdiction of the Syariah Court shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years, or any fine exceeding 5000 ringgit, or with any whipping exceeding six strokes or with any combination thereof. According to Ahmad Ibrahim, such jurisdiction is much less than that given to the first class magistrate who can normally deal with offences punishable with imprisonment up to five years or a fine up to 10,000 ringgit or whipping up to 12 strokes or any combination thereof. See also sections 85 & 87 of the Subordinate Courts Act 1948.

There are two judicial interpretations with respect to the jurisdictions of the Syariah courts in relation to the matters enumerated in the State List, which, by virtue of article 121(1A), the civil courts cannot interfere with. The first is that, to ascertain whether or not the Syariah court has jurisdiction over the matter in dispute, an examination must be made of the state's enactments to see if there is an express provision regarding such matters. The mere presence of these matters in the State List does not necessarily confer jurisdiction upon the Syariah courts. This principle was laid down by Harun Hashim J in the case of *Mohamad Habibullah bin Mahmood v Faridah bte Dato' Talib*²¹ where he stated:

“It is obvious that the intention of the Parliament by inserting article 121 (1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah courts; *Dalip Kaur v Pegawai Polis Daerah, Balai Polis daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 7. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah court. The validity of a state law can be questioned in a separate proceeding under art 4 (3) of the Federal Constitution.”

However, in the case of *Md Hakim Lee v Majlis Agama Islam, Wilayah Persekutuan, Kuala Lumpur*,²² Abdul Kadir Sulaiman J laid down a different principle in determining the jurisdiction of the Syariah courts in relation to article 121(1A). This principle emphasizes the mere availability of the matters in the State List. This means that the matters that are mentioned in the State List are definitely within the exclusive jurisdiction of the Syariah courts. Hence, the absence of these matters in the state's enactments does

²¹ [1992] 2 MLJ 793, p. 800.

²² [1998] 1 MLJ 681.

not necessarily preclude the Syariah courts from having the jurisdiction to adjudicate. He said:

“To my mind, having considered art 74 and para 1 of the State List in the Constitution, the jurisdiction of the Syariah courts is much wider than those expressly conferred upon it by the respective state legislature. The Syariah courts shall have jurisdictions over persons professing the religion of Islam in respect of any of the matters included in para 1 thereof. It is not to be limited to those expressly enacted. The matters include Islamic law and the personal and family law of persons professing the religion of Islam. They include cognizance over offences by persons professing the religion of Islam against precepts of that religion. The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that those matters are within the jurisdiction of the Syariah courts within the contemplation of para 1 of the State List and which jurisdiction is ousted from the courts mentioned in art 121 (1) of the Constitution. If the state legislature has not yet legislated specifically on the matter, it is within its competency to do so in the future by virtue of the powers given under art 74 of the Federal Constitution. Therefore, when these matters are in issue, the jurisdiction is clothed in the Syariah courts and not in the courts mentioned in art 121 (1), notwithstanding the absence of express provisions in the state enactments at the time the issue arises. That is the intention of art 121 (1A) when it states in no uncertain term that the civil courts in art 121 (1), which include the High Courts, shall not have jurisdiction over the matter. The fact that the Syariah courts have not been expressly conferred with the jurisdiction to adjudicate on the issue raised, by the state legislature, does not mean that the jurisdiction must be exercised by the courts in art 121 (1). The issue is not one whether a litigant can get his remedies but one of jurisdiction of the courts to adjudicate – the threshold jurisdiction to be seized of the matter.”²³

In the case of *Abdul Shaik bin Md. Ibrahim v Hussein bin Ibrahim*,²⁴ the Court held that the interpretation held by Abdul Kadir Sulaiman was contrary to the interpretation in Mohamad Habibullah’s case. In the case of *Soon Singh a/l Bikar Singh v Pertubuhan*

²³ [1998] 1MLJ 681, p. 685.

²⁴ [1999] 5 MLJ 618.

Kebajikan Islam Malaysia,²⁵ Mohamed Dzaidin SCJ delivered a judgment which seemed to settle the dispute. The learned judge said, *inter alia*:

“...whilst we agree with the approach adopted by Abdul Hamid J following *Habibullah*, that when there is a challenge to jurisdiction the correct approach is to look at the States Enactments to see whether or not the Syariah Courts have been expressly conferred jurisdiction on a given matter...”

After thorough consideration of the above case law it is submitted that the Islamic law relating to Muslim succession as expressly enumerated in the State List is evidently within the jurisdiction of the Syariah courts. There are express provisions in the State List and the state enactments, which mention the matters of distribution and inheritance of Muslims.²⁶ Therefore, any matters regarding the succession of Muslim estates, either testate or intestate are governed by the laws and regulations enacted by the State Legislature and any disputes pertaining to it are to be heard and determined exclusively by the Syariah courts.²⁷

7.7. The Syariah Appeal Court's Opinion

The issue regarding the jurisdiction of the Syariah courts over matters of Muslim succession was discussed in detail in the famous case of *Jumaaton and Anor v. Raja*

²⁵ [1999] 1 MLJ 489.

²⁶ The State List of the Ninth Schedule states “...Islamic law and personal law and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate...”. Section 46 (2) of the Administration of Islamic Law (Federal Territories) Act, 1993 states: “A Syariah High Court shall (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all parties are Muslim and which relate to ...(viii) division and inheritance of testate or intestate property; (ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such person are respectively entitled...”

²⁷ The Probate and Administration Act, 1959 and the Small Estate (Distribution) Act were enacted and passed by the Parliament. It appears therefore that these two Acts are against the relevant provisions of the Federal Constitution, the two interpretations and the state enactments as far as the administration of estate and the jurisdiction in such matters are concerned.

Hizaruddin.²⁸ This was an appeal case heard by the Syariah Appeal Court, regarding an application for a declaration that the shares, including the income derived therefrom, in a company that were held in the name of the defendant (a son of the deceased) formed part of the deceased's estate.

Two of the heirs, Jumaaton Zaiton bt Haji Awang and Raja Delila bt. Raja Nong Chik, applied to the Syariah High Court of the Federal Territory of Kuala Lumpur for a declaration against the defendant, Raja Hizaruddin b. Raja Nong Chik (a son of the deceased), that the 11,095,666 unit of shares (and the income derived therefrom) in Arensi Holdings (M) Bhd., which was registered in the defendant's name, was part of the estate of the deceased. They claimed that the property did not belong absolutely to him and must be distributed among the twelve legal heirs according to the *farā'id* system.²⁹ The Syariah High Court held that it had no jurisdiction to hear the case under section 46(2) of the Administration of Islamic Family Law (Federal Territories) Act, 1993 (Act 505).³⁰

The appellants subsequently appealed to the Federal Territory Syariah Appeal Court. On appeal, the Appeal Court upheld the decisions of the Syariah High Court. The Syariah High Court had no jurisdiction on the basis that this was a matter of probate and the administration of the estate and therefore governed by the Probate and Administration

²⁸ [1998] 6 MLJ 557.

²⁹ [1998] 6 MLJ 557, p. 559.

³⁰ Ibid.

Act, 1959. Such a matter is within the Federal List of the Ninth Schedule of the Federal Constitution and applicable to Muslims.³¹

The Chief Judge of the Federal Territory Syariah Appeal Court who led the panels for the hearing stated that reference had been made to the relevant provisions of the Federal Constitution. According to him, even though the State List of the Federal Constitution provides for the “Islamic law relating to succession, testate and intestate” and the “distribution of property”, such matters do not include matters of probate and administration.³² Instead, matters of probate and administration of estate are mentioned in item (e) paragraph (i) of the Federal List, which means that Parliament has the power to enact laws concerning “succession, testate and intestate, probate and letters of administration of estate.”³³

Furthermore, he referred to item (e) paragraph (ii), where it is stated that: “matters mentioned in paragraph (i) do not include Islamic personal law relating to ... succession testate and intestate.” These provisions, according to the judge, denote that, since laws pertaining to “probate and letters of administration” are within the Federal List and not the State List, the State Legislative Assembly and the Syariah courts have no power or jurisdiction over such matters.³⁴

³¹ [1998] 6 MLJ 557, pp. 563- 565.

³² Ibid, p. 561.

³³ [1998] 6 MLJ 561.

³⁴ Ibid.

Even though section 46 (vii) of the Administration of Islamic Law (Federal Territories) Act, 1993 clearly states that the division and inheritance of Muslim property, testate and intestate are within the jurisdiction of the Syariah courts, the laws regarding probate and letters of administration, which are clearly contained in the federal statute, namely the Probate and Administration Act, 1959 prevent the Syariah courts from exercising such jurisdiction.³⁵ Even though the personal and family laws, including the Islamic law of succession, of persons professing the religion of Islam are included in the State List, the matters of probate and letters of administration are still held on the Federal List.³⁶

7.8. The High Court's View

The above decision was then referred to and adopted by the Civil High Court in the case of *In the Estate Of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid v. Tunku Khadijah bte Tunku Abdul Rahman Putra & 2 Ors.*³⁷ The issues here were whether or not the High Court had jurisdiction to hear and determine a dispute arising out of the administration of the estate of a Muslim and whether or not it had jurisdiction to hear and determine the disputes pertaining to the validity of the marriage between the deceased and Chong, and the legitimacy of the third petitioner who was the child of the marriage. With respect to these issues of jurisdiction, the High Court held that matters pertaining to “probate and administration” do not fall within the civil jurisdiction of the Syariah courts

³⁵ Ibid.

³⁶ Ibid, p. 563.

³⁷ [1999] 1 AMR 30.

as confirmed by the Syariah Appeal Board of the Federal Territory Syariah Court in *Jumaaton & Raja Delila v Raja Hizaruddin*.³⁸

Arguments similar to those in the Jumaaton case were put forward contending that matters pertaining to probate and letters of administration are within the jurisdiction of the Civil High Court by virtue of the Federal List in the Ninth Schedule of the Federal Constitution.³⁹ According to the learned judge in this case, the Probate and Administration Act, 1959 is an Act of general application to both Muslims and non-Muslims. Unlike other statutes which contain a clause limiting their application to non-Muslims, such as section 2(2) of the Wills Act, 1959, section 2 of the Distribution Act 1958 and section 31 of the Adoption Act 1952, the Probate and Administration Act contains no such provision.⁴⁰

The learned judge also relied on section 24 (f) of the Courts of Judicature Act 1964, which confers upon the High Court jurisdiction in respect of matters of “probate and administration.” He further supported his contention by stating the predominant position of the provisions in the Courts of Judicature Act 1964, *vis-à-vis* other ordinary Acts of Parliament or written laws, other than the Federal Constitution as enumerated in section 4 of the Courts of Judicature Act 1964, which provides that in the event of inconsistency or

³⁸ Ibid, p. 31.

³⁹ Ibid, p. 34.

⁴⁰ [1999] 1 AMR 30, p. 35.

conflict between the Courts of Judicature Act 1964 and any other written law other than the Federal Constitution, the Courts of Judicature Act 1964 shall prevail.⁴¹

However, with regard to questions of validity of marriages and legitimacy of children, the Court held that such matters are within the jurisdiction of the Syariah courts. The hearing was therefore stayed and all parties were directed to refer to the Syariah Court for a final and conclusive determination regarding these two issues.⁴²

7.9. The Analysis of the Judgments in the above Cases

7.9.1. The Determination of Estate

Observing the decision of the Syariah Appeal Court in the Jumaaton case, it appears that the basis of the judgment was that the matter in dispute was one of probate and administration of estate. The Court's view was that the determination of the shares in dispute, whether they constituted an asset of the deceased or not, was part of the process of probate and the administration of the estate. It appears that the Court did not consider this as an issue pertaining to a question of Islamic law.

It is important to note that the application by the appellants to the Court was for a declaration that the shares in dispute constituted part of the deceased's estate according to the Islamic law of succession. They argued that the shares were merely registered under the defendant's name and his position thereon was as a trustee. Such registration did not render the respondent the absolute owner of the shares. They required the Court to

⁴¹ Ibid, p. 34.

⁴² Ibid, p. 37.

ascertain whether, according to Islamic law, the ownership of the shares had passed to the defendant by such mere registration, or alternatively would such a transaction constitute a bequest by the deceased in favour of the defendant. The plaintiffs claimed that even though the transfer of the shares had taken place, the deceased remained in control of the company.⁴³ On that basis, they claimed that the shares were merely trusted property and the defendant was a mere trustee. This means that the shares constituted part of the deceased's estate to which they should be entitled as prescribed in the Islamic law of succession.

It is submitted that this issue clearly pertains to a question of Islamic law. The determination of the estate of the deceased is regarded as part and parcel of inheritance law. According to Islamic law, the term estate is known as "*al-tarikah* or *al-tirkah*" which constitutes the third essence of succession, without which succession would never take place. It technically denotes the property, the right and the usufruct legally acquired and left behind by the deceased upon his death.⁴⁴ Therefore, to determine the status of the shares from the perspective of Islamic law is undoubtedly an issue of Islamic law.

It is therefore clear that such a matter is within the ambit of the Syariah courts' competency. This is supported by virtue of the State List of the Federal Constitution, which among other things enumerates that "the determination of matters of Islamic

⁴³ *The Sun*, Thursday, July 9, 1998, p.8.

⁴⁴ Khan, *Islamic law of Inheritance*, p. 29. See also Doi, I., Abdur Rahman, p. 273.

law”⁴⁵ is within the power and jurisdiction of the State Legislature and the Syariah courts.⁴⁶

7.9.2. The Meaning of Probate and Administration of Estates

Section 2 of the Probate and Administration Act, 1959 defines “probate” as a grant under the seal of the court authorizing the executor or executors therein named to administer the testator’s estate. The “probate action” is defined in the same section as meaning a cause or matter in which a petition for probate or administration is contested by any person, and includes an application to alter or revoke any grant of representation. Furthermore, this section also defines “administration”, with reference to the estate of a deceased person, as letters of administration issued by the court whether general, limited or with a will annexed or otherwise authorizing the person or persons therein named to administer the deceased person’s estate in accordance with the law.

Caroline Sawyer defines “administration of estates” as the process whereby the personal representatives collect in the assets of the estate and then meet the debts and liabilities and pay out the legacies and devices before distributing the residue, managing the estate as necessary in the meantime.⁴⁷

⁴⁵ See the State List “...the determination of matters of Islamic law and the doctrine of Malay custom.”

⁴⁶ See the case of *In the Estate of Tunku Abdul Rahman*, p. 37. In this case, the court had referred the disputes on the question of Islamic law i.e. the validity of marriage and the legitimacy of children.

⁴⁷ Sawyer, Caroline, *Principles of Succession, Wills & Probate*, 2nd edition, London: Cavendish Publishing Limited, 1998, pg. 329.

Considering the above facts, it could be substantially argued that the issue in dispute in the Jumaaton case did not fall within those definitions. Hence, it is submitted that the determination of assets whether they constitute part of the estate or not from the perspective of Islamic law, is not necessarily within the meaning of “probate and administration”. This process is best considered as a question of Islamic law and the Syariah courts are therefore arguably the only courts with the competence to decide such issues.

7.9.3. Broad Meaning of the Islamic Law of Succession

It can be argued that the Syariah Court had overlooked the fact that the wording: “Islamic law relating to succession, testate and intestate” as enunciated in the State List encompasses all aspects of the Islamic law of succession including the administration of Muslim estates. Therefore, even though the dispute before the Syariah Court, was comprehended by the Court as a matter of probate and the administration of the estate, it still had jurisdiction.

It is a well-established principle that the Islamic law of succession comprises the whole process of the administration of a deceased Muslim’s estate.⁴⁸ There is no division between the Islamic law of succession and the administration of estates. The Islamic law of succession should not be confined to the division, distribution and determination of legal heirs and their quantum of shares in the estate. The question of whether a property constitutes the deceased Muslims’ estate or not and the administration of the estate are

⁴⁸ Imam, Mohamad, “Probate And Administration Of A Muslim’s Estate In Malaysia- Legislative Competence And Syariah Civil Court Jurisdiction”, p. 132.

part and parcel of the Islamic law of succession. These questions should certainly be heard only by the Syariah courts as provided for in the State List of the Federal Constitution and the state enactments.

This is further supported by item (viii) of the state enactments. Here it is clearly stated that the division and inheritance of testate or intestate property is one of the matters within the Syariah courts' jurisdiction. This section implies a broad meaning and denotes that any matter relating to Muslim inheritance, including issues pertaining to *wasīyyah*, are under the Syariah courts' jurisdiction. In other words, the clause arguably refers to the Islamic law of succession, which covers all matters pertaining to the succession of the deceased Muslim's estate. This provision clearly corresponds to the Federal List and the State List. Therefore, reliance on article 121 (1A) of the Federal Constitution suffices to confer the Syariah courts with exclusive jurisdiction and further, prevents the High Court from interfering.

7.9.4. Muslim's Personal Law

It is important to note that matters pertaining to succession to a deceased Muslim's estate fall under Islamic law and the personal and family law of a person professing the religion of Islam. The law of Muslim succession revolves around the Muslim family circle and is strongly connected with personal rights and obligations as well as matrimonial issues.⁴⁹ Therefore, on the basis that succession is a matter of Muslim personal law and part of Islamic law, the Federal Constitution in its State List of the Ninth Schedule apparently

⁴⁹ Zuhdi, *Pengantar Undang-Undang Islam di Malaysia*, p.128. According to him, there are some authors who included matters relating to property in the personal law sphere.

guarantees it. Such matters come under the power of the State Legislative Assembly and hence, are within the Syariah courts' jurisdiction and no interference from the civil courts is permitted. The Federal Constitution, as stated in the State List, clearly expresses that it is within the state legislative powers to enact laws concerning the personal and family law of Muslims.

Furthermore, in paragraph 4(e) (ii) of the Federal List, it is indisputably asserted that the matters in paragraph 4 (e) (i), which include succession, testate and intestate, probate and letters of administration do not include the Islamic personal laws relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate. This could be taken to mean that succession to a deceased Muslim's estate is a personal law like marriage, divorce, guardianship and so in which the civil court is strictly prohibited from interfering, as expressed in article 121(1A). In other words, succession should be treated just as the other Muslim personal laws. It is in fact true that the words "probate and administration" in the Federal List are not mentioned literally or specifically within the State List, but the words "distribution of estate" are and clearly comprise probate and the administration of estates.

7.9.5. The Conflict between Article 121(1A) and Other Statutory Provisions of Federal Acts

It is extremely important to highlight the effect of article 121(1A) of the Federal Constitution, which evidently confers upon the Syariah courts the exclusive jurisdiction in respect of any matter within their jurisdiction. By virtue of this provision, the civil

court is constitutionally prohibited from interfering with the decisions of the Syariah courts concerning all matters within the jurisdiction of the latter.⁵⁰ The purpose of enumerating this provision is to strengthen the position and jurisdiction of the Syariah courts by taking away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah courts.⁵¹

However, it appears that by putting section 4 and section 24 of the Courts of Judicature Act together with the provisions of the Probate and Administration Act, 1959, and to furthermore read them with item 4 (e) (i) of the Federal List of the Ninth Schedule as the High Court reasoned in *In the Estate of Tunku Abdul Rahman*, the purpose of inserting article 121 1(A) is certainly defeated.⁵² Hence, it is submitted that the above-mentioned statutory provisions seemingly contradict article 121 (1A) of the Federal Constitution. As a result, these provisions should have no legal effect on the exclusive jurisdiction of the Syariah courts over Muslim succession.

Also in this case, the learned judge's point on the non-availability of clauses that preclude the applicability of the Probate and Administration Act, 1959 to Muslims, such as those in the Wills Act, 1958 and the Distribution Act, 1959, appears to be inappropriate. It is important to note that the availability of such clauses in these Acts has the effect that matters pertaining to bequests or *waṣiyyah* and the distribution of Muslim estates are to be strictly governed by Islamic law. However, in the case of the

⁵⁰ Ibrahim, Ahmad, *The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law*, p. xx.

⁵¹ Buang, Salleh, *Historic Judgment on Article 121(1A) of the Federal Constitution, case comment on Mohd Habibullah v Faridah Dato' Talib*, Malaysian Law News, February 1993, p. 11.

⁵² Imam, p. 130.

administration of estates, which clearly includes the matter of bequests and the distribution of estates, Islamic law is statutorily neglected because of the non-availability of such a clause in the Probate and Administration Act, 1959. This implies inconsistency between these federal statutes.

It is therefore submitted that such provisions should have no legal effect on the process of the administration of a deceased Muslim's estate, particularly in relation to the Syariah courts' jurisdiction. As far as such a clause is concerned, the interests of Muslim parties in having their personal matters of succession determined by Islamic law, which constitutes their personal law, would not be realized because at the end of the process, the applicable law is not the Islamic law. Accordingly, the Syariah courts would not decide the case.

7.10. Are the Syariah Courts Ready to Take the Jurisdictional Responsibility?

It is imperative to say that discussions on the issue of which court is competent to hear and determine cases pertaining to the Islamic law of succession rely upon the understanding and interpretations of the relevant provisions in the Federal Constitution as well as other federal acts and state enactments. From the perspectives of the Syariah and civil courts as discussed above, there seems to be a strict interpretation of the statutory provisions, including the Federal Constitution, without looking into the present scenario of rapid legislative changes. The current facts apparently show a trend whereby attempts

are being made to gradually introduce a new legal system in Malaysia, which would be definitely based on the local customs, requirements, needs and necessities.⁵³

On the other hand, the arguments that favour the Syariah courts' competency, even though validated by and strongly based on the statutory provisions, seem to introduce the idea of successfully upgrading and strengthening the position and status of the Syariah courts in Malaysia, which are reflected by such legislative changes. In other words, the discussions regarding the jurisdiction over matters pertaining to Muslim succession have not highlighted the issue from a practical point of view.

It should be noted that the Syariah courts are both state and religious courts. Their jurisdictions are limited to their territorial states and they have no jurisdiction if any of the parties in dispute is non-Muslim. Therefore a difficulty would arise if a case were filed in the state of Terengganu and part of the estate was situated in another state, such as Kedah. If the beneficiaries are to be required to file a separate application in each of the states where the estate is situated, this certainly would create another problem which is probably worse in term of costs, expenses and time. It is important to mention here that there are fourteen states and Federal Territories in Malaysia, which each have their own Syariah court.

Furthermore, presently there is no statutory provision stating that the decision of a Syariah court from one state should be accepted and legally effective in other states in

⁵³ Bari, Abdul Aziz, "Perlaksanaan Islam melalui Kerangka Perlembagaan Malaysia- Masalah dan Potensinya", *IKIM Law Journal*, 3:2 (1999), p. 95.

Malaysia. Furthermore, the decision of the Syariah Appeal Court in one state is not binding on the lower Syariah courts of other states. Therefore, these issues would cause legal problems for the parties to the dispute. Moreover, the Syariah courts' jurisdiction is limited to Muslim parties only. The Syariah courts are not competent to determine disputes involving non-Muslims. Problems would certainly arise where a dispute concerned the ownership of property where the interested parties were Muslim beneficiaries and non-Muslim creditors.

Section 50 of the Administration of Islamic Law (Federal Territory) would be a useful reference point for further discussions. It is submitted that there is currently no uniformity in terms of the administration and management of cases, fees, procedures, fines, forms, the certificate of *farā'id* forms and documents that must be attached together in filing the application for the certificate.⁵⁴ The Syariah courts rely on the facts provided by the applicant who is not even under oath, and subsequently calculates the share to which each beneficiary is entitled. Relying only on the facts put forward by the applicant, the process simply ends with the issuance of such a certificate.⁵⁵

It is significant to note that the Syariah Courts have no jurisdiction to grant specific relief, which is normally applied for by the parties in dispute. The power to issue declarations, vesting orders, injunctions and specific relief is within the ambit of the High Court's

⁵⁴ Abd Rahman, Dato' Sheikh Ghazali, "Prosedur Dan Amalan Semasa Terhadap Pembahagian Harta Pusaka di Negeri-negeri", *Bengkel Pengagihan Pusaka KWSP Mengikut Hukum Faraid*, 19th & 20th February 2003, Institute Latihan Keselamatan Sosial KWSP (ESSET), organized by KWSP with co-operation of Jabatan Kehakiman Syariah Malaysia (JKSM), p. 48. Dato' Sheikh Ghazali Abd Rahman is the Head, Hakim Syarie, Jabatan Kehakiman Syariah Malaysia.

⁵⁵ Mohamad, Dato' Abdul Hamid bin Haji, "Administration of Property in Malaysia: A Civil And Syariah Law Perspective", *M.L.J.*, 3 [2002], p.iii.

jurisdiction. This is specifically provided for in a federal Act, namely the Specific Relief Act, 1950. This problem was discussed in *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Another*.⁵⁶ The case concerned the issue of *waqf*, which is undoubtedly within the jurisdiction of the Syariah courts. However, the Supreme Court held that the respondent in this case had applied for a perpetual injunction under section 51(2) of the Specific Relief Act, 1950. Accordingly the Court held that the Civil High Court is the only competent forum to grant such an injunction.⁵⁷

It is submitted that the Syariah Appeal Court in the Jumaaton case seemed to be realistic in reaching its decision. The three members of the panel of the Syariah Appeal Court, namely Sheikh Ghazali, the Syariah Chief Judge, the late Tan Sri Professor Ahmad Ibrahim and the late Tan Sri Harun bin Hashim were among the figures appointed by the Government to the Technical Committee of Civil laws and Islamic laws. This committee was set up solely for the purpose of improving and upgrading the status and position of the Syariah courts in Malaysia.⁵⁸ The case in question was undoubtedly an opportunity for them to devise a new interpretation of the provisions of the Federal Constitution in order to realize the idea of Malaysia having its own common law. Professor Mohamad Imam, a professor of law at the National University of Malaysia, commented on the decision in that case:

⁵⁶ [1992] 2 MLJ 244.

⁵⁷ Apart from that, the inadequate number of Syariah court judges is also a problem. According to Mohd. Naim Mokhtar, a Subordinate Court Judge, Department of Islamic Judiciary, the number of cases filed is not proportionate to the number of judges. For example, under his jurisdiction, he is the only judge who can hear cases from the districts of Petaling Jaya, Shah Alam, Subang, Puchong, Sungai Buloh and Seri Kembangan of Selangor. See Mokhtar, Hj. Mohd. Naim, "Administration of Family Law in the Syariah Court", *M.L.J.*, 3 [2001], p. lxxxi.

⁵⁸ Yaacob, Abdul Monir, "Undang-Undang Pentadbiran Agama Islam Pengkanunan, Reformasi Dan Penyelarasan", *IKIM Law Journal*, 2:2 (1998), pp.71-79.

“The Syariah Appeal Court of the Federal Territory of Kuala Lumpur did not avail itself of the opportunity, for reasons of its own, in the Jumaaton case to correct one of the aberrations of the Malaysian Legal System as to the Syariah Courts’ jurisdiction, to the exclusion of the Civil Courts, to enforce and administer the entire Islamic law of succession. It resigned itself to merely affirming the status quo but a plea for presumably, statutory intervention to give such a jurisdiction to the Syariah Courts.”⁵⁹

7.11. Conclusion

The decision of the Syariah Appeal Court in the Jumaaton case seems to conflict with the provisions of the Federal Constitution, especially article 121 (1A). The intention of the Government in amending article 121 by inserting article 121 (1A) was to strengthen the position of the Syariah courts, especially with respect to Muslim personal law. This could be achieved by preventing the civil courts from interfering with the Syariah courts’ decisions. However, the Syariah Court of Appeal did not adequately take this into account. In relation to the decision in Jumaaton, Professor Mohamad Imam commented:

“This decision, unless reconsidered by the same Court, will in all probability be followed as a persuasive precedent by the Syariah Courts in the other states. This decision has also the effect of reassuring the correctness of the Civil Courts’ practice relating to this area of Islamic law, and leaving a very faint hope of its correction at their hands. For the necessary correction, one can only look to the Federal Court to act under Article 12 in an appropriate case and reverse the Jumaaton interpretation of item 4 (e) (ii) of the Federal List and item (i) of the State List as to the meaning and scope of the matter: ‘Islamic personal law relating to succession, testate and intestate,’ i.e. whether or not it includes the process of ‘probate and administration’ of the estate of a deceased Muslim.”⁶⁰

It is clear therefore that the decision in the Jumaaton case establishes that whenever any dispute arises in connection with the administration and distribution of a deceased Muslim’s estate, the competent court to hear and determine the case is the civil High

⁵⁹ Imam, p. 134.

⁶⁰ Ibid.

Court. The relevant provisions in the State List of the Ninth Schedule of the Federal Constitution which enumerates matters pertaining to Islamic law relating to succession, testate and intestate, and section 46 (2) (viii) of the Administration of Islamic Law (Federal Territories) Act, 1993 therefore have no legal effect.

The Federal Constitution, which stands as the supreme law, contains provisions that seem to cause confusion among the Malaysians. In addition, the inclusion of section 50 in the Administration of Islamic Law (Federal Territories) Act, 1993 confines the Syariah courts to merely issuing certificates of *farā`iq* upon request by the civil courts, the Land Office or any interested parties, and hence is in conflict with the Federal Constitution, and this contributes further to the confusion.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

Even though the *farā'id* system is prescribed in detail in the Qur'an and the *Sunnah*, this does not necessarily mean that no further *ijtihād*, or reasoning, can be performed. It is quite obvious that many of the court decisions have been based on *ijtihād*, as can be seen the cases of *musyārahah*, *ʿumāriyyatayn*, *ʿawl* and *radd*. This is due to the absence of clear proofs or *dalīl qaṭʿīy* in the Qur'an and the *Sunnah*.

The issue regarding the concept of *tarikah*, or estates, also needs to be explored in depth and hence *ijtihād* is really needed. There are no Qur'an or *Sunnah* proofs that define and elaborate in detail the concept of *tarikah*. The only available proof is provided by the two versions of the *hadīth* regarding the heritability of *māl*, *ḥaq* and *manfaʿah*, and these have caused disagreement among the leading Muslim scholars. In other words, it is not quite correct to suggest that it is absolutely prohibited to perform *ijtihād* on matters regarding the *farā'id* system. This contention is supported by the discussions that have been held on the necessarily related topics, such as the concept of *māl* in Islamic law and the rights that are attached to estates. The discussions on these have shed a light on the divergence of opinions between the Muslim scholars and clearly reveal their efforts of *ijtihād*.

From the analysis of the concept of *tarikah* from the perspective of Islamic law, it is quite clear that its components of *māl*, *ḥaq* and *manfaʿah*. This is the opinion of the majority of

Muslim scholars including the Syāfi'īs, which have become the dominant school in Malaysia. Apart from the issue regarding the components of estates, the issue of ownership is similarly significant in ascertaining whether wealth constitutes the *tarikah* of the deceased or not. In Islamic law, there are two kinds of ownership, namely absolute and non-absolute, both of which are capable of rendering tangible and intangible assets heritable. Moreover, the ownership must meet the requirement of *Syarī'ah* compliance; otherwise the asset is non-heritable. The presence of an asset at the time of death is not a requirement to constitute it as heritable.

Looking into the relevant statutory provisions applicable in Malaysia, it is evident that the definition of estate is not different from the definition of *tarikah*. This is due to the fact that the statutory definition is very broad. Furthermore, the concept of *māl* in Islamic law includes everything that is regarded as a person's wealth. However, in applying the definition, the Malaysian courts and the Land Office appear to ignore the requirement of *Syarī'ah* compliance. It is important to remember that it is Islamic law that is applicable to Muslims in Malaysia, particularly in matters of succession, and hence the relevant authority must make serious attempts to apply the law in a way that satisfies the needs and interests of the parties concerned.

Regarding the settlement of rights and liabilities attaching to estates, it is possible to conclude that the laws applicable in Malaysia do almost accord with the principles of Islamic law. The Malaysian courts recognize the four rights, according to Islamic law, namely the funeral expenses, the payment of debts and liabilities and the execution of

waṣiyyah prior to the distribution among the legal heirs. Even though the statutes that govern the administration of the deceased Muslim's estate are based on English law, the principles involved do not conflict with Islamic law. However, some differences have occurred in cases concerning the priorities of creditors in the case of insolvent estates, and the issue of when the rights of the legal heirs arise.

It can be observed that in reaching their decisions, the judges do not base their findings on proper Islamic research methodology. They merely rely on secondary books, which are confined to the opinions of the Syāfi'īs. Taking into account the changes taking place in the world today, there is certainly a need for the opinions of other schools of laws, such as the Mālikīs, Ḥanafīs and the Ḥanbalīs, to be considered to ensure the proper implementation of Islamic law. In the field of Muslim succession, especially with regard to the concept of *tarikah*, or estate, it is necessary to develop the application of Islamic jurisprudence, particularly in Malaysia, on the basis that the current trends in sectors such as banking and *takāful*, do not limit the scope of *Fiqh* to the Syāfi'īs school of law.

The significance of *Syarī'ah* compliance is clearly illustrated by *Hibah Harta*, an Islamic estate-planning instrument. The excellent idea behind the introduction of this instrument is clouded by the fact that it does not fully comply with Islamic principles. Having a proper plan to distribute property is permissible as long as it does not contradict the Islamic legal principles. In this regard, in the light of the present study, it is clear that this instrument does not fulfill this requirement and even to an extent, contradicts the principles of the *farā'id* law. Complying with the *Syarī'ah*, and furthermore the *farā'id*

law, is vital because a failure to meet *Syarī'ah* requirements results in the infringement of the rights of others. The verdict, or *fatwā*, issued by the *Fatwā* Council of Wilayah Persekutuan Kuala Lumpur appears very general and hence not decisive. After analyzing in depth the *hibah harta* and studying the work of Hj. Othman on which it is based, and making a comparison with the conditions as laid down in the *fatwā*, it appears that this instrument needs further refinement before being promoted to the public. This is supported by the fact that the *Muftī's* Office itself, which has declared the validity of the instrument, issued a reminding letter to the Bumiputra-Commerce Trustee Berhad asking them not to mention the *fatwā* while promoting the instrument.

Family *takāful* and conventional life insurance are newly invented financial instruments that did not exist during the time of the Prophet Muḥammad and hence no definite Qur'anic injunction or Prophetic tradition is found concerning them. They are therefore a matter open to *ijtihād* and reasoning that must take into account, among other things, the *maqāṣid* or aims of the *Syarī'ah* as well as the nature and concept of the business.

The payment of monetary compensation by the *takāful* and insurance company is similar and analogous to a practice carried out in Malay Muslim society. Whenever there is a death, every adult in the community donates a certain amount of money to the deceased's family. The pertinent issue here is that the accumulated money is not distributed among the deceased's legal heirs but is given to the close family members, including any adopted children.

It is therefore clear that the money payable from the *takāful* and conventional insurance does not necessarily pass to the legal heirs under the Islamic law of succession. Moreover, it is not valid for *waṣiyyah* and *hibah* as well.¹ This is on the basis that the money is not the property of the deceased but payment by other fellow participants with the common objective of assisting the dead participant's family. The inclusion of the element of nomination has no effect on this suggestion because the nominee remains the trustee for administrative purposes and acts as a representative in making the claim and distributing the money among the appointed beneficiaries.

Furthermore, with regard to government retirement benefits, it should be noted that confining the recipients to the legal heirs of the pensionable officer as prescribed under the *farā'id* law would defeat the objectives of such schemes as underlined by the Government. It should also be noted that under the *farā'id* law, some individuals, such as adopted sons or daughters, who may have been financially dependant upon the pensionable officer during his lifetime are excluded from inheritance. Besides this, there is the possibility that the money would be granted to those who are not really financially affected by the death.

¹ In the Resolution of Workshop "Hibah: Its Model and Application in Takaful Perspective" held on 12th March 2003 at the Park Royal Hotel, Kuala Lumpur, it is stated that it is valid to make Takaful Benefit as a *hibah* even though it is not in existence at the time the contract is performed. This opinion is claimed to be Mohd Daud's. This workshop was organized as a closed session by the Islamic Banking and Finance Institute of Malaysia, after the Takaful Nasional Sdn Berhad had to face a grave problem arising from a case in which a participant had appointed his fiancée as the beneficiary of the benefit if he died following the *hibah* policy introduced by the company. However, upon his death, the fiancée made the claim and at the same time, the legal heirs of the deceased participant also made a claim contending they were entitled to the benefit as legal heirs under the *farā'id* law. The Takāful operator had to settle the case by paying a huge amount of money to both parties, which cost them more than one million ringgits. Dr. Ismail Abu Hassan, a lecturer at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University of Malaysia, who attended the seminar, provided this information. Two officers of the Takaful Nasional Sdn Berhad, Mohd Arsi Omar and Mohd Maiz, confirmed this information during an interview held on 12th September 2003.

The basic principles of the Islamic law of succession are prescribed in detail in the Qur'an and the *Sunnah*. However, as mentioned above, in cases where no clear Qur'anic or *Sunnah* injunctions are found, Muslim scholars resorted to *ijtihād* in an effort to solve problems arising after the death of the Prophet. These three sources have become reference points and provide examples to the later Muslim scholars in their endeavors to come up with solutions for newly encountered problems. In Malaysia, with the advent and implementation of Islam, prior to the coming of the British, the principles of the Islamic law of succession were applied alongside the *adat* laws. The British continued with this practice after their failure to introduce English common law regarding the distribution of Muslim estates. There are many cases decided by English judges, which show that the Islamic principles of Muslim succession were judicially recognized.

It is however unfortunate to see that Muslims in Malaysia, since independence until the present day, do not have a single statute regarding the distribution of their estates. Even though Muslim successions, testate and intestate are included in the State List and the Federal List of the Federal Constitution of Malaysia, no single statute has been passed either by the Parliament or the State Legislative Assembly. As a result, Muslims have to refer to the treatises written by Muslim scholars in the past, normally in Arabic, in order to know the rights of legal heirs to the estates and other related issues.

The legal issues regarding the jurisdictional conflict between the civil courts and the Syariah courts further complicate this problem. It is therefore important to mention that in dealing with the issues of Muslim succession, the most important point that should

always be addressed is in relation to the rights that arise due to the death of the deceased. Clearly, the courts' main function is to deal with the matters in dispute fairly and justly by applying the very best method to avoid any kind of action, which could possibly bring injustice to the parties concerned. In other words, in succession cases, the interest of the parties involved is the most significant priority that should be looked upon by the courts.

Having said that, it is in the interest of the deceased Muslim as well as all the parties involved, such as the beneficiaries, that their rights as prescribed by their religion are fully protected and fulfilled. The most important aim of every Muslim is to have their rights realized and recognized by the legal institution, i.e. the Syariah courts, that is capable of deciding, in terms of its specialist knowledge, issues pertaining to the Islamic law principles as laid down in the Qur'an and the *Sunnah* of the Prophet.

It is therefore submitted that the Federal Constitution is not a major hindrance thwarting the right of the Muslims to have their personal law issues decided by their religious courts. Action could be taken to bring the Muslims' dream of having their cases of succession decided by the Syariah courts realized. Besides the necessary amendments that could be made to several provisions of the relevant acts and enactments, the Syariah courts should improve their efficiency in making themselves really ready to take up the jurisdiction from the civil courts.

The establishment of an Islamic division in the civil courts to deal with matters pertaining to Islamic law could be a good possible solution. Moreover, the civil court judges'

interpretations on matters pertaining to Islamic law could be highlighted because the application of the provisions in the Federal Constitutions as well as the acts and enactments are very much dependant on them. There is a tendency nowadays among the judges themselves to give positive interpretations regarding the status of Islam and Islamic law in the Federal Constitution in a way that looks to be an effort to recognize Islamic law as a primary source of law in the Malaysian legal system.²

RECOMMENDATIONS

The constitutional issue as discussed in the *Jumaaton* case could be relevant to the decision given by the learned judge, Raja Azlan Shah in *Datuk Menteri Othman bin Baginda v. Datuk Omi Syed Alwi*³ when suggesting modes of interpreting the provisions of the Federal Constitution:

“In interpreting a constitution, two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a Constitution, being a living piece of legislation, its provision must be construed broadly and not in a pedantic way- with less rigidity and more generosity than other Acts. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumption of statutory interpretation.”

In the light of the above statement, the mere presence of the clause “Islamic law relating to succession, testate and intestate” in the State List of the Ninth Schedule of the Federal Constitution would seem sufficient to confer such jurisdiction upon the Syariah courts. Furthermore, article 121 of the Federal Constitution was amended by inserting article 121

² Refer to cases of *Che Omar bin Che Soh v PP* [1998] 2 MLJ 55, *Minister of Home Affairs v Jamaluddin bin Othman* [1998] 1 MLJ 369 and *Hajah Halimatussaadiah v Public Service Commission* [1992] 1 MLJ 513.

³ (1981) 1 MLJ 29.

(1A) for the purpose of upgrading and strengthening the position of the Syariah courts in Malaysia.

The present phenomenon clearly shows the intention of Parliament to place the personal laws of Muslims exclusively under the jurisdiction of the Syariah courts.⁴ In this respect, the Islamic law relating to succession, testate and intestate, is undoubtedly one of the Muslim personal laws and hence, the interpretation of the Federal List and the State List should accord with the intention behind the insertion of article 121 (1A). Therefore, the presence of the relevant clause in the State List together with section 46 (vii) of the Administration of Islamic Law (Federal Territories) Act, 1993 should be adequate to eliminate any doubts regarding the question of which court is competent to adjudicate on cases concerning Muslim succession.⁵

The application of the Probate and Administration Act, 1959 should therefore be limited to the succession to non-Muslim estates, and the issuance of grants by the High Court should be limited to non-Muslim succession. Any succession pertaining to deceased Muslims should be administered and adjudicated separately by the Syariah courts.

In relation to this, any seemingly conflicting provisions in the Federal Constitution should be amended to make matters clear. Amendments to the Administration of Islamic Law Act are necessary. Section 46 should be amended to spell out clearly the Syariah courts' jurisdiction on such matters. Section 50 should also be amended to confer upon

⁴ Abu Bakar, Abdullah, *Ulasan Kes: Juma'aton Dan Raja Delila Lwn Raja Hizaruddin*, pp. 70-71.

⁵ Buang, Salleh, *Utusan Malaysia*, 21/7/1998.

the Syariah courts the power to issue *farā'id* certificates without any request from the civil court or the Land Office and to give the certificate a binding legal effect, and furthermore to exclude any other body from any interference with the Syariah courts' jurisdiction.

A statute must also be introduced governing Muslim succession, which covers all the aspects of the law of succession, including the administration and distribution of the estate to the beneficiaries. The current provisions in the Probate and Administration Act, 1959 and the Distribution Act, 1953 should be utilized as a sample and provide guidelines when drafting the new law, with adjustments being made to any provisions that are contrary to Islamic law. This statute should take into account the opinions of other schools of law and not be confined to the Syāfi'is. The primary source of reference should be the Qur'an and the *Sunnah*, and not the opinions of scholars. The opinions of scholars should stand as secondary reference points to aid the comprehension of the primary sources.

Another aspect that should be highlighted is the question of why the High Court insists on adjudicating on matters of Muslim succession. The relevant articles of the Federal Constitution clearly spell out that matters of Islamic Law should be under the jurisdiction of the Syariah courts. Moreover, article 121(1A) shows the intention of the Federal Legislature to protect and strengthen the status and jurisdiction of the Syariah courts by removing the power of the High Court to invalidate the decisions of the Syariah courts.

To overcome the problem, a suggested solution is to set up another division within the High Court to deal with matters of Islamic law, especially those of succession. In this scenario a *Syari'ah* judge, or *Qāḍī*, would sit side by side with the civil court judge to determine any issue pertaining to the Islamic law of succession. The civil court judge would deal with matters other than Islamic law, while the *Syari'ah* judge would deal with Islamic law rulings. It is therefore proposed that no amendments be made with regard to the relevant provisions of the Federal Constitution, Federal Acts or the states enactments except for the purpose of establishing such a division. However, this should be seen as the initial step toward transmitting exclusive jurisdiction to the Syariah courts, this being the intention behind the insertion of article 121 (1A).

It is relevant to mention here that the *Syari'ah* judges, registrars, assistant registrars and other court staff should have access to sufficient courses and training, especially with regard to the administration of estates, to provide them with adequate knowledge and experience pertaining to such matters.⁶ This preparation should be seriously addressed and undertaken because otherwise it is very doubtful whether the Syariah courts could successfully carry out the necessary process as the rules and regulations pertaining to estate administration would be absolutely new and unfamiliar to them. Therefore, such a transfer of jurisdiction from the civil High Court to the Syariah High Court should be carefully carried out bearing in mind that the confusion caused by such potential problems would further undermine the credibility of the Syariah courts' administration in the eyes of the Malaysian public, including the Muslims. The efforts to improve the status

⁶ Dato' Abdul Hamid bin Haji Mohamad, *Administration of property in Malaysia: A Civil Law and Syariah Law Perspective*, a paper presented at the Seminar on Islamic Property Management on 7th & 8th November, 2001, p.7.

of the Syariah courts should not be discredited by unnecessary hardship being placed on the parties, which in turn would cause the people to mistrust the efficiency of the officers of the Syariah courts.

In the case of the *Hibah Harta* instrument, arguably the *‘umrā* and *ruqbā* conditions have nothing to do with the primary intention of introducing the instrument, which is to prevent the donee from manipulating or misusing the gifted property, i.e. selling or mortgaging it, or expelling the donor from the gifted home. The primary intention could probably be achieved by restricting the donee from any such dealings with the property, which could defeat the intention of the donor in making the *hibah*. An appropriate solution could possibly be found if the opinion of the Ḥanbalīs is taken into account, whereby absolute freedom is given to the contracting parties to insert any condition into the contract as long as it does not contradict the *Syarī‘ah*.⁷

In this regard, it is suggested that the donor could insert a condition for his/her own benefit, such as the right for him/her or any other specified person to remain in the gifted house. This is similar to the condition allowing the donor to receive the proceeds of the gifted property. However, additional conditions that exclude the legal heirs from inheritance are absolutely null and void because they are against the sound *ḥadīths* as

⁷ To the Ḥanbalīs, particularly Ibn Taymiyyah and Ibn al-Qayyim, any conditions that benefit any of the parties to the contract are valid as long as no prohibition is found in Islamic law and they do not contradict the proofs of the *Syarī‘ah*. This principle is applicable to all kinds of contract including contracts of exchange and contracts of donation. If such an agreed condition is not fulfilled, the contract is capable of being revoked by another contracting party. See al-Zuhaylī, vol. 4, p. 197- 210.

well as the *farā'id* system. This is the unanimous opinion of the four Sunni schools of law.⁸

It must be clear that the acceptance of the property by the Bumiputra-Commerce Trustee Berhad on behalf of the donee is through its valid appointment as the donee's representative and this must be proven by the appointment being documented. Only when the appointment and the functions of the representative are clearly set out is the product valid. This may allow the registration of the product in the name of the trustee, instead of the donee. It is therefore suggested that the appointment of the Bumiputra-Commerce Trustee Berhad as the donee's representative is made and properly documented prior to the execution of the offer and acceptance.

It is also suggested that the National *Fatwā* Council should validate this instrument rather than a state *fatwā* council. This would ensure that all the state *fatwā* councils would recognize the validity of the instrument, thus enabling the Bumiputra-Commerce Trustee Berhad to promote it throughout the country without facing challenges in the courts.

With regard to the benefits under the *takāful* and conventional life insurance policies, it is suggested that the payment of the money is made in favour of the persons or beneficiaries who are freely selected by the participant and are stipulated clearly in the contract mutually agreed to by the parties. The inclusion and exclusion of beneficiaries is left for the participant to freely and totally decide and is agreed upon by the *takāful* operator or

⁸ See *ibid*, p. 197- 210.

insurer. In the case where the participant does not specify the beneficiaries, the payment of the money is decided based on the objectives of the transaction.

The payment of benefits from *takāful* and insurance activities arises from the agreement between the participants and the company. To whom the money should be distributed is not within the scope of the contract. It is based on a separate agreement between the parties involved. As it is a contract of *tabarru'āt*, it is up to the donor to decide in whose favour the money should be given. It should be noted that the distribution of the money among the legal heirs is not an effect of a *takāful* or insurance contract. This is completely different to a contract of exchange in the sense that the transfer of ownership of the subject matter is the effect of such a contract as clearly prescribed by the *Syarī'ah*.⁹

In relation to this, it is suggested that the *takāful* and conventional insurance activities as well as government retirement benefits are regarded as modes of Islamic estate planning. The disposition of property upon one's death should not be confined to distribution under the *farā'id* system. It should be based on a variety of property disposal mechanisms, including the *hibah*, *waqf* and *waṣiyyah* laws. Muslims could also resort to any other modes of estate planning provided that such modes are *Syarī'ah* compliant, including the *harta sepencarian*.

Having said this, the *takāful* and insurance activities and government retirement benefits are arguably best regarded as modes of estate planning and hence, the beneficiaries of these benefits could be expanded. From the discussion on these three, it is quite clear that

⁹ Al-Zuḥaylī, vol 4, p. 233.

they do not fully meet the characteristics necessary to make them heritable under the *farā'id* law. In particular, there is the issue of ownership, which is largely based on the discussion of the concept and aims of the three modes. In other words, in determining whether a wealth is heritable or not, the concept and aims of the particular instrument should be taken into account.

Diversifying property disposal upon death and not confining it to the *fara'id* system does not contradict the Qur'anic and *ḥadīth* injunctions. The Qur'an itself even encourages the Muslim to allocate wealth to the people who are not entitled under the *farā'id* system. Chapter *al-Nisā'* (4): 8 states: "But if at the time of division other relatives, or orphans, or poor, are present, feed them out of the (property), and speak to them words of kindness and justice". From this verse, we can deduce that the importance of varying the recipients of the estate, for instance to include adopted children, by way of donation was being addressed. However, although in this verse even though the way to help those who are not legally entitled is stated as being by way of donation, other methods of achieving the same purpose should not be dismissed. As long as other methods do not contradict the *Syarī'ah* principles and do not infringe the rights of the legally entitled heirs, they should be welcomed and utilized to achieve the maximum benefits.

The Prophet Muḥammad even disallowed one of his companions, Sa'ad ibn Abī Waqqāṣ, who wished to bequeath two-thirds of his wealth and leave the remaining for his only heir, a daughter. The Prophet allowed him to only bequeath a maximum of one-third of his estate, emphasizing the importance of financially securing his heir's future after his

death. The Prophet laid down a vital principle by saying: "If you leave you heirs rich, it is better than leaving them indigent, dependant on people".¹⁰ From this *ḥadīth* we can deduce the significance of taking care of the future of those we dearly love. In Islamic estate planning, a combination of various modes of property disposal is therefore a method that Muslims can utilize in order to financially secure the lives of others.

With regard to *fatāwā* in Malaysia, it is suggested that any *fatwā* issued by either the National *Fatwā* Council or a state *fatwā* council should contain a detailed discussion on the issues in question. Each *fatwā* should be based on clear Islamic research methodology including the arguments upon which the *fatwā* is based. In addition, *fatāwā* should be publicized in the sense that the public should have easy access to them. This would enable the public to comprehend the *fatwā* and study it in depth, rather than blindly accepting it without understanding the reasons and arguments behind it.

As to the feasibility of these recommendations, these recommendations are feasible considering the facts that the Islamic Law of Succession was applied prior to the coming of the British, with the mixture of *adat* laws. The British judges had applied it as seen in the court cases and had also decided that Islamic law was the law of the land of the Malay States.¹¹ There is also tendency in the civil court's interpretation to gradually introduce a new legal system in Malaysia.¹² The case of *Meor Atiqurrahman bin Ishaq & Others v.*

¹⁰ See Ibn Rusyd, translated by Nyazee, vol. 2, p. 407.

¹¹ See case *Ramah v. Laton* (1972) 6 FMSLR 128. Thorne J stated: The question in debate was not, in the view which I take, a question of foreign law at all, but the question was, in the events that had happened, what were the rights of the plaintiff according to the law of this land in the estate of her deceased husband. The local law is a matter of which the Court must take judicial notice. The Court must propound the law,..."

¹² See above, p. 245.

*Fatimah bte Sihi and Others*¹³ illustrated how the Court considered the effect of article 3(1) of the Malaysian Federal Constitution.¹⁴ The Court decided that based on article 3, it is the Government's responsibility to protect and promote Islam as best as it could. This demonstrates that the legal system is moving in this direction.

As to the official position of the government, the present Malaysian Government had taken several attempts to streamline the codification of Islamic law. The Islamic and Civil Law Technical Committee was established on 6th May 1988. According to Yaacob, in its first meeting, the committee viewed that the priority is to look into the laws applicable in the Syariah courts and to enact sufficient laws for the courts.¹⁵ This is in line with the Government intention to upgrade the status of the Syariah courts in Malaysia by inserting article 121(1A) of the Federal Constitution whereby preventing the civil courts from interference with the decisions of the Syariah courts. The Government had also formed a committee under the chairmanship of the late Tan Sri Syed Nasir Ismail to look into the unsatisfactory position of the Syariah courts and its judges and officers and to suggest measures to be taken to raise their status and position.¹⁶ The Government has also established *Jabatan Kehakiman Syariah Malaysia* (Syariah Judiciary Department of Malaysia), in 1998 in order to address some of the problems that are affecting the administration of Syariah courts such as the proposal to restructure the Syariah courts throughout Malaysia and the appointment of a Chief Syariah Judge of

¹³ [2005] 5 MLJ 375

¹⁴ Article 3(1): Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

¹⁵ Yaacob, Abdul Monir, 'Undang-undang Pentadbiran Agama Islam: Pengkanunan, Reformasi dan Penyelarasan' (1998) 2 IKIM Law Journal 37, pp. 67-74.

¹⁶ Ibrahim, "The Future of the Shariah and the Shariah Courts in Malaysia", *JMCL*, 20, (1993), pp. 44-46.

Malaysia. This department is put directly under the Prime Minister's Department.¹⁷ Thus, the proposals made by this study fall within the aspirations of the Malaysian Government and the legal system in terms of enhancing the provisions made by the Syariah courts and overcoming the jurisdictional conflicts between these courts and the civil courts.

¹⁷ Shuaib, Farid Sufian, et.al. *Administration of Islamic Law in Malaysia Text and Material*, pp. 208-209.

BIBLIOGRAPHY

Books

- ‘Abd al-Laṭīf, Ḥassan Ṣubḥī Aḥmad. *Aḥkām al-Mawārīth fī al-Sharī‘ah al-Islāmiyyah*. Iskandariyyah: Mu‘assasah Shabāb al-Jāmi‘ah, n.d.
- Abū Zahrah, Muḥammad. *al-Milkiyyah wa Naẓariyyah al-‘Aqd*. Cairo: Dār al-Fikr, 1996.
- _____. *Aḥkām al-Tarikāt wa al-Mawārīth*. Cairo: Dār al-Fikr, n.d.
- Afzalurrahman. *Banking and Insurance*, London: The Muslim School Trust, 1979.
- Anas, Imām Mālik. *al-Mudawwanah al-Kubrā*. Beirut: Dār Ṣādir, n.d.
- Anderson. J.N.D. *Islamic Law in The Modern World*. London: Stevens and Sons Limited, 1959.
- Arjunan, K. & Low Chee Keong. *Lipton & Herzberg’s Understanding Company Law in Malaysia*. Student edition. Victoria: LBC Information Services, 1995.
- ‘Aṭiyyah, Muḥammad Abū al-Ḥāj. *Ḍawābiṭ al-Irth fī al-Tasyrī‘ al-Islāmī*. 3rd. edition. N.p., Dār al-Thaqāfah al-‘Arabiyyah, 1981.
- Awang, Ridzuan. *Undang- Undang Tanah Islam; Pendekatan Perbandingan*. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1994.
- Ba‘albakī, Rūḥī. *Al-Mawrid – Qāmūs ‘Arabī-Inklīzī*. 4th edition. Beirut: Dār al-‘Ilm li al-Malāyīn, 1992.
- Badrān, Abū ‘Aynayn. *al-Syarī‘ah al-Islāmiyyah Tārīkhuhā wa Naẓariyyah al-Milkiyyah wa al-‘Uqūd*. N.p.: Mu‘assasah Syabāb al-Jāmi‘ah, n.d.
- Al-Bahūtī, Manṣūr Ibn Yūnus Ibn Idrīs. *Kasyāf al-Qinā‘ ‘alā Matn al-Iqnā‘*. Iskandariyyah: Mu‘assasah Syabāb al-Jāmi‘ah, 1981.
- Baillie, Neil B.E. *A Digest of Moohummdan Law*. Lahore: Premier Book House, 1965.
- Barrāj, Jumu‘ah Muḥammad. *Aḥkām al-Mawārīth fī al-Syarī‘ah al-Islāmiyyah*. ‘Ammān: Dār al-Fikr li al-Nasyr wa al-Tawzī‘, 1981.
- BIRT, *Takaful (Islamic Insurance) Concept and Operational System From the Practitioner’s Perspective*, Kuala Lumpur: BIMB Institute of Research and Training Sdn. Bhd., n.d.

- Braddel, Roland. *The Legal Status of the Malay States*. Singapore: Malaya Publishing House Limited, 1931.
- Brener, Michael, ed., *Social Method and Social Life*. London: Academic Press, 1981
- Brill, E.J. *First Encyclopedia of Islam*. New York: Leiden, 1993.
- Bryman, Alan, *Social Research Methods*. 3rd. edition, Oxford: Oxford University Press, 2004
- Buang, Salleh. *Malaysian Torrens System*. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992.
- _____. *Malaysian Legal History; Cases and Materials*. Kuala Lumpur: Dewan Bahasa dan Pustaka, 2002.
- _____. *Historic Judgment on Article 121(1A) of the Federal Constitution, case comment on Mohd Habibullah v Faridah Dato' Talib*. Malaysian Law News, February 1993.
- Buku Panduan Permohonan Pembahagian Harta Pusaka Kecil, Seksyen Pembahagian Pusaka, Kuala Lumpur: Jabatan Ketua Pengarah Tanah dan Galian Kementerian Tanah dan Pembangunan Koperasi, Kuala Lumpur, 3rd edition, n.d.
- Bustami, Tajul Aris Ahmad. Eds., *Harta Sepencarian Prosiding Ex-Parte Perintah Injunksi*. Kuala Lumpur: Pusat Undang-Undang AIKOL, Universiti Islam Antarabangsa, Malaysia, 2003.
- Al-Būṭī, Saʿīd Ramadān. *Fiqh al-Sīrah al-Nabawiyyah*. Damshiq: Dār al-Fikr, 1996.
- Coulson, N.J. *Conflicts and Tension in Islamic Jurisprudence*. London: The University of Chicago Press, 1969.
- _____. *Succession in the Muslim Family*. London: Cambridge University Press, 1971.
- Curzon, L.B., *Land Law*. London: MacDonald and Evans Ltd., 3rd edition, 1979, p. 238 & 253.
- Daud, Mustafa Hj. *Perniagaan Menurut Islam*. Kuala Lumpur: Utusan Publications & Distributors Sdn Bhd, 1995
- Doi, I., A Rahman. *Shariah: the Islamic Law*. Kuala Lumpur: A.S. Noordeen, 6th print, 2002.
- Doshi, Varsha L. *Making a Will*. Kuala Lumpur: Penerbit Fajar Bakti Sdn Bhd., 1994

- Al-Dusūqī, Muḥammad ʿArifah. *Ḥāshiyah al-Dusūqī ʿalā Sharḥ al-Kabīr*. Beirut: Dār al-Fikr, n.d.
- Al-Fayrūzabadī. *al-Qāmūs al-Muḥīt*. Beirut: Dār al-Iḥyāʾ al-Turāth al-ʿArabī, 1991.
- George, Mary. *Malaysian Trust Law*. Subang Jaya: Pelanduk Publications, 1999.
- Hariati, Sharifah. *Islamic Insurance (Takaful) in Contemporary Malaysia with Special Reference to Takaful Act, 1984*, Master of Comparative Law, International Islamic University Malaysia, 2000.
- Hashim, Tun Mohamed Suffian. *An Introduction to the Constitution of Malaysia*. Kuala Lumpur: Government Printer, 1972.
- al-Ḥaskafī, Muḥammad bin ʿAlāʾ al-Dīn. *al-Dur al-Mukhtār*. Cairo: Maṭbaʿah al-Wāʿidh bi al-Jamāmīz, 1327H.
- al-Hilālī, Muhammad Taqi-ud-Din and Khan, Muhammad Muhsin. *Interpretation of the Meanings of the Noble Qurʾān in the English Language*. Riyadh: Darussalam, 2000.
- Hooker, M.B. *Adat Laws in Modern Malaya*. Kuala Lumpur: Oxford University Press, 1972.
- _____. *Islamic Law in South-East Asia*. Singapore: O.U.P., 1984.
- _____. *Readings in Malay Adats Laws*. Singapore: Singapore University Press, 1970.
- Ibn ʿĀbidīn, al-Syāmī. *Ḥāsiyah Rad al-Mukhtār ʿalā Dur al-Mukhtār*. Bākistān: Maktabah Rasyīdiyyah Kuʿtah. 1404H.
- Ibn al-Athīr. *al-Nihāyah fī Gharīb al-ḥadīth wa al-ʿĀthār*, N.p.: al-Maktabah al-Islāmiyyah, n.d.
- Ibn Mājah, *Sunan Ibn Mājah*, Cairo: Maṭbaʿah ʿĪsā al-Ḥalabī, n.d.
- Ibn Manzūr, Muḥammad. *Lisān al-ʿArab*, Beirut: Dār al-Ṣādir, 1990.
- Ibn Qudāmah. *Al-Mughnī wa al-Syarḥ al-Kabīr ʿalā Matn al-Muqniʿ*. Beirut: Dār al-Fikr, 1992.
- Ibn Qūdī, Syamsuddīn Aḥmad, *Natāʾij al-Afkār fī Kash al-Rumūz wa al-Asrār*, Egypt: Sharikah Maktabah wa Maṭbaʿah al-Bābī al-Ḥalabī wa Awlādihi, 1970.

Ibn Rusyd, Abī al-Walīd Muḥammad bin Aḥmad bin Muḥammad. *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*. 5th edition. Egypt: Syarikah Maktabah wa Maṭbaʿah Muṣṭafā al-Bābī al-Ḥalabī wa Awlādihi, 1981.

_____. *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*, translated into English by Nyazee, Professor Imran Ahsan Khan and reviewed by Rauf, Professor Mohammad Abdul, Reading: Garnet Publishing, 2003.

Ibrahim, Ahmad and Joned, Ahilemah. *The Malaysian Legal System*. 2nd edition. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1995.

_____. *Family Law in Malaysia and Singapore*. Singapore: Malayan Law Journal, 1984.

_____. *Islamic Law in Malaysia*. Edited by Gordon, Shirle. Kuala Lumpur: Malaysian Sociological Research Institute Ltd., 1975.

Ibrahim, Ahmad & Yaacob, Abdul Monir, eds. *The Administration of Islamic Laws*, Kuala Lumpur: IKIM, 1997,

al-Jammāl, Muḥammad ʿAbdul Munʿim. *Ensyklopedia Ekonomi Islam*. Translated into Bahasa Malaysia by Salahuddin Abdullah. 2nd edition. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1997.

Al-Jastānī, Sulaymān bin al-Asyʿath. *Sunan Abī Dawūd*. Karachi: N.p.d.:n.p.

al-Jazīrī, ʿAbd Raḥmān. *Kitāb al-Fiqh ʿalā al-Madhhab al-Arbaʿah*. n.p.: Dār al-Manār, 1999.

Jowitt, Earl and Walsh, Clifford, *Jowitt's Dictionary of English Law*. Edited by John Burke, London,: Sweet & Maxwell, 2nd edition, 1977,

Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*. Beirut: Dār al-Kitāb al-ʿArabī, 1982.

Khan, Muhammad Akram. *Economics of the Quran: A Study of Surah al-Maidah and Surah al-Nah*. Lahore: Library Information and Management Academy, 1994

Khafīf, ʿAlī. *al-Milkiyyah fī al-Sharīʿah al-Islāmiyyah maʿa Muqāranatihā bi al-Qawānīn al-ʿArabiyyah*. Beirut: Dār al-Nahdah al-ʿArabiyyah, 1990.

_____. *Aḥkām al-Muʿāmalāt al-Sharʿiyyah*. Cairo: Dār al-Fikr al-ʿArabī, 1996.

Khan, Muhammad Mustafa. *Islamic Law of Inheritance A New Approach*. New Delhi: Kitab Bhavan, 2nd edition, 2000.

Longman Dictionary of Contemporary English, England: Longman Group UK Limited, 2nd edition, 1987.

Lorraine Blaxter, et.al. *How To Research*, Buckingham: Open University Press, 1996

Mahmood, Nik Ahmad Kamal Nik. *Kontrak Pekerjaan: Satu Analisa Perbandingan*. Al-Ahkam, Jilid 7, Kuala Lumpur: Dewan Bahasa Dan Pustaka, Kuala Lumpur.2000.

Mahmood, Rosli. *Perbankan dan Pemberian Pinjaman*. Kuala Lumpur: Utusan Publications & Distributors, 1998.

Al-Mawardī, Abū al-Ḥasan ʿAlī Muḥammad. *Al-Aḥkām al-Sulṭāniyyah*. Cairo: al-Ḥalabī, 1970.

Merican, Pawancheek. *Islamic Inheritance Law in Malaysia*. Kuala Lumpur: Malayan Law Journal, 2004.

Moten, Abdul Rashid, *A Guide to Research Proposal and Report Writing*. Malaysia: Research Centre International Islamic University Malaysia (IIUM), 1998

Al-Mubārakfūrī, Imām al-Ḥāfiẓ ibn al-ʿAlā Muḥammad ʿAbd al-Raḥmān bin ʿAbd al-Raḥīm. *Tuhfah al-Aḥwadhī bi Syarḥ Jāmiʿ al-Tirmizī*. N.p.: Dār al-Fikr, 1979.

Al-Muʿjam al-Wasīṭ. Prepared by Ibrāhīm Muṣṭafā. et.al. Istanbul: al-Maktabah al-Islāmiyyah, n.d.

Musa, Shafai. *The Conditions of the Countervalues of the Contract of Sale under Islamic Law with Occasional Comparison with English Law*. Unpublished Ph.D Thesis. Glasgow: University of Glasgow Calēdonian, 2000.

Muslehuddin, Muhammad. *Insurance and Islamic Law*. 4th edition. Lahore: Islamic Publications Limited., 1982.

Al-Naysābūrī, Muḥammad ʿAbd al-Ḥākīm. *Al-Mustadrak ʿalā al-Ṣaḥīḥayn*. Beirut: Dār al-Kutub al-ʿIlmiyyah, n.d.

Al-Nawawī, Yahyā ibn Sharaf. *Sharḥ Saḥīḥ Muslim*. Beirut: Dār al-Qalam, 1987.

_____. *Minhāj al-Ṭālibīn*. n.p., n.p., n.d.

_____. *Minhaj et Talibin A Manual of Muhammadan Law According to the School of Shafii by al-Nawāwī*. Translated into English from the French Edition of L.W.C.Van Den Berg, by E.C. Howard, Adam Publishers & Distributors, Delhi, 2001.

Nasir, Jamal J. *The Islamic Law of Personal Status*. London: Graham & Trotman, n.d.

Malik, Nora Abdul, *Islamic Arbitration (Tahkīm) and Mediation in Resolving Family Disputes- A Comparative Study under Malaysian and English Law*. Unpublished Ph.D Thesis, Glasgow: University of Glasgow Calédonian, 2002.

Oxford Advanced Learner's Dictionary, prepared by A S Hornby, edited by Sally Wehmeir, 6th edition. Oxford: Oxford University Press, 2000.

Pearl, David. *A Textbook on Muslim Personal Law*. 2nd edition. London: Croom Helm, 1987.

Al-Qaraḍāwī, Yūsuf. *Fiqh al-Zakāh*, Beirut: Mu`assasah al-Risālah, 1997.

_____. Al-Qaraḍāwī, Yūsuf. *The Lawful and The Prohibited in Islam*. Kuala Lumpur: Islamic Book Trust, 1985.

_____. *Fatwa Terkini Wanita & Keluarga*. Translated into Bahasa Malaysia by H. Mohd. Roihan M.A. Kuala Lumpur: Pustaka Shuhada, 1996.

Al-Qūsī, ʿAbd al-Munʿim Maḥmūd, *Ribā Islamic Law and Interest*. Unpublished PhD Thesis, Temple: Temple University, 1983.

Raman, G. *Probate and Administration in Singapore and Malaysia: Law and Practice*. Kuala Lumpur: Malayan Law Journal Sdn. Bhd., 1991.

Rashid, Abdul. *Undang- Undang pusaka Dalam Islam; Suatu Kajian Perbandingan Dalam Islam*. Kuala Lumpur: Penerbitan Hizbi and al-Hidayah Publisher, 1997.

Rosman, Arieff Salleh, *Harta Intelektual Menurut Fiqh Islam; Pendekatan Perbandingan Dengan Undang-Undang Malaysia*. Skudai: Universiti Teknologi Malaysia, 2002.

Sābiq, Sayyid, *Fiqh al-Sunnah*. 11th edition. Cairo: Dār al-Fath li Iʿlām al-ʿArabī, 1999.

Sadeq, M. Abul Hassan and Ghazali, Aidit. eds. *Readings in Islamic Economic Thought*, Kuala Lumpur: Longman Malaysia, 1992

Al-Ṣanʿānī, Muḥammad ibn Ismāʿīl. *Subul al-Salām Sharḥ Bulūgh al-Marām min Jamʿ Adillah al-Aḥkām*, Beirut: Dār al-Kutub, 1986.

Sawyer, Caroline. *Principles of Succession, Wills & Procedure*. London: Cavendish Publishing Limited, 1998.

Al-Syarbīnī, al-Khaṭīb. *Mughnī al-Muḥtāj*. Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1958.

Al-Syātibī, Abū Iṣḥāq Ibrāhīm bin Mūsā al-Gharnati. *al-Muwāfaqāt fī ʿUṣūl al-Sharīʿah*. Cairo: n.d.

al-Syawkānī, Muḥammad bin ʿAlī bin Muḥammad. *Nayl al-Awṭār*, Egypt: Maṭbaʿah Muṣṭafā al-Ḥalabī, 1250H.

_____. *Tafsīr Fath al-Qadīr*, Cairo: Maṭbaʿah Muṣṭafā al-Ḥalabī, 1349H.

Sheridan, L.A. *Malaya, Singapore and the Borneo Territories*. London: Steven Ltd., 1965.

Al-Syīrāzī, Abī Ishāq Ibrāhīm bin ʿAlī ibn Yūsuf al-Fīrūzābādī. *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī*. Dār al-Fikr, n.d.

Shuaib, Farid Sufian, et.al. *Administration of Islamic Law in Malaysia Text and Material*. Kuala Lumpur: Malayan Law Journal, 2001

Siddique, Muhammad Nejatullah. *Insurance in an Islamic Economy*. Leicester: Islamic Foundation, 1985.

Singh, Mahinder. *The Law of Wills Probate Administration and Succession in Malaysia and Singapore*. Kuala Lumpur: International Law Book Services,

Al-Suyūṭī, Jalāl al-Dīn ʿAbd al-Raḥmān. *al-Ashbāh wa al-Nazāʿir*, Beirut: Dār al-Kutub al-ʿIlmiyyah, 1983, p. 327.

Tyabji, Faiz Badruddin M.A. *Muhammadan Law The Personal Law of Muslims*. 3rd edition. Bombay: N.M. Tripathi & Co., Law Publishers, 1940.

Williams, Joshua. *Principles of the Law of Real Property*. 2nd edition, London: Sweet & Maxwell Ltd, 1920.

Wilson, Rodney. *Economics, Ethics and Religion, Jewish, Christian and Muslim Economics Thought*. New York: New York University Press, 1997.

_____. *Economic Development in the Middle East*. London: Routledge, 2000.

Wilkinson, R.J. *Papers on Malay Subjects*. Kuala Lumpur: Federated Malay States Government Press, 1971.

Yusof, Mohd Fadzli. *Takaful; Sistem Insurans Islam*. Kuala Lumpur: Utusan Publications & Distributors Sdn Bhd, 1996.

Zaydān, ʿAbd al-Karīm. *al-Madkhal li Dirāsah al-Sharīʿah al-Islāmiyyah*. 16th edition, Beirut: Muassasah al-Risālah, 2001.

Zuhdi, Mahmood. *Pengantar Undang- Undang Islam di Malaysia*. Kuala Lumpur: Penerbit University Malaya, 1997.

Articles and Journals

Abd Rahman, Dato' Sheikh Ghazali, "Prosedur Dan Amalan Semasa Terhadap Pembahagian Harta Pusaka di Negeri-negeri", *Bengkel Pengagihan Pusaka KWSP Mengikut Hukum Faraid*, 19th & 20th February 2003, Institute Latihan Keselamatan Sosial KWSP (ESSET), organized by KWSP with co-operation of Jabatan Kehakiman Syariah Malaysia (JKSM),

Abd. Rahman, Zainal Azam, "Modern Takaful, Commercial and Mutual Insurance (A Short Analysis)", *IKIM Law Journal*, 4:1 (2000).

Carroll, Lucy. "Application of the Islamic Law of Succession: Was the Propositus a Sunnī or Shi'ī?". *Islamic Law and Society*. 2 (1995).

_____. "Definition and Interpretation of Muslim Law in South Asia: The Case of Gifts to Minors". *Islamic Law and Society*. 1:1 (1994).

_____. "Life Interest and Inter-Generational Transfer of Property Avoiding the Law of Succession". *Islamic Law and Society*. 8:2 (2001).

Bakar, Mohd Daud. "Islamic Property Management: An Overview", *Seminar on Islamic Financial Planning*, organized by Centre For Research and Training (CERT), The Quality Hotel City Center Kuala Lumpur, Malaysia, 29th – 30th July 2002.

_____. "Kedudukan Hibah Di Dalam Perundangan Islam dan Sivil (Rujukan Khas Untuk Takaful Keluarga)", *closed seminar on Hibah: It's Model and Application in Takaful Perspective*, on 12th March 2003 at Parkroyal, Kuala Lumpur.

Bari, Abdul Aziz, "Perlaksanaan Islam Melalui Kerangka Perlembagaan Malaysia-Masalah dan Potensinya". *IKIM Law Journal*. 3:2 (1999), p. 95.

Billah, Mohd. Maasum. "Life Insurance: An Islamic View". *Arab Law Quarterly*. 8:4 (1993).

_____. "Islamic Insurance: Its Origins and Development". *Arab Law Quarterly*, 13 (1998)

_____. "Insurable Interest: Can the Modern Law be Adopted in Takaful Operations?". *Arab Law Quarterly*. 15:2 (2000)

Buang, Salleh. "Temporary occupation licenses; some proposals for reforms". *Malayan Law Journal*. 2 [1987] ccli.

Geranmayeh, Ahmad. "Life Insurance in Islam", *the 1st International Islamic Insurance/ Takaful Summit*, Dubai, United Arab Emirates, November, 1996

Hamid, Mohamed El Fatih. "The Freedom to Make Stipulations in the Islamic Law of Contract", *Journal of Islamic and Comparative Law*. 6(1976), pp. 22.

Ibrahim, Ahmad. "The Philosophy of Islamic Insurance – Shariah Concepts and Principles", *IKIM Law Journal*. 2:1 (1998).

_____. "The Amendment to article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law". *Malayan Law Journal*. 2 [1989] xvii.

Ibrahim, Badruddin, *The Doctrine of al-`Iṣā` or al-Wiṣāyah with Reference to the Appointment of Wāṣī al-Mukhtār under Islamic law*, a proposal for Ph.D Thesis, unpublished, n.d.

Idris, Tan Sri Dato' A Samad Idris, "Pembahagian Harta Pusaka Menurut Adat Perpatih: Pengalaman Malaysia", in: *Pentadbiran Harta Menurut Islam*, edited by Abdul Monir Yaacob and Mohd. Fauzi Mustafa, Kuala Lumpur: IKIM, 1999.

Imam, Mohamad. "Probate And Administration of A Muslim's Estate in Malaysia-Legislative Competence and Syariah Court Jurisdiction". *Jurnal Undang- Undang Malaysia*. 2(1998).

Ismail Mohd @ Abu Hassan. "The Role of the Islamic Law of Succession and Administration of Estate in Islamic Financial Planning". *Seminar on Islamic Financial Planning*. Organized by Centre For Research and Training (CERT), The Quality Hotel City Center Kuala Lumpur, Malaysia, 29th – 30th July 2002,

Kimber, Richard. "The Qur'ānic Law of Inheritance". *Islamic Law and Society*. Leiden Brill, 1998.

Mohamad, Dato' Abdul Hamid bin Haji. "Administration of Property in Malaysia: A Civil And Syariah Law Perspective". *Malayan Law Journal*. 3 [2002] i.

Mohamad, Abdul Hamid. "Administration of Property in Malaysia: A Civil And Syariah Law Perspective". *Seminar on Islamic Property Management*. 7th- 8th November 2001.

Mokhtar, Hj. Mohd. Naim. "Administration of Family Law in the Syariah Court". *Malayan Law Journal*. 3 [2001] lxxxi.

Muhamad, Abdul Kadir Hj. "Hukum Pusaka Orang-orang Islam di Malaysia: Satu Tinjauan Ringkas". *Jurnal Syariah*. 5:1 (1997).

Mūsā, Muḥammad Yūsuf. "The Liberty of the Individual in Contracts and Conditions according to Islamic Law". *Islamic Quarterly*. 2:4 (1995).

Powers, David S. "The Islamic Inheritance system, A Socio-Historical Approach. *Arab Law Quarterly*". 8 (1993).

Tapah, Suwaid. "Harta Sepencarian dan Wang Simpanan KWSP". *Bengkel Pengagihan Pusaka KWSP Mengikut Hukum Faraid*. 19th – 20th February 2003. Institut Latihan Keselamatan Sosial KWSP (ESSET). Organized by KWSP with the cooperation of Jabatan Kehakiman Syariah Malaysia (JKSM)

Teng Kam Wah. "Who is an employee?", *Malayan Law Journal*. 2 [1997] ci.

Yaacob, Abdul Monir. "Undang-Undang Pentadbiran Agama Islam Pengkanunan, Reformasi Dan Penyelarasan". *IKIM Law Journal*, 2:2 (1998),

Yaacob, Othman. *Pengurusan Trust Hibah Menggunakan Fungsi Dan Tanggungjawab Pemegang Amanah Untuk Menjamin Kepentingan Pihak-Pihak Serta Pelaksanaan Syarat Hibah*. Unpublished paper..

Zin, Mohd. Kertas Kerja 1. "Pentadbiran dan Pengurusan Harta Pusaka Kecil". *Seminar Dan Dialog Mengenai Harta Pusaka Jajahan Tumpat*. Anjuran Bersama Pejabat Tanah Jajahan Tumpat Dan Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan Negeri Kelantan. 8 July 2003.

Web Pages/ Documents

Billah, Maasum, *Quantum of Damages In Takaful (Islamic Insurance) In the Contemporary Economic Reality*, [online], n.d., available from: <http://islamic-finance.net/islamic-insurance/article/t-quantum%28> [accessed 17th December 2004].

Securities Commission, *Frequently-Asked Question*, [online], available from http://www.sc.com.my/htm/icm//fr_icm.html [accessed 25th August 2003].

Takaful Nasional, *Konsep Takaful*, [online], available from <http://www.takafulnasional.com.my/default.fm> [accessed 2nd August 2003].

A *fatwā* issued by A Group of Islamic Researchers, *Why Male's Share of Inheritance Doubles Female's?*, [online], 27th March 2005, available from: <http://www.islamonline.com>. [accessed 6th April 2005].

Utusan Online, *Hibah Harta: A Muslim's Way to Prove One's Eternal Love*, [online] 23rd April 2001, available from <http://www.utusanonline> [accessed 20th April 2005].

Utusan Online, *BCB Lancar Produk Amanah Berkembar*, [online], 15th February 2001, available from <http://www.utusanonline.com> [accessed 4th April 2005].

Utusan Online, *Skim Hibah Harta Dapat Sambutan*, [online], 25th August 2002, available from <http://utusanonline.com> [accessed 24th April 2005].

http://www.kwsp.gov.my/english/body_epf_frequently_asked_questions.html [accessed 8th August 2003]

International Institute of Islamic Finance, INC, [online], available from http://www.iiif-inc.com/iiif/eve_04.php [accessed 31th October 2005].

Malaysian Newspapers

The Sun, Thursday, July 9, 1998.

Utusan Malaysia, August 21, 1998.

GLOSSARY

<i>Amānah:</i>	Trust
[°] <i>Amara:</i>	To live long
[°] <i>Aqd:</i>	Contract.
[°] <i>Āriyyah</i>	Financial contract/ loan.
<i>Aṣḥāb al-furūd</i>	Qur`ānic heirs.
[°] <i>Aṭiyyah:</i>	Bestowal/gift.
<i>Bayt al-māl:</i>	The public treasury in an Islamic state.
<i>Dayn:</i>	Debt.
<i>Ḍamān:</i>	Guarantee.
<i>Dhawu al-arḥām:</i>	Outer family/ distant relatives.
<i>Diyyah:</i>	Blood money/ compensation.
<i>Al-diyyah al-wājibah:</i>	Obligatory blood money/ compensation.
<i>Farā`id:</i>	Shares allotted to heirs as specified in the Holy Qur`an.
<i>Faraq:</i>	Judicial separation.
<i>Farāḍa:</i>	To allocate/ to enjoin.
<i>Fasakh:</i>	Nullity of marriage
<i>Fāsid:</i>	Invalid/ defective.
<i>Fatwā (pl. fatāwa):</i>	Islamic legal opinion.
<i>Fiqh:</i>	The understanding/ the legal science founded mainly on rules and principles developed by human reasoning (<i>ijtihād</i>) and the body of knowledge so derived.
<i>Gharar:</i>	Contractual or legal risk/ uncertainty.

<i>Al-gharrāwayn/al-gharībatayn/‘umāriyyatayn:</i>	The case of a deceased who leaves behind a wife and his parents, or a husband and her parents. This case was decided by ‘Umar al-Khaṭṭāb, the second Caliph of Islam.
<i>Ḥaḍānah:</i>	Guardianship/ custody
<i>Ḥadīth:</i>	All that is narrated from the Prophet Muḥammad, his acts, his sayings and whatever he has tacitly approved.
<i>Hadiyyah:</i>	Presence.
<i>Halāl:</i>	Permitted
<i>Harām:</i>	Prohibited
<i>Harta Sepencarian:</i>	Jointly acquired property between a husband and his wife
<i>Ḥaq:</i>	Right.
<i>Hibah:</i>	Gift.
<i>Hibah Harta/ Hibah Trust/ Amanah Hibah:</i>	An Islamic estate-planning instrument of the Bumiputera-Commerce Trustee Berhad.
<i>Al-ḥuqūq al-muta‘alliqah bi al-tarikah:</i>	The rights, which are attached to the heritage.
<i>‘Iddah:</i>	The waiting period following dissolution of marriage by death or divorce
<i>Ijārah:</i>	Contract of Lease/ hire/ tenancy
<i>Ijmā‘:</i>	Unanimous agreement of the jurists of the Muslim community at any period following the demise of the Prophet Muḥammad on a Syarī‘ah matter/ consensus of opinion
<i>Ijtihād:</i>	Reasoning/ the effort a scholar makes in order to deduce legal ruling from the various sources of law
<i>‘Ilm:</i>	Knowledge/ science

<i>Ikhtilāf:</i>	Juristic disagreement
<i>Jāhiliyyah:</i>	Ignorance
<i>Kafālah:</i>	Contract of Guarantee
<i>Kaffārah:</i>	Expiation
<i>Kalālah:</i>	The absence of parents, grandparents, children and children's children.
<i>Al-Khalafīyyah:</i>	Replacement/ succession
<i>Luzūm:</i>	Binding
<i>Māl:</i>	Property
<i>Manfa'ah:</i>	Usufruct
<i>Marad al-mawt:</i>	Terminal illness.
<i>Milkiyyah:</i>	Ownership
<i>Maysir:</i>	Gambling
<i>Maqāsid:</i>	Plural of <i>maqṣad</i> , objectives.
<i>Muḍārabah:</i>	Profit and loss sharing.
<i>Muḍārib:</i>	Investor
<i>Muftī (pl. muftīs):</i>	Official expounder of Islamic law
<i>Al-Muqāsamah:</i>	The equal distribution between the grandfather and the siblings that are in potential competition over an estate.
<i>Murābahah:</i>	A sale of goods at a price covering the purchase price plus a margin of profit agreed upon by both parties concerned.
<i>Musyārahah/ musytarakah/ ḥajariyyah:</i>	The case of a person who dies leaving heirs constitute of husband/wife, mother, uterine brother and germane brother.
<i>Nadhr:</i>	Vow

<i>Nusyūz:</i>	Disobedience/ violation of marital duties
<i>Qāḍī</i>	<i>Syarīʿah</i> judge
<i>Qiyās:</i>	Analogy
<i>Qur`ān:</i>	The Holy Book
<i>Ra`su al-māl:</i>	Capital
<i>Ribā:</i>	Usury
<i>Ribawī:</i>	Related to <i>ribā</i>
<i>Risywah:</i>	Corruption
<i>Ruqbā:</i>	Awaiting another party's death
<i>Ṣadaqah:</i>	Alms/ charity
<i>Ṣāhib al-māl:</i>	Provider of capital
<i>Ṣaḥīḥ:</i>	Valid/ authentic
<i>Sharīʿah:</i>	Literally means the path denoting the way of life ordained by Allāh
<i>Sharṭ (pl. shurūṭ):</i>	Condition
<i>Ṣighah:</i>	The mode of offer and acceptance
<i>Ṣulh:</i>	Reconciliation/ settlement
<i>Tabarruʿāt:</i>	Sincere donation
<i>Takāful:</i>	Mutual cooperation
<i>Taqdīr:</i>	Ascertainment
<i>Tarikah/ tirkah:</i>	Property left by the deceased/ heritage
<i>ʿUmrā:</i>	Gift for life
<i>ʿUrf:</i>	Customary practices, which are not in conflict with the Qur`ān or the Sunnah.

<i>Wakālah:</i>	Contract of agency
<i>Waqf:</i>	Gift left in perpetuity/ endowment
<i>Wārith:</i>	Legal heir
<i>Wasaq:</i>	Weight
<i>Waṣiyyah:</i>	Bequest/ will/ testamentary disposition
<i>Wiṣāyah:</i>	Guardianship/ trusteeship
<i>Zakāh:</i>	Almsgiving

APPENDIX

Sample of Trust Deed of the *Hibah Harta* Instrument of the Bumiputra-Commerce
Trustee Berhad.

BETWEEN

XXXXXXXXXXXXXXXXXXXX

(“THE DONOR”)

AND

BUMIPUTRA-COMMERCE TRUSTEE BERHAD

(“THE TRUSTEE”)

AND

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

(“THE DONEE”)

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@

TRUST DEED

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@

BUMIPUTRA COMMERCE TRUSTEE BERHAD (167913-M)
D-0-6 MEGAN PHILEO PROMENADE
189 JALAN TUN RAZAK
50400 KUALA LUMPUR

THIS TRUST DEED is made on this day of 20

BETWEEN: -

- (1) The party whose name(s), description(s) and address are stated in Section 1 of the Schedule A hereto (hereinafter referred to as "~~the Donor~~") of the one part

and

- (2) **BUMIPUTRA-COMMERCE TRUSTEE BERHAD** (Co. No. 167913-M), a company incorporated in Malaysia under the Companies Act 1965 and having its registered address at *21st Floor Bumiputra-Commerce Bank Berhad No.6 Jalan Tun Perak, 50050 Kuala Lumpur* and place of business at *D-0-6 Megan Phileo Promenade, 189 Jalan Tun Razak, 50400 Kuala Lumpur* (hereinafter called "The Trustee") of the second part.

and

- (3) The party whose name(s), description(s) and address are stated in Schedule B hereto (hereinafter referred to as "~~the Donee~~"), of the third part.

WHEREAS:-

- A. By a *sighah* made by the Donor and accepted by the Donee, and in witness whereof, the parties have hereunto set their hands the day and year first above written.
- B. ~~The Donor is the owner of the property~~ listed under the Schedule C hereto (hereinafter referred to as the "Trust Asset" and reference to the Trust Asset shall be construed as reference to all or any one or more of them)
- C. ~~The Donor and the Donee are desirous to appoint the Trustee to administer the Trust Asset during the Donor's and Donee's lifetime and to distribute the Trust Asset to the Donee upon the Donor's demise or transfer the Trust Asset back to the Donor according to the terms and conditions stated herein~~
- D. ~~The mode of distribution~~ of the Trust Asset is subject to the terms stipulated under Section 2 of Schedule A.

- E. The Trustee has agreed to act as trustee of these presents and to hold the Trust Asset created thereby on trust for the parties herein in accordance with the provisions stated herein.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, ~~the Donor~~ agrees to execute such further instruments as shall be necessary to ~~vest the~~ Trustee with full title to the property, and the Trustee agrees to hold the Trust Asset, IN TRUST, NEVERTHELESS, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

PART I – POWER OF TRUSTEE

- 1.1 In addition to any powers granted under applicable law or otherwise, and not in limitation of such powers, but subject to any rights and powers which may be reserved expressly by the Donor in this Deed as stated in Schedule F, the Trustee is authorized to exercise the following powers :-
- a. ~~Monies~~, if any requiring to be invested under this Deed [including accumulations of income] may, at the discretion of the Trustee be applied or invested in the purchase of or at interest upon security of such stocks, fund shares securities or other investments or property insofar as the said investments concerned are not made in contravention with Shariah whatsoever nature and whosoever situate and whether involving liability or not upon such personal credit with or without security as the Trustee shall have the same full and unrestricted powers of investing and varying investment in all respect as if they were absolutely and beneficially entitled thereto.
 - b. To hold and retain any and all Trust Asset and to dispose of such Asset according to the terms and conditions contained herein.
 - c. To comprise, adjust, arbitrate, sue, defend, abandon, or otherwise deal with and settle claims, in favor of or against the Trust Asset as the Trustee shall deem best and the Trustee's decision shall be conclusive.
 - d. To cause the Trust Asset to be registered or vested in the name or names of the Donee upon the demise of the Donor and the Trustee shall not be liable for any loss which may be occasioned by the exercise of this power.
 - e. To transfer and register the Trust Asset direct to the Donor's ~~or~~ Donee's next-of-kin and beneficiaries in accordance with ~~Syariah Law~~, without

the necessity of applying for grant of Letters of Administration in the event that either ~~the Donor and Donee~~ who is deemed to get the Trust Asset ~~deceased~~ before the Trustee is able to transfer and register the Trust Asset in his or her name. **HOWEVER**, where there is a grant of representation to the estate of either of them the Trustee may at its own discretion transfer the said Trust Asset to their legal personal representative.

- 1.2 Notwithstanding of the above, the Trustee may also exercise all rights stated in **Schedule E** of this Deed.

PART II

DONOR'S AND DONEE'S REPRESENTATION AND WARRANTIES

- 2.1 The ~~Donor and Donee~~ hereby represents and warrants to the Trustee that: -

- i) They have full power, authority and legal right to enter into this Deed;
- ii) Neither the signing and delivery of this Deed and/or any other documents to which they are a party nor the performance of any of the transactions contemplated herein or therein does or will not contravene or constitute a default under any provision contained in any agreement, instrument, law, judgment, order, license, permit or consent by which they are bound or affected;
- iii) They are not in breach or contravention of or in default under any law or regulation, order, authority, agreement, undertaking, instrument, arrangement, obligation or duty applicable to, or which is binding upon or affect, them or the Trust Asset, the consequences of which breach, contravention or default, could materially and adversely affect the their assets, liabilities, or condition (financial or otherwise) or their ability to perform their obligation hereunder; no event of default or prospective event of default has occurred which, with the giving of notice and/or the lapse of time and/or the fulfilment of any other condition, would constitute a default under any such other agreement, undertaking or instrument; and no event or omission has occurred which entitles, or which with the giving of notice and/or the lapse of time and/or the fulfilment of any other condition could entitle, any creditor or creditors of them to declare any of the their indebtedness due and payable prior to its specified maturity;
- (iv) They are not bankrupt or have committed any act of bankruptcy or has entered into any arrangement or composition with their creditors;
- (v) No litigation, arbitration or administrative proceedings before or of any court, tribunal or regulatory authority is presently pending or, to the knowledge of them, threatened against them or the Trust Asset.

PART III – TRUSTEE REMUNERATION

- 3.1 The Trustee shall be entitled to charge such fee, as it deems fit and proper in connection with this Deed. The Donor and the Donee hereby undertake and agree to pay such fees as stated in **Schedule D**
- 3.2 In addition to the above clause, if the Trustee, in its sole discretion, proceeds to exercise the rights under **Clause 1.1(d)**, the estate administration fee shall be 1.0% (One percent) of the total value of the Trust Asset. at that particular time.
- 3.3 In the event, the Trust Asset transferred back to the Donor (other than) due to revocation made by the Donor, the administration fee shall be 0.1% (zero point one percent) of the value of the total Trust Asset, of the Donee's respective portion, at that particular time or if more than one (1) Donee, 0.1% (zero point one percent) of their respective portion. However if the Trust Asset transferred back to the Donor due to revocation made by the Donor, the administration fee shall be the same as **Item B of Schedule D**.

PART IV – TERMINATION

- 4.1 Neither party shall have the right to terminate this Deed except as provided under ~~the Syariah Law~~ pertaining to Hibah.
- 4.2 Reversion of the Trust Asset to the Donor or termination by way of distribution and transfer to the Donee by the Trustee is considered sufficiently and legally discharge the Trustee's duties and the Trustee shall not be held liable or responsible to any party under this Deed thereafter

PART V – MISCELLANEOUS

- 5.1 The Donor and Donee hereby declare that in the interpretation of this Deed the expression "the Trustee" shall (where the context permits) mean the trustees for the time being hereof whether original or substituted and if there shall be no such trustees shall (where the context permits) include the persons empowered by statute to exercise or perform any power or trusts hereby or by statute conferred upon the trustees hereof and willing or bound to exercise or perform the same.

- 5.2 Time wherever mentioned in this Deed shall be of the essence.
- 5.3 This Deed shall be binding on the successors in the title and the assigns of the parties.
- 5.4 If any ~~Donor and Donee~~ should die under such circumstances as would render it doubtful which of them ~~survived the other~~, this clause shall, notwithstanding any rule of law to the contrary, have effect as if the Donee had survived the other. ~~The Donee shall have absolute ownership of the property and the same shall be subject to the provisions of Clause 1.1.1.~~
- 5.5 The Donor and Donee shall pay any stamp, documentary and other similar duties and taxes to which this Deed or any related documents may be subject or give rise and shall fully indemnify the Trustee from and against any expense, damage, loss or liability which any of them may incur as a result of any delay or omission of the Donor and Donee to pay any such duties.
- 5.6 a) Any notice or communication under or in connection with this Deed may be in writing and shall be delivered personally, or by post, telex, cable or facsimile, to the party's address as stated in the preamble of this Deed and Schedule A and B herein or at such other address as the recipient may have notified to the other party hereto in writing. Proof of posting or dispatch of any notice or communication to the Borrower shall be deemed to be proof of receipt:
- ii) if it is personally delivered, at the time of delivery;
 - iii) in the case of a letter, on the second business day after posting;
 - iv) in the case of a telex or cable, on the business day immediately after transmission; or
 - v) in the case of a facsimile, on the business day immediately after transmission PROVIDED that the sender has received an answer back confirmation.
- b) No change in the address for service of the Donor and Donee howsoever brought about shall be effective on the Trustee unless actual notice of such change has been given to the Trustee.
- 5.7 This Deed shall be construed, regulated and governed by and in accordance with the laws of Malaysia.

- 5.8 The Donor and Donee shall fully indemnify the Trustee from and against any cost, expenses, losses, claims, damages or liability (as to the amount of which the certificate of the Trustee shall, in the absence of manifest error be conclusive) which the Trustee may incur or incurred in carrying out the Trustee duties in this Deed.
- 5.9 The Donor and Donee shall on demand pay:
- a) To the Trustee all expenses (including legal fees on a solicitors and client basis, printing, publicity and out-of-pocket expenses) incurred in connection with the negotiation, preparation or completion of this Deed: and
 - b) To the Trustee all expenses (including legal fees on a solicitor and client basis and out-of-pocket expenses) incurred in connection with any variation, consent or approval relating to this Deed or any related documents or in connection with the preservation or enforcement or attempted preservation or enforcement of any of their rights under this Deed or any related documents.

PART VI – SEVERABILITY

6. Severability.

- 6.1 In the event that any of the terms, conditions, provisions, contained in this Deed shall be deemed invalid, unlawful or unenforceable to any extent such terms, conditions or provision shall be severed from the remaining terms, conditions and provisions which shall continue to be valid to the fullest extent permitted by law.

@@

IN WITNESS WHEREOF the parties have hereunto set their hands the day and year first above written.

Signed by the Donor
in the presence of:



.....
XXXXXXXXXXXXXXXXXXXXX
I/C NO: XXXXXXXXXXXXXXX

.....

Signed by the Donee in the
presence of:



.....
XXXXXXXXXXXXXXXXXXXXX
I/C NO: XXXXXXXXXXXXXXX

.....

Signed for and on behalf of
Bumiputra-Commerce Trustee Berhad
in the presence of:



.....
SHAHIDAH BINTI HASHIM
GENERAL MANAGER
I/C NO : ~~801207110241070~~

.....

SCHEDULE A (which is to be taken part, read and construed as an essential part of this Deed)		
Section	Item	Particulars
1.	Name, description and address of the Donor	1. Name : xxxxxxxxxxxxxxxxxxxx I/C : xxxxxxxxxxxxxxxxxxx (new) xxxxxxxxxxxxxxxxx (old) Address: xxxxxxxxxxxxxxxxxxxx.
2.	Condition of Distribution	~~XXXXXXXXXXXXXXXXXXXX~~
3.	Name, description and address of the Guardian	-NIL-

Note –

~~TRUQBA~~ – waiting for whoever demises first. If the Donor demises first, the Donee will get the Trust Asset and vice versa.

SCHEDULE B

(which is to be taken part, read and construed as an essential part of this Deed)

PARTICULARS OF THE DONEE

No	Name	Age	I/C-Birth Cert.- Passport No.	Address	Relationship
1.	xxxxxxxxxxxxxxxxxxxxxx	xx	xxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx xxxxx.	xxxxxxxxxx

SCHEDULE C

(which is to be taken part, read and construed as an essential part of this Deed)

PARTICULARS OF THE TRUST ASSET

NO	TYPE OF ASSETS	PARTICULARS	VALUE (RM)	NAME	PORTION
1.	Landed Property	Geran: 14131 Lot No: 41203 Mukim: Kuala Lumpur District: Kuala Lumpur State: Wilayah Persekutuan K.L Land Area: 197 sq. m. Annual Rent: RM 60-00		XXXXXXXXXXXXXXXXXXXXXXX	ALL
2.	Landed Property	Unit 211, Block E, Phileo Damansara 1, No. 9 Jalan 16/11, Off Jalan Damansara, 46350 Petaling Jaya, Selangor.		XXXXXXXXXXXXXXXXXXXXXXX	ALL
3	Landed Property	H.S (D) 78984 P.T. 38743 Mukim: Kuala Lumpur District: Kuala Lumpur State: Wilayah Persekutuan K.L Land Area: 483 sq. m. Annual Rent: RM 145-00		XXXXXXXXXXXXXXXXXXXXXXX	ALL
4.	Landed Property	H.S.(M) 3070 P.T. 12851 Mukim: Kajang District: Hulu Langat State: Selangor Land Area: 360.7307 sq. m. Annual Rent: RM45-00		XXXXXXXXXXXXXXXXXXXXXXX	ALL
5	Agricultural Land	H.S.(D) 1217 P.T. 2854 Mukim: Dengkil District: Sepang		XXXXXXXXXXXXXXXXXXXXXXX	ALL

SAMPLE

		State: Selangor Land Area: 0.4047 hectare Annual Rent: RM8.70			
6	Landed Property	H.S.(M) 34195 Lot: 11737S Mukim: Ipoh (S) District: Kinta State: Perak Land Area: 1,297.9 sq. m. Annual Rent: RM559-00		XXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX	½
		TOTAL IMMOVEABLE ASSET			
7	Individual Licence	Kuala Lumpur Golf & Country Club, Malaysia Membership No: A1088P		XXXXXXXXXXXXXXXXXXXX	ALL
8	Individual Licence	Kelab Golf Darul Ridwan Membership No: A099		XXXXXXXXXXXXXXXXXXXX	ALL
9	Individual Licence	Meru Golf and Country Club		XXXXXXXXXXXXXXXXXXXXXXXXXXXX	ALL
10.	Deposit	Kuala Lumpur Golf & Country Club Membership No: A1088P		XXXXXXXXXXXXXXXXXXXXXXXXXXXX	ALL
11.	Deposit	Royal Lake Club Membership No: 9650		XXXXXXXXXXXXXXXXXXXXXXXXXXXX	ALL
12.		Royal Perak Golf Club Membership No: A166		XXXXXXXXXXXXXXXXXXXX	ALL
13		Kelab Golf Darul Ridwan Membership No: A99		XXXXXXXXXXXXXXXXXXXXXXXXXXXX	ALL
14		Kelab Golf Negara Subang Membership No: 34542		XXXXXXXXXXXXXXXXXXXXXXXXXXXX	ALL
		TOTAL MOVEABLE ASSET			

SCHEDULE D

(which is to be taken part, read and construed as an essential part of this Deed)
**FEE BASED ON THE ESTIMATION VALUE OF THE TRUST ASSET –
RM 250,000-00**

HIBAH FEE

TOTAL =

SCHEDULE E

(which is to be taken part, read and construed as an essential part of this Deed)

- A) In addition to the powers granted under Clause 2.1 of the Deed, the Trustee is authorised to exercise the following powers to the Trustee's sole and absolute discretion: **(if any)**

- NIL -

SCHEDULE F

(which is to be taken part, read and construed as an essential part of this Deed)

Rights and powers, which reserved by the Donor, are as follows; (if any)

1. The Donor with the consent of the Donee ~~may lease or rent and manage the~~ Trust Asset irrespective of whether the term of the lease shall exceed the period permitted by law or the probable period of any trust created hereby.
2. The Donor and the Donee shall insure, at all times, the Trust Asset against loss or damage by fire or such other risk to the full value thereof or such other amount as the Donor consider desirable and pay the premiums for such insurance and the Donor shall hold any money received in respect of any such policy in trust of the Donee.
3. The Donor and the Donee undertake to pay all assessment, quit rent, rates or licenses fee payable from time to time in respect of the Trust Asset as and when the same become due and payable, and to forward the receipt or any proof of such payment to the Trustee for record purposes.

