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THE DISTRIBUTION OF FARAID IN WILAYAH PERSEKUTUAN;
ITS PROCEDURE AND PRACTICE

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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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ABSTRAK

Kajian ini bertujuan untuk mengetahui kedudukan sebenar mengenai pembahagian Faraid mengikut prosedur yang dilaksanakan di Wilayah Persekutuan khususnya di Mahkamah Syariah, Jabatan Tanah dan Galian dan Amanah Raya Berhad serta lain-lain agensi yang terlibat. Faraid merupakan suatu sistem perundangan yang menetapkan peraturan pembahagian harta pusaka orang-orang Islam yang meninggal dunia. Ia ditentukan kepada waris-waris yang berhak menerima harta pusaka mengikut peruntukan syara'. Ketentuan dari harta pusaka ini bertujuan agar harta-harta yang ditinggalkan dapat diagihkan dengan adil kepada waris- waris yang berhak dan layak menerimanya . Konsep pusaka juga perlu dilihat dalam konteks yang lebih luas. Ianya mengandungi dasar-dasar dan peraturan-peraturan mengenai waris-waris serta pembahagiannya, cara memperolehi harta, jenis harta dan pentadbirannya, kelahiran, kematian serta susunan ahli keluarga. Terdapat pelbagai badan atau agensi yang terlibat dalam pembahagian ini samaada secara lansung atau tidak lansung. Badan atau agensi ini bertanggungjawab melaksanakan pembahagian pusaka tersebut berdasarkan hukum yang telah ditetapkan oleh Islam. Oleh itu, prosedur yang ditetapkan oleh badan atau agensi yang bertanggungjawab adalah untuk memastikan pelaksanaan pembahagian menjadi mudah dan cepat serta telus. Ini bermakna pembahagian yang mengikut prosedur yang betul akan menyelesaikan pembahagian harta dengan mudah dan cepat.

ABSTRACT

This research is to find out the true position about *faraid* distribution according to the procedure, which is practised in Federal Territories especially in the Syariah Court, Land and Mineral Department, Amanah Raya Berhad and the other agencies. *Faraid* is a law system that states the distribution procedures to inheritance of Muslims who have already passed away. It also determines the heirs who have the right to accept inheritance according to *Syara'*. The purpose of determining this inheritance is for the properties, which are left behind and it can be divided in justice to heirs who have the right and qualification to accept it. The heritage concept should also be looked in a large context. It consists the policy and procedure about the heirs and distribution, methods to get the property, kinds and administration of property, birth, death, and family arrangement. There are various bodies and agencies that are involved in this distribution whether directly or indirectly. This body or agency has the responsibility to practise the distribution of the inheritance based on *hukm* (law), which is determined by Islam. Besides that, the procedure determined by the body and agency, which has the responsibility to ensure that the practice of distribution become easy and efficient. That means the right procedure will settle the distribution of property easily and swiftly.

ملخص البحث

هذا البحث يهدف إلى معرفة صحيحة عن تقسيم الفرائض على حسب النظام المستخدم بولاية فرسكتون وخصوصا في المحكمة الشرعية ومؤسسة الأراضي والمعادن وأمانه راي برحد وغيرها. والفرائض هو من النظام القانوني الذي أثبت فيه نظام تقسيم العقار إل من الأموات. وهذا يثبت إلى الوارثين ذوي الحق لقبول هذا الميراث وتدييره وتوزغ العقار المتروكة بكل عدل وانصاف حسب تقسيمه. إن مسشروعية الميراث لا بد وأن ينظر فيه على نطاق واسع، وهو يتضمن على القواعد والنظام المتعلقة بالورثة وتقسيمها، وكيفية لحصول على العقار، نوع العقار، وإدارتها، وميلادالوارث وموته، وترتيب أعضاء الأسرة. وهناك، لجنات ومؤسسات عديدة تساعد في تقسيم الفرائض، سواء كان مباشرة أو غير مباشرة. وهذه اللجنات والمؤسسات مسؤولة في تقسيم الإرث مطابقة للأحكام أثبتت في الإسلام. والخلاصة، أن الاجراءات المتخذة من قبل هذه المؤسسات تستطيع أن تجعل نظام الفرائض يكون أكثر سهلا وكاملا. وهذا يدل على أن التقسيم التابع للنظام الصحيح سيحل المشكلات المتعلقة بالعقار والإراث بكل سهولة وسرعة.

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 Probate and Administration Act, 1959.
 Public Trustee Ordinance, 1950.
 Small Estate (Distribution) Act, 1955.

GLOSSARY

<i>'ilm al-qadi</i>	Personal knowledge of a judge.
<i>a.s</i>	Abbreviation of "' <i>Alaihi Al-salām</i> " meaning " <i>Upon him the peace</i> ". Only reserved for prophets other than Muhammad s.a.w.
<i>Alhadith</i>	Plural of <i>hadith</i> sayings of the Prophet Muhammad s.a.w.
<i>Al-miirat</i>	Inheritance, legacy, Heritage, Estate.
<i>Ayah Muhkamah</i>	lesson or warning from coherent.
<i>ayah</i>	Signs.
<i>ayāt</i>	Plural of <i>ayah</i> , verses of the Qur'an.
<i>fard 'ain</i>	An obligation upon every person in the community.
<i>faridoh 'adilah</i>	Fairness obligation
<i>Fatwa</i>	Opinion upon a point of law.
<i>Fiqh</i>	Jurisprudence.
<i>Fuqaha</i>	Islamic jurists.
<i>Had</i>	A specific form of punishment laid down in the Qur'an.
<i>Hadith</i>	Sayings of the Prophet Muhammad s.a.w.
<i>Haj</i>	Pilgrimage (a journey to a place, which has religious important to go perform the <i>hajj</i> to Mecca).
<i>Haram</i>	Sin, Offense (something which is against the rules of a religion).
<i>Hukm</i>	Legal rule.
<i>Ihram</i>	Garment of a Mecca pilgrim.
<i>ijma'</i>	Consensus of opinion of the 'ulama.
<i>Iqrar</i>	Admission.
<i>Irtsan</i>	legacy (money or properties, etc that somebody receive after someone dies).
<i>Kaffarah</i>	Expiation.
<i>Kitabah</i>	Documentary evidence.
<i>Marat-al-maut</i>	Close to death.
<i>Mazhab</i>	Schools of jurisprudence.
<i>Mujtahid</i>	A jurist who is qualified to exercise <i>ijtihad</i> .
<i>Nasab</i>	Paternity or lineage.
<i>Qadi</i>	Judge.
<i>Qarabah</i>	Family relationship.
<i>s.a.w.</i>	Abbreviation of " <i>Sallallahu 'Alaihi Wa Sallam</i> " meaning " <i>Peace be upon him</i> ". It is compulsory for a Muslim to utter this blessing whenever he hears the Prophet Muhammad's name being mentioned.
<i>Sunnah qoimah</i>	<i>Correct mode of life (Sunna of the Prophet)</i>
<i>Ulama</i>	<i>Plural of 'alim, Islamic jurists.</i>
<i>Umrah</i>	Minor pilgrimage to Mecca.
<i>Wakalah</i>	Agency.
<i>Warista</i>	Succession
<i>Wasi</i>	Executor of a Will.
<i>Zakah</i>	A tax levied on every competent Muslim.
<i>Zihar</i>	Drawing comparison between one's.

TRANSLITERATION

<i>Al-miirat</i>	الميراث
<i>Ayah Muhkamah</i>	اية المحكمة
<i>faridoh 'adilah</i>	فريضة عادلة
<i>Fuqaha</i>	فقهاء
<i>Haj</i>	حج
<i>Haram</i>	حرام
<i>Ihram</i>	احرام
<i>Ijma</i>	إجماع
<i>Irtsan</i>	ارثا
<i>Kaffarah</i>	كفّارة
<i>marat-al-maut</i>	مارة الموات
<i>mazhab</i>	مذهب
<i>Miiraatsan</i>	ميرثان
<i>Mujtahid</i>	مجتهد
<i>Nasab</i>	نسب
<i>Qarabah</i>	قراية
<i>Sunnah qoimah</i>	سنة قيّمة
<i>Umrah</i>	عمرة
<i>Warista</i>	ورثة
<i>Yaritsu</i>	يريث
<i>Zakat</i>	ذكاة
<i>Zihar</i>	ظهر

ABBREVIATIONS

ARB	Amanah Raya Berhad
p.b.u.h.	Peace Be Upon Him
AS	‘alayh al-salām
Comp.	Compiler/compiled by
Def.	Definition
ed.	Editor/edition/edited by
H	hijriyyah
JKPTG	Jabatan Ketua Pengarah Tanah dan Galian.
M	miladiyyah
n.a.	No author/no artist
n.d.	No date/no year
n.pb.	No publisher
n.pl.	No place
narr.	Narrated by
p.	Page
p.p	Pages
perf.	performers
RA	radiya Allāh ‘anhu / ‘anhā / ‘anhum
rev.	Review/revision of
SAW	salla Allāh ‘alayh wa sallam
SEDA	Small Estates (Distribution) Act
SWT	subhānahu wa ta‘ālā
trans.	Translator/translated by
vers.	Version
vol.	Volume
writ.	Written

CHAPTER 1

INTRODUCTION

1.0 Background of Research

The settlement and distribution of inheritance is an issue in current society which related to ownership of property especially land property. It has a total of heirs that unmake apply to distribute of inheritance, although it has involved old dead of landowner. It is because, limitation of awareness and understanding about the concept of *faraid* distribution. Nevertheless, it is the role of responsible agencies as Syariah Court, Land and Mineral Department, Amanah Raya Berhad and others to practice the proper action to settle this problem. The settlement and distribution issue will be easy if the society understand and aware the important of inheritance distribution.

The purpose of this research is to know the implementation of *faraid* and the distribution of Muslim inheritance in Malaysia especially in Federal Territories. The rules and procedure was practice to solve problem related to inheritance. It was determined by the government to implement distribution in fair and just according to *faraid* system.

This research is also to gain information about the distribution of *faraid* that implemented in Federal Territories. Beside that, the expose about *faraid* should be performed in order that we can know and understand how the methods to distribute the inheritance properly to make sure that there will be no disputes or problem in the future. If it happen, it's will be generating a space or opportunity to bicker. It is fine if the matters of dead inheritance were managed without disputes among the members of family or heirs.

1.1 Research Aim

The aim of this research is to know and to clarify the procedure and practicing of *faraid* distribution, which made by the Syariah Court, Land and Mineral Department, Amanah Raya Berhad and other agencies in Federal Territories.

1.2 Objective of Research

The objective of this research is to study and have clear sighted on the practice of the *faraid* system implemented in Federal Territories (Kuala Lumpur) and other agencies concerned.

It also to understand the procedure and guidelines used to distinctly portion the property accordingly.

The *faraid* is indeed justifiable in avoiding and minimizing qualms among next-of-kin and relatives concerning the distribution of inheritance to the legal heirs.

The purpose of *faraid* is for justice. In the legal meaning it is a declaration from the parties to end their quarrel and solve the property problems. In Syariah Court context this process will assist and help the parties in quickly to determine their right according to Islamic laws, at the same time it will give justice for the parties, who should get his right. So that, it can't give more satisfactory from the parties, who want get the inheritance as their needed.

1.3 Scope

The scope of research is to observe the procedure and implementation of distribution of inheritance in Federal Territories and other agencies or department that is involved in the implementation of the *faraid* law.

1.4 The Importance Of The Study

It is important to understand the significant improvement of inheritance distribution after implementing the Islamic *Ahlu Waris* consist in the *faraid* system. It helps to avoid dispute amicably among families. This will contribute to a more harmonies society and community.

Besides that, the fact and truth about *faraid* has to be revealed, so that all of us will understand what is the method of the distribution of the deceased property accordingly. Then, the disputes and problems regarding to this matter will not be long. This is because, if it happens, there will be exist any space and chance, which is brings to the disputes between heirs.

Then, it is also provides to make that the inheritance of there is no alternative to distribute *faraid* according others way and *faraid* is a part of Islamic Law from early period Islam. The Shariah Court enforced it during that time; this is a way to settle the problems related to the distribution of *faraid*. This system are providing as consultancy service by Allah.

Other important of the study is to know the procedure and the practice of this system in Syariah Court, Land and Mineral Department and Amanah Raya Berhad, people do not know because the system is familiar to not for them, they think that if they want to settle the problem, they cannot find the way except go to the court. This is the responsibility of the Shariah student for further understanding of this system. The researcher chooses the distribution of *faraid* as a case study and at the same time it becomes as the article from various sources.

1.5 Research Methodology:

1.5.1 Interviews

A number of interview sessions was carried out to obtain an accurate details and information in regards to the practice of *faraid* in different agencies such as the Syariah Court in Federal Territories.

1.5.2 Library Research

Library research was also conducted to seek information thru collecting and analyzing the data obtained.

Firstly, to identify the execution of *faraid* in Federal Territories the researcher has used the two main methods, the first method is the data collection, actually in this method the researcher used the documentation method, in this method it has shown to researcher how to collect data by using some documents which are related to this research as well as the electronic media, the source from internet and so on. Subsequently, the researcher also used the copybooks from any journal and brochures to get some data that related to the background for this topic.

The second method is data analysis, this data actually helped researcher to analyze the collected data, subsequently the researcher has done to make a conclusion from the data which has been analyze, beside that the researcher also used this data to analyze the items which related to the cause and implication on the distribution of system in Syariah Court, Land and Mineral Department, Amanah Raya Berhad and other agencies.

This is the descriptive research, but this time the researcher tries to investigate what is the actual purpose behind the procedure and practice of *faraid* distribution. This research also explains about the right time to execute this rule. The research also tries to find out the right solution before the people take the court as their solution of their problems. Islam has only one way to solve the distribution of *faraid* as mentioned in Qur'an but there are

more methods to execute. We can't see the people give wrong perception about the Syariah Court. Finally, the researcher hopes that this system will become the main way for the people to settle their distribution.

1.6 The Literature Review:

As mentioned by Tuan Hj Osman Yahya (1995:15,16) he explains that the management of inheritance is complicated and difficult for the moveable or immoveable properties and the importance of various parties of that property existing nowadays. Thus the administration of inheritance should be managed by an efficient staff and have broad knowledge and ability to control the whole aspect of law, which is related to procedure and ownership of property.

According to Abdul Rashid Hj Abd Latiff (1997:179) who mentions that the law of inheritance consists the basic and procedures that complete and is rich with various methods to distribute the property since *sahabah* period. The important thing for Muslims today is to learn and understand the basis and procedures of the law properly and practising it in life proper with the need and situation of the procedure. Besides that, to facilitate the understanding and implementation of Muslim inheritance law (*hukm faraid*), that the law should be secured and arranged according to proper law.

Besides that, Prof. Madya Mohd. Ridzuan Awang (1996:11,12) states that the practice and the administration of Muslim inheritance in the State Syariah Court is still bound and limited. The Syariah Court or Syarie Judge only has the power to authenticate the heirs that have the right of the deceased's inheritance and determine (right) the share through Faraid Certificate or the declaration of the deceased. The implementation of laws in administration and distribution of Muslim inheritance is the Small Inheritance (Distribution) Act 1955 and the Will and Administration of Estate Act 1959. Although, both of the law have been practised, but the Muslims are allowed to follow the faraid law (*hukm faraid*). Besides that, however there are some states that give the authority to Syariah High Court to hear and decide the claim of Muslim inheritance, but this

implementation is still not complete such as other family cases. This situation may cause the existence of the Administration of Muslims Inheritance Law not being practised specifically in the Syariah Court.

While, Dato Hj Wan Mohamed Hj Wan Mustapha (1993: 8) writes that it will be most easy, practical and regular if the laws proceed to the case that involves the non-Muslims, and the new act should be legislated to apply for the Muslims; it is the Distribution of Inheritance and Muslim Estate Act 1992.

As the conclusion, the writer mentions that the laws that exist in the implementation of the administration and distribution of inheritance is to facilitate the administration and distribution of Muslim inheritance affairs. Besides that, it will be easy, secure and regular if it is administrated by an organization or body that has the authority to practise it. If the existence of the laws is not followed with completely and there is an overlapping of authority between the bodies hence the settlement and the distribution of inheritance is not solved but it will be a big problem in the Muslim society. Thus, the determination of certain procedures should be determined; it is to ensure that the practice of distribution and management of Muslim Inheritance can be made swiftly and effectively.

1.7 Overview of Inheritance in Islam.

The process of distribution of inheritance has already existed in Islam. This process is known as *faraid*, Allah has already mentioned in the Qur'an that the *faraid* is used to solve problems in the distributions of inheritance property according to Islamic teachings. Whereas the Syariah Court is supposed to become one of the agencies to make the process to separate or distribute the inheritance.

The Qur'an and Sunnah have invariable laws (*hukm-hukm*) about the distribution of inheritance in Islam, but the method to manage that inheritance is not in detail, because this is a responsibility of the Islamic community to make procedures in managing and

conducting some hokum with requirements, that the procedure which is determined by Islam consistent with what it was mentioned.¹

Qur'an has explained and mentioned that the laws (*hukm-hukm*) related to the rights of heritage is without neglecting the rights of anyone. The share should be taken by all of the heirs, as had been mentioned applicable to locality (*Nasab*) of the deceased, whether as children, father, mother, wife, husband, sisters, uncle, grandchildren or siblings of a father or a mother.

Nevertheless, Qur'an is the main *hukm* (law) and determines to the distribution of inheritance, while permanency about legacy was taken from *hadith* Prophet p.b.u.h and *ijma'* of companions are very limited. We can say that in Islam law or hokum, there are limited ayahs, which describe in depth of a *hukm*, except a *hukm* that is related to *faraid*. This matter causes the heritage is one of the shape of valid ownership and allowed by Allah. Besides that the property is a stand in life that is good to the individual, society and country.

1.8 Introduction of Property and Inheritance

Definition of "Property"²

In dictionaries and law books there are various definitions given to "property", they are:

- (i) A property is whole and includes all shapes or types that can be used. Therefore the importance of property can be described, where every person can get it.³
- (ii) All important things are valuable and every person can get it except their selves, life and freedom.⁴

¹ Rizuan Awang. 1994. "*Undang-undang Tanah Islam: Pendekatan Perbandingan*". Dewan Bahasa & Pustaka. p: 352.

² Fatimah Sulaiman. 1999. "*Tegahan Penggunaan Harta (Al-Hajr) Kajian Perbandingan Antara Syariat Islam dengan Undang-undang Sivil*". Dewan Bahasa & Pustaka. 1st Published. p:20.

³ John S. James, *Stroud's Judicial Dictionary of Words and Phrases*, 5th Edition, V. 4, page. 2057.

- (iii) Property is something that is general which includes all matters that humans have the authority to it.⁵
- (iv) Right to get, use, banish or own such as land property.⁶
- (v) Something that can be owner or can banished by someone or a group.⁷
- (vi) In one condition, the word “property” is synonymous with “ownership” or “dominium” that is the collection of rights that can be used by the owner. In other conditions, this word means something that is subjected to ownership, which includes the thing and the right that can get it.⁸
- (vii) Property also includes “intellectual property” such as copyright trademark.⁹

From this definition, we can make the conclusion that the property is something important and valuable or have a price, where the human can get it. Human has the authority to implement any types of business. Property consists of things but not the thing such as rights and importance.¹⁰

Definition of Inheritance

- i. The devolution of property on the death of its owner, either according to the provisions of his will or under the rules relating to intestacy contained in the Administration of Estates Act 1925 as amended.¹¹
- ii. Property that a beneficiary receives from the estate of a deceased person.¹²

⁴ James A. Ballentine, *Ballentine's Law Dictionary*, 3rd Edition, page 1010.

⁵ James A. Ballentine, *Ballentine's Law Dictionary*, 3rd Edition, page 1010.

⁶ Noah Webster, *Webster's New Twentieth Century Dictionary of the English Language*, 2nd Edition, page 466.

⁷ Ibid.

⁸ W.J. Chappenden dan J. W. Carter, *Helmores Personal Property and Mercantile Law in New South Wales*, 9 Edition, Page. 3.

⁹ E. C. G. Tyler, N. E. Palmer, *Crossly Vaines on Personal Property*, 5 Edition, page. 12.

¹⁰ Fatimah Sulaiman. 1999. “Tegahan Pengurusan Harta “al-Hajr” Kajian Perbandingan antara Syariat Islam dengan Undang-undang Sivil”. 1st Published. p: 20.

¹¹ Elizabeth A. Martin (ed.) 2002. *Oxford A Dictionary of Law*. Oxford New York: Oxford University Press. p: 251.

¹² Ibid.

- iii. Inheritance is the act of receiving the money and property from somebody who has died.¹³ According to JKPTG, is whole of the property and the importance of deceased, whose death can be proven.

Inheritance¹⁴

Inheritance is an left by someone who is dead, such as money, property or the rights or any asset, which has value and is allowed by *syara'* to be owned by heirs. It is consistent with the *hadith* from the Prophet p.b.u.h, which means;

"Who has left some rights or property, hence that right or property is to his heir after death "

The types of Inheritance¹⁵

The Inheritance of Heirs is as follows:

1. Immovable property such as a building, a piece of land, a plantation, etc.
2. Movable property such as money, shares, jewelry, equipment, vehicles, clothes, etc.
3. Money owed to a deceased person.
4. Property that has been mortgaged or pawned by a deceased person and that is redeemable.
5. Property purchased by a deceased person during his lifetime for which payment has been made by him but which has not been delivered to him until his death.
6. *Maskahwin* that has not being paid to a wife until the wife's death.
7. Other assets such as savings, EPF (Employees Provident Fund) money, shares, unit trusts, bonds and insurance policies approved by Islamic law.
8. All the aforesaid property in and outside the residence of a deceased person.
9. All other assets of material value.

¹³ Collins Cobuild. 1999. *English Dictionary*. London: Harper Collins Publishers. p: 867.

¹⁴ www.arb.com.my. 2003. "Sistem Pembahagian Pusaka Islam". [http:// www.arb.com.my/ilmu/faraid.asp](http://www.arb.com.my/ilmu/faraid.asp).

¹⁵ Ibid.

The meaning of Small Inheritance¹⁶

Small Inheritance is property that includes of immoveable and moveable properties where the total current value is not more than RM 600,000 and the deceased has not leave any will (*wasiat*) under the Act of Will 1958.

Immoveable Property is land or any importance from it. The building is the one of the Immoveable Property.

Moveable property is another property from immoveable property such as money, shares, bank account, Kumpulan Wang Simpanan Pekerja (KWSP), Insurance, vehicles, firearm (weapon), jewelry and others.

Definition of *Faraid (Al-Miirats)*¹⁷

Al-miirats, in an infinitive from Arabic is *warista-yaritsu-irtsan-miiraatsan*. The meaning according to the language is ‘moved something from someone to the others’, or from a community to other communities. The meaning of *al-miirats* is not limited only in matters related to property, but through property and non-property. Most of the Qur’anic sentences are coherent with that matters, Prophet Muhammad (p.b.u.h) also says like that. In the Qu’ran, Allah says:

((وَوَرَّثَ سُلَيْمٰنُ دَاوُدَ))

“And Solomon was David’s heir... “(*an-namlu:16*)

((وَكُنَّا لِحَنِّ الْوَارِثِيْنَ))

“...And we are their heirs!” (*al-Qasas:58*)

Prophet Muhammad (p.b.u.h.) says:

"العلماء ورثة الأنبياء"

¹⁶ Jab. Ketua Pen. Tanah dan Galian Persekutuan. 2003. *Soal Jawab Pembahagian Harta Pusaka*, Page. 1.

¹⁷ Muhammad Ali Ash-Shobuni. “*Pembahagian Harta Kepada Waris Menurut Islam*”. (Malay Edition). Page 22.

“*Ulama are heir of Prophets.*”

While *al-miirats* meaning according to the Muslim scholars’ is change or move the right from deceased person to his heir, who is alive and the thing which left is money, land or what ever belongings according to Islam.

The meaning of Faraid

The Faraid according to the definition of literal sense is rate of share.

From syara’ sense is rate of share which is decided by syara’ to heir¹⁸.

Faraid Knowledge is the knowledge explained by Allah about the way to distribute inheritance to heirs according to Qur’an and Sunnah, which is determined clearly.

1.8.2 The Status of *Faraid*¹⁹

Faraid is an important knowledge; because the Prophet Muhammad (peace be upon him) encourages us to learn about it, the prophet says in his *Hadith*:

- a. Abu Daud and Hakim said from Abdullah bin Amr bin Al As r.a., that Prophet Muhammad peace be upon him says:

[العلم ثلاثة وما سوى ذلك فهو فضل : آية محكمة، أو سنة قائمة، أو فريضة عادلة]

Mean: *The knowledge are threes; others have advantages: Ayah Muhkamah (without nasakh), Sunnah qoimah (true word from the Prophet Muhammad) and faridoh ‘adilah (justice in distributed of inheritance).*²⁰

¹⁸ Al-Imam Abi Zakaria Yahya Bin Syaraf An-Nawawi ad Damsyikki. Raudhatu Thaolibin. Maktab Al-Islami. Jilid 5/3.

¹⁹ Musa Fathullah Harun. 1994. “*Masalah wasiat dan faraid*”. Kuala Lumpur. Perpustakaan Negara Malaysia. p: 24.

²⁰ Sahih al-Bukhari 8:187-189 dan Sahih Muslim 3:1233

b. Al-Hakim said from Abdullah bin Mas'ud r.a. that Prophet Muhammad peace be upon him says:

[تعلّموا القرآن وعلموه النَّاس وتعلّموا الفرائض وعلموه النَّاس، فَإِنِّي امرؤ مقبوض، وإنَّ العلم سيقبض، وتظهر الفتن حتى يَخْتَلَف الاثنان في الفريضة لا يجدان من يقضي بها].

Mean: *Study and teach Qur'an to the people, and study the faraid and teach it's to the people. I am is a person which hold (dead) and that knowledge will hold (draw), and the libel will appear, until two person have a conflict about distribution of inheritance, and no person can solve between them.*²¹

b. Ibnu Majah and Hakim said from Abu Hurairah r.a, that Prophet Muhammad peace be upon him says:

[يا أبا هريرة، تعلّموا الفرائض وعلموها، فَإِنَّه نصف العلم وهو ينسي وهو أوّل شيء يترع من أمّتي]

Mean: *O ye Abu Hurairah, study of faraid and teach it's (to other people); it is some of knowledge and it's will be forget; and it is a first one will draw from my followers.*²²

Among of Prophet Muhammad p.b.u.h. Companions, who are famous about the *faraid* are Ali Bin Talib, Abdullah Bin Abbas, Zaid Bin Thabit and Abdullah Bin Mas'ud r.a.

The knowledge of *Faraid* should have the other three of knowledge²³, they are:

i - *Knowledges of Fatwa*, that it is to know the part of inheritance (left) which, determined for each heir.

²¹ Al Mustadraku 4:333.

²² Sunan Ibnu Majah 2:908, Al-Mustadrak 4:332 dan Al Jami'us Soghiri 1:131.

²³ Musa Fathullah Harun. 1994. "Masalah wasiat dan faraid". Kuala Lumpur. Perpustakaan Negara Malaysia. p. 26.

ii- *Knowledge of Kith (nasab)*, which it is to know the heirs who have the right to accept the inheritance cause the kith (*nasab*).

iii -*Knowledge of Mathematics*, which it is to settle calculations in distributing of inheritance to the heirs.

The Sources of *hukm* and *Faraid* knowledge.

Hukm and the *faraid* are based on sources and those sources cannot be doubted. It is because the Qur'an and the *Hadith* have explained as below:

i. *The Holy Qur'an*²⁴

"God (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parent are (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother had sixth. (The distribution in all cases is) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by God; and God is All-knowing, All-wise".

ii. *Hadith* : The Prophet p.b.u.h. Say, which mean:

"Give the appointed portions to those entitled to them. Then whatever remains is for the nearest male". (Narrated by Bukhari – Muslim).

iii. *Ijma'* and *Ijtihad* of the companions of the Messenger of Allah, *imams* of *mazhab* and *mujtahid* of proven knowledge.

²⁴ Al-Qur'an. An-Nisa' 4: 11. (Abdullah Yusuf Ali. 2000. *The Holy Qur'an (Original Arabic Text with English Translation & Selected Commentaries*. Kuala Lumpur: Saba Islamic Media.)

A substantial part of *faraid* and the section governing the distribution of property among heirs are provided for in the Qur'an. Only a small part is determined on the basis of *Hadith* and *Ijma'*. Some *faraid law* and allocation of distribution to heirs is determined by Qur'an. Only half of it is determined based on Sunnah (*hadith*) and *Ijma'*.

The distribution of *faraid* has been determined and explained in depth by the Holy Qur'an in Surah an-Nisa' verse 11,12 and 176. This explanation clearly says if we make comparison with the other Law (*hukm*), It shows that the distribution of inheritance by *faraid* has been explained by Allah is more practical and good if compared to the other customs or laws. Those verses also explain briefly and in detailed the requirements of people who have the right of heritage and who do not. Besides that, it also shows clearly the situations of heirs, who accept their share in "certain situations" and who accept the inheritance through *Asabah*.

We should know that in verse, which apparent basics of the *faraid knowledge*; consist with the arrangements and the procedure that are related to the right and the distribution of inheritance completely. The procedure, which is given by Allah are clear and perfect, he determines the right of each heir by justice and intelligence. Most greatest of God, who determines this matter with a purpose to create justice in human life, take care of human welfare, prevent cruelty from those who desire to do so and put away oppression from the weak group. That is a person who inability to manage property it self.

Islam refuses the distribution of inheritance, which is divided injustice that is made based on affection, that property only endowed by them on love in spite of their locality in close family arrangements. Islam is not bound with human feelings, customs and others, but the most important is the responsibility of family members. For example, a son has responsibility to devout for his parents; supporting them at old times and other situations. So, that, he should accept or obtain all of that inheritance.

Besides that, Islam declares the distribution, which is made based on *faraid* system should be accepted with willingness, because Allah was determined his consideration to

the Muslims. From that, there will no traitors in distributing the inheritance from the anvil, which is determined by Islam.

The system of inheritance in Islam is different from the system of inheritance in other religions. Where a person is given the freedom to determine who can and how much is his inheritance will be divided to the heir after his death. Some of grounds are given, that is why in Islam, the system of inheritance is made through *syara'* (*faraid*).²⁵

1. To block and deprive the causes of dispute between siblings who knows that he or she has no right to accept inheritance, which is determined by Allah or religion, not made by others. So he or she will accept it because it is hukum by Allah.
2. If the distribution of inheritance is given to humans, it will cause to be given to people who have the right to the inheritance. But they give to other people, who do not a right to accept it.
3. Allah SWT mostly knows about human problems in distributing inheritance after someone dies. He says, which means: "*Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by God; ...*", (*an-Nisa: 11*)

Based on that evidence, we cannot neglect this system, which is determined by *syara'* in executing what ever we want, whether it is related directly or not. Especially in matter, which is related to an important matter in our religion. We cannot leave out the responsibilities, because the system of *faraid* is ordered by Allah and enacted by our religion. So, it become Improbable if we neglect it as ordered. The explanations about *faraid* are detailed compared to the other laws in Qur'an. It shows that the system of *faraid* must be outstanding in carrying out the distribution of inheritance. If it is unsuitable in distributing inheritance, it is very cruel to the person that should not have a right, where it is improper for him to accept it. Besides that, if distribution is done through the *faraid*, it cannot create the problems because it will be executed as determined by Islam.

²⁵ Dr. Ahmad Hidayat Buang. 2002. "Faraid: Kewajiban atau Opsyen". *Majalah Massa*. Kuala Lumpur: Utusan Melayu (Malaysia) Berhad. Bil: 366 26 Okt. -1 Nov. p: 60.

CHAPTER 2

THE ADMINISTRATION AND DISTRIBUTION OF ISLAMIC INHERITANCE IN MALAYSIA.

2.0 The Administration and Distribution of Islamic Inheritance.

Islam is the religion of the federation as mentioned in Article 3 of federal constitution of Malaysia. However, all matters related to Islamic affairs or Hukum Syara^c is under the state jurisdiction, which the Ruler or Sultan of every state is the head of Islamic Religion except for the states as Penang, Malacca, Sabah, Sarawak and Federal Territories, the Yang Di Pertuan Agong will be the head of Islamic Religion on that states.²⁶

Therefore, the matter of the Islamic Religion and Hukm Syara^c is under the state jurisdiction, hence all states make a law known as 'The Administration of Islamic Law or Hukm Syara^c' for their states. It consists on the matters that are stated in state list²⁷, but the jurisdiction is very limited.

Sometimes, once that matters are included in state list, the Federal constitution limit the scope and power of the state law. Especially in the matter related to the administration and distribution of Muslim property (whether moveable or immoveable property).

Even though in the Federal Constitution, the question about the inheritance (including Muslim inheritance) is under the rights and power of state government (it is the same level with Islam Religion), but the federal government has an authority to administer any land laws in every state through National Land Council. (Majlis Tanah Negara).²⁸

²⁶ Mohd Rizuan Awang. 1987. *Konsep Undang-undang Islam; Pendekatan Pembahagian*. Kuala Lumpur: Al-Rahmaniah.

²⁷ Ibid.

²⁸ Ibid.

This section will discuss about the concept of the administration and distribution of Muslim property and the law applied. Besides that, this discussion will also analyze about the problem related to *Hukum Syara*^c as the result consequently (whether directly or indirectly) in practicing and applying with the civil law.

2.1 Inheritance Right Of Muslims.

In peninsular Malaysia (other than Penang and Malacca) the law applicable to intestacy of a Muslim estate is the Muslim law including Malay customs. The formal validity of a will made by a Muslim is determined by the provisions of a Wills Act 1959 but the testamentary powers of disposition of property in the Will of a person professing the religion of Islam are governed by Islamic law.²⁹

The Syariah Law prohibits succession of a deceased Muslim's intestate property to a non-Muslim. Where a person dies a Muslim convert and leaves behind his heirs where are non-Muslims, they are not entitled to inherit all the deceased's property. The deceased's next of kin are barred from inheriting the deceased relative's property because his or her personal law prohibits inheritance by non-Muslims.³⁰ For example the case of *Re Timah binte Abdullah* (1941) MLJ 51, it was held that the next of kin of a deceased Japanese woman who had become a convert to Islam, could not inherit the property of the deceased. Such a situation may lead to unjust result. Should there be a distant lawful beneficiary who has converted to Islam, it would seem he would be entitled to inherit all the property of the deceased and should there be no lawful Muslim beneficiaries, the deceased's moveable property is reverted to Bait-ul-mal and immoveable property escheats to the State Land Authority.³¹

A Muslim may not by will dispose of more than one-third of his estate after payment of funeral expenses and debts and testamentary dispositions in excess of the legal one-third

²⁹ Mahinder Sigh Sidhu. 1998. *The Law of Wills Probate Administration and Succession in Malaysia and Singapore*. Kuala Lumpur: International Law Book Services. p: 299.

³⁰ Ibid, 299.

³¹ Ibid.

cannot take effect until the heirs consent to them after the death of the testator. The will of a Muslim who attempts to prefer one heir by giving him a larger share of the estate than he is entitled to the estate by Muslim law is wholly invalid to such bequest without the consent of the other heirs.

Though a Muslim may bequeath one-third of his estate by will, his heirs must consent to the disposition according to Islamic law. If not, the one-third will form part of the estate, which will be dealt with according to Islamic law. The remaining two-thirds will be disposed of according to the principles of Islamic law, including any recognized law or custom.

2.2 The distribution of Inheritance.

The distribution of deceased's estate are different in the case of Muslim and non-Muslim estates where the distribution of non-Muslim is according to the Distribution Act 1958. While the distribution and the right of the Muslim estates are dependent largely on Islamic rules of inheritance and succession.

In Malaysia the distribution of inheritance is according to *faraid* if the deceased leaves no any heirs. However, if the deceased had died intestate without leaving any heir, the Government is entitled to the whole of the estate, except where the estate consists of land when the land escheats to the land State Land Authority. In the default of any person taking an absolute interest in the property of the intestate, it belongs to the government as ownerless property.³²

Under the Islamic law, where the deceased dies intestate and leaves now lawful next of kin, his moveable property reverts to Bait-ul-mal (funds of the Islamic Council) and if there is land it escheats to the State Land Authority.

³² Mahinder Sigh Sidhu. 1998. *The Law of Wills Probate Administration and Succession in Malaysia and Singapore*. Kuala Lumpur: International Law Book Services. p: 305

The Qur'an and Sunnah have invariable law (*hukm-hukm*) about the distribution of inheritance in Islam, but the method to manage the distribution is not in detail. This is a responsibility of Islamic community to make procedure in managing and conducting some rules. Even though, the rules and procedure applied must not be contrary and is consistent with *Hukm Syara'*.³³

The procedure to manage the inheritance in Islam is different with the procedure before the coming of Islam. Before Islam comes, the procedure and local custom it based on the Africa custom, where the property and the authority to vanish is exceptional for females and only a man will get the distribution.³⁴

However, those procedures had been annulled and amended after the coming of Islam. Islam had recognized the new principle based on the equality right between male and female. Allah commands in the Qur'an that means: "*if there are brothers and sisters, (they share), the male having twice the share of the female*"³⁵

According to the opinion of majority *fuqaha*, the right to heritage in Islam can be made through one of that cause;

Firstly: Marriage, through the valid marriage between the husband and wife, it generates the right of inheritance by both;

Secondly: Descendant (*Nasab or Qarabah*); it is a relationship that exists between family members such as father, son, siblings and uncles, and;

Thirdly: *Wala'* relationship between slave and his master, where the slave had been freed³⁶.

The above cause will not become any affection instead when the three of the requirement exist and there is no other barrier. The three requirements are, the person leaving the property is truly dead whether it is known by people or decided by judge, secondly: that

³³ Rizuan Awang. 1994. *Undang-undang Tanah Islam: Pendekatan Perbandingan*. Kuala Lumpur: Dewan Bahasa & Pustaka. p: 352.

³⁴ *ibid.*

³⁵ The Holy Qur'an. an-Nisa 4: 176.

³⁶ Prof Ahmad Ibrahim etc. 1991. *Undang-undang Harta Dalam Islam*. Kuala Lumpur: Dewan Bahasa & Pustaka. al-Ahkam J III. p: 50.

the heirs are still alive after the death of property owner and thirdly: there is no barriers in heritage of the property such as the heir killed the deceased or different religion and the heir is a slave.

In the *faraid* system, when a person dies, those living must do the following with the estate that the deceased leaves behind, in the following order before its will distributed to the heirs:

- i. To discharge all his obligations relating to *zakat*, various *kaffarah* or penalties for oath, *zihar*, coition whilst fasting in the month of Ramadan, coition whilst in the state of *ihram* during *haj* or *umrah*, homicide, etc.
- ii. To pay for his funeral expenses.
- iii. To settle all his debts to his fellow beings. The settlement of such debts shall include the performance of the *haj* on his behalf if he had not already done so in his lifetime, and the payment of *maskahwin* if payment had not already been made. Even if the deceased died testate, the settlement of all his debts must precede the disposal of his estate that is spelt out in his testament.
- iv. To execute his will. A will is not for a person's heirs. This was clearly stated by the Messenger of Allah thus: "*Surely Allah has given to every one entitled to anything his due, therefore there shall be no bequest for one who inherits*".

The amount of estate provided for in a will for disposal shall not exceed one-third of the remaining estate after the settlement of (i) to (iii) above. This is consistent with the following *hadith*:

"Surely Allah has ordained that you bequeath to charity one-third of your property upon your death as an addition to your righteous deed." (Narrated by Bukhari).

- v. To distribute the remaining estate among his heirs after settlement of (i) to (iv) above.

The next of kin of a deceased person are entitled to the deceased's estate regardless of the amount. The estate must therefore be distributed among them in accordance with the law of Allah except to those who disclaim their right thereto. In the event that a beneficiary is away from the country or is missing, his share of the estate must be set-aside for him until his returns.

Concealing the estate of a deceased person from those who are entitled to it is an act of deceit. It is *haram* and cruel to do so. Any beneficiary who is involved in such an act, either directly or indirectly, shall be answerable to Allah in this world and in the hereafter. A Muslim cannot ignore the rule of Allah and dispose of the estate of a deceased person according to the rule or custom of a particular country.

2.3 The administration and distribution of Inheritance.

In Malaysia, the administration and distribution of inheritance is included the state list and the duty of state government, except the administration of non-Muslim property is under the duties of Federal Government.³⁷ At this moment the administration and distribution of an inheritance is referred to the administration of inheritance of English law. The problem of administration and distribution of Muslim inheritance is under the powers of Islamic Religion Affair and Syari'ah Court in every state.³⁸

After the administration of Inheritance law was enforced, the Civil Court conducted the administration and distribution of inheritance affair. It is gazetted in Wills Act and Administration of Estates 1959³⁹ and Small Estate (Distribution) Act 1955.⁴⁰

Since the administration of inheritance had been conducted by Civil Court through both Acts, its jurisdiction includes to all property and estates without being specified of any

³⁷ Malaysia. n. d. *Federal Constitution*. List 1, 4(e)(i) and (ii) Ninth Schedule.

³⁸ Mohd Rizuan Awang. 1987. *Konsep Undang-undang Islam; Pendekatan Pembahagian*. Kuala Lumpur: Al-Rahmaniah. p. 408.

³⁹ Ibid.

⁴⁰ Ibid.

Religion or Tribes. However, the practiced of that law among the Muslims are subjected to *faraid law*, which in this matter the Qadi or the Syariah Court is required to determine the distribution of Muslim Inheritance according to the *faraid*, make a declaration of nazar, will, and make a decision about matrimonial property. Unfortunately the others claim on inheritance such as debt and others should be proposed to the Civil Court.

The Wills Act and the Administration of Inheritance Act 1959 was enforced in Malaysia on 1 February 1960, while Small Estate (Distribution) Act 1955 was enforced in stages.⁴¹ According to that Act, the administration and distribution of inheritance is divide to three types:

First: The distribution of Customary Inheritance.

Customary Inheritance is the property that the amount of its value is more than RM 600,000 whether it consists of all moveable property or immoveable property or mixture of moveable and immoveable property. It is administered through the Wills Act and The Administration of Estate Act 1959.

Second: The administration of Summary Inheritance.

Summary Inheritance is the inheritance that consists to moveable property and the amount is not more than RM 50, 000. There is a special provision in Authority of Will Act and The Administration of Estate Act that the administrator of inheritance officer was given special authority to manage and solve the summary inheritance without applying the Letters of Administration from the High Court.³³

The estate that consists in this type is moveable property such as vehicles; share, saving money and others, which the amount of it is not more than RM 50 000. The heirs of the

³³ Mohd Rizuan Awang. 1987. *Konsep Undang-undang Tanah Islam; Pendekatan Perbandingan..* Kuala Lumpur: Al-Rahmaniah..

deceased can transfer of the property without applying the Letter of Administration in Court; but the heirs should make an application to the Administration of Inheritance Officer or trustee of Amanah Raya to administer and distribute the property.

Third: The administration of Small Inheritance.

The 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 i.e. the estate must contain some land or buildings. The value of the property comprised in an estate should be considered at the date of the filing of the petition for probate or letters of administration or lodging of a petition for distribution under the small estates procedure in respect of the estate. The Small Estates (Distribution) Act 1955 (SEDA 1955) provides that the District Land Administrator (DLA) has exclusive jurisdiction in the administration of intestate small estates. In other words, if the estate is an intestate estate, which falls within the definition of a 'small estate', the District Land Administrator will have exclusive jurisdiction. Section 5 of the SEDA 1955 provides that in the case of testacy, the High Court will have exclusive jurisdiction even in respect of estate, which are 'small estates'.⁴²

The distribution of small inheritance is according to the Small Estate (Distribution) I, Act 1955.⁴³ The purpose of this Act is to make the claim of administration and distribution can be done easily and swiftly. So, the administration and the distribution of inheritance will be arranged.

The application to claim the inheritance can be made by heirs of the dead, such as husband or wife, son or daughter, mother or father, Bait-ul-mal etc.), debtor, the buyer in sale agreement letter, the important person such as (pawnbroker or land lease), Chieftain and Land Administer, that made for Local Officers or the Settlement officer to settled it.

⁴² Kanesh Surdrum. 2000. "*Administration of Estates Handbook*". Division I. Kuala Lumpur: MLJ Sdn. Bhd. p. 392.

⁴³ Ibid.

The applicant must prove the death of the deceased through evidence such; the death certificate or funeral permit, letter of oath by two witnesses, which watched the solemnized of funeral or the order, which is produced by the High Court that assumes the death of the deceased.

In distributing of Small Inheritance, the Distribution of Inheritance Officer should determine the law applies to change the inheritance of the dead and to decide the shares or rights of every heirs. The laws are:

First: Syari'e Laws (*hukm faraid*) for Muslim.⁴⁴

Second: The Administration of Islamic Law in every state.

Third: Customary Tenure Land Enactment that determines of customary land in Negeri Sembilan.⁴⁵

Fourth: The Provision of Section 34, Third Schedule in Small Estates (Distribution) Act 1955 that is practiced in Penang and Malacca.

Fifth: Land (Group Settlement Areas) Act, 1960, that limits the transfer of rights is only to one heir. If it becomes a dispute between the heirs, the land should be sold and the income should be divided to heirs according to syara' (*faraid system*).

Sixth: In Malay Reserve Enactment provision state that the change of right is for Malay only, although in *Hukm Syara'* the husband or wife that is non-Malay but a Muslim will be presumed a valid heir.⁴⁶

Seventh: Distribution of Inheritance Ordinance (Distribution Ordinance No. 1/58) that determines the distribution of non-Muslim inheritance.⁴⁷

Besides the law stated above, the Distribution of Inheritance Officer must also understand the provision related to heritage of the deceased.⁴⁸ Actually, the purpose of the Small Estates (Distribution) Act 1955 cannot be achieved satisfactorily, because often in the same situation the customary inheritance can be settled earlier compared to the Small Inheritance.

⁴⁴ Al-Qur'an. An-Nisa' 4: 5,7,11, 12 & 173; al-Baqarah2: 282.

⁴⁵ Mohd Rizuan Awang. 1987. *Konsep Undang-undang Tanah Islam; Pendekatan Perbandingan*. Kuala Lumpur: Al-Rahmaniah. p. 356.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

The overdue in settlement of the Small Inheritance exist in cases from the heirs or the weakness of the provision. This is also because the lateness of heirs to claim authority of property, no compromise between heirs, the heirs refuse to attend the trial because of disagreement between them, claim of inheritance made separately, missing the grant by heir, the heir stay far away or out side and failing to understand well about the distribution according to *Hukm Faraid*.

Besides that, among the heirs, some provisions in the distribution of inheritance, is very loose and will cause in rising of overdues to settle the distribution of small inheritance. This provision should be amended and the additional authority should be given to the Land Tax Collector (District Administrator) or the Distribution of Inheritance Officer which can help them to settle the cases of inheritance and also proceed the trial of postponed or unsettled cases on the cause of the death or the officer transfer that trial of the case. To settle this matter, a new provision should be admitted, where if the heir does not attend the court without any reason it can be assumed as doing fault. Besides that, the provision of section 14, has given the authority to heirs, who are not satisfied between them could make a charge in the High Court in two months to settle the dispute.

Regarding to the administration of this small inheritance, one matter should be understood, even though the system of *Faraid* determines the share for every heir, but that share is no inevitably divided following and involving the distribution of inheritance physically.

In Malaysia the separation of land problem happens, although there is no clear statistics made on it. In this matter of land separation, the *faraid* system had been defeated by certain people because of the separation of the land.⁴⁹

In this problem, the *faraid* system cannot be defeated; this is because, there are among the heirs who also do not understand about the *faraid* system, which the distribution of *faraid*

⁴⁹ Mohd Rizuan Awang. 1987. *Konsep Undang-undang Tanah Islam; Pendekatan Perbandingan*. Kuala Lumpur: Al-Rahmaniah.