

AN INTRODUCTION TO ISLAMIC LAW OF PROPERTY IN MALAYSIA

Zulkifli Hasan*

1.0 Introduction

In Malaysia, law of property of the Muslims is based on customary practice or “adat” and mixed with the Islamic law principles. The customary practice known as “adat pepateh” was brought from Sumatra and it is practiced by the Malays of Negeri Sembilan. The other Malay states in the peninsula followed another customary practice namely “adat temenggong” originated from Palembang. When Islam came into Malaysia, it is a lot of Malays daily life and this include the practice of the customary laws on property. The Islamic law then has been applied extensively until now and the courts recognized shariah as the governing law of property for Muslims.

Section 25 of the Civil Law Act 1956 stated that the administration of Muslim’s property shall in accordance with the Islamic law. It provides that nothing in Part VII (devolution and disposal) of this statute shall affect the disposal of any property according to muslim law, native law and custom. This provision shows the personal law of Muslims regarding with the administration of property is Islamic law and as clearly stated in Part VII on the disposal and devolution of property. Section 25 gives clear provision that the principles of English Law relating with the property’s administration do not apply to Muslims who are governed by Islamic law¹.

As regard to the jurisdiction of the courts, although the Islamic law is applicable to the law of property for Muslims, the cases will be handled by the civil court and not the syariah court. The Federal Constitution provides that the civil court has jurisdiction to deal with the procedural aspects of the administration of Muslims’ estates and the syariah court only deals with minor jurisdiction such as the issuance of “distribution certificate or sijil faraid”.

* E-mail: zul361977@yahoo.com. Tel: +44 (0) 7761457686 Weblog: <http://zulkiflihasan.wordpress.com>.

¹ *Tengku Nik Maimunah & Anor v Hassan Bin Othman & Anor* (1982) 2 MLJ 264. It was held that the muslim law referred in section 25 of the Civil Law Act 1956 is the law professed and practiced in the state of Terengganu subject to any rules in its administration that may be regulated by the state law of Terengganu.

Hence, this chapter aims at providing an overview on the administration of Islamic law of property in Malaysia. It contains 6 parts inclusive of the introduction. Part One deals with the administration of an estate, Part Two discusses on wakaf, Part Three concerns with *zakat*, Part 4 explains on *Hibah*, Part 5 touches on Harta Sepencarian and finally Part 6 represents a conclusion. The discussion will only touch the matters involving Muslim only.

2.0 Administration Of Estate

In Islam property can be divided into several categories namely tangible and intangible and movable and immovable. However ‘property’ in the scope of the discussion will be divided into two categories, ie ‘estate’ and ‘non-estate’ properties. The word ‘estate’ here means the property of a deceased person or in Malay word known as “pesaka” or “pusaka”. The administration of estate actually refers to the administration of the property of a deceased person. Estates of a deceased are of two types namely testate and intestate. A testate estate is an estate of a deceased person who dies leaving a will. An intestate estate is the estate of a deceased person who dies without leaving a will².

In Malaysia, intestate estates are of two types. There are small estates and non-small estates. A ‘small estate’ or “harta pesaka kecil” is an estate consisting wholly or partly of immovable property not exceeding RM600,000 in total value. Other than that, there are ‘non-small estates.’ The distribution of small estates is within the jurisdiction of the land administrators. Only appeals go to the High Court. The administration and distribution of non-small estates are within the jurisdiction of the High Court³ even though the parties involved are Muslim. Syariah Court has only jurisdiction over property matters in the matter of issuing a “sijil faraid”.

² Abdul Hamid bin Haji Mohamad. *Administration of Property in Malaysia: A Civil Law and Syariah Law Perspective* [2002] 3 MLJ 1 p 1.

³ *Ibid* p 5.

Probate matters are exclusively within the jurisdiction of the High Court in accordance with the Wills Act 1949. The Wills Act shall only applicable to non-Muslims. The law applicable is the English common law, either as codified in the Wills Act 1949, the Probate and Administration Act 1959 (Revised in 1972) and the Rules of the High Court 1980. For Muslims they are governed directly by principles of hukum syarak laid down in the recognized sources of Islamic law⁴.

2.1 Distribution of Small Estate

The distribution of small estate is provided in the Small Estates Distribution Act 1955 (Act 98) (“the Act”). The Act provides the administration and procedure of distribution. The maximum value of a small estate is fixed at RM600,000. Previously it used to be only RM25,000. It is observed that a majority of Muslim estates in this country fall under the category of 'small estate'⁵.

An application to distribute property is made to the land administrator. The land administrator will conduct an inquiry and normally will require the applicant to obtain “sijil faraid” from the Syariah Court. The land administrator obtains the '*sijil faraid*' from the Syariah Court that determines the portion of the estate each beneficiary is entitled to. The land administrator makes the distribution order accordingly. If any party dissatisfied with the order, he may make an appeal to the High Court.

Section 19 of the Act provides that if any difficult point of law or custom arises in any proceeding before the land administrator, he may refer the matter, if it relates to Muslim law or Malay custom, for decision to the Ruler of the State in which his district is situated or to such other person or body of persons as the Ruler may direct. If the question relates to any other matter, he may state a case for the opinion and directions of the High Court. This provision further mentioned that if a difficult question arises before the land

⁴ Reference will be made mainly to the Muslim Wills Enactment (Selangor) 1999 and the Muslim Wills Enactment (Negeri Sembilan) 2004.

⁵ Supra note 2 p 4.

administrator on matters other than Islamic law and Malay custom, the issue may be referred to the High Court for decision.

Under the Small Estates Distribution Act 1955 reference is also made to the Syariah Court for the '*sijil faraid*'. The applicant shall make a request by letter, stating the names of the beneficiaries and their relationship to the deceased or the land administrator or the solicitor acting for the beneficiary. Practically, the Syariah Court will only rely on the facts stated by the applicant, which are not even under oath, and calculates the share each beneficiary is entitled to⁶. The Syariah Court then may issue the "sijil faraid".

The procedure for the distribution of a small estate is provided under Small Estates Distribution Act 1955. The Act provides inter alia that the estate duty is exempted on small estates; sureties are not required in the application for a letter of administration in the High Court, the land administrator has all the information on land matters and the land administrator himself makes the endorsement on the title after the order is made. For Muslims, they shall make an application to obtain a sijil faraid before he may distribute his property before the land administrator. The application shall be made to the state syariah court where the property is situated. The land administrator will not endorse any distribution order unless they receive the sijil faraid issued by the syariah court.

2.2 Distribution of non-small estates

Probate matters or intestate estate are exclusively within the jurisdiction of the High Court. The Wills Act shall only applicable to non-Muslims. For Muslims, they also are bound to apply for the distribution of non-small estates to the High Court. However, the jurisdiction of the High Court in this matter only related with the letter of administration. The laws on the distribution of Muslims' property still the Islamic law.

⁶ *Supra* note 2 p. 3

Procedurally, at the first instance the applicant shall apply for the grant of a letter of administration and following that, he shall also apply for a vesting order. Before making the vesting order, the High Court will normally require the Muslim's applicant to obtain a sijil faraid from the Syariah Court. The applicant shall apply to the syariah court for the sijil faraid and make payment at certain amount. Then he would submit the sijil faraid to get a vesting order. The distribution order made by the High Court is made in accordance with the sijil faraid.

2.3 Wills.

A Will is neither a contract nor an agreement between two or more persons. It becomes a legal document only after the demise of the testator. It is a gratuitous gift of property by its owner to another contingent on the giver's death⁷. *Wasiat* or will derived from the root word "*wasa*" which means be conveyed. Technically it means a transfer of ownership for no consideration to take effect after death⁸. In short, it means a declaration in prescribed form of the intention of the person making it of the matters which he wishes to take effect on or after his death, until which time it is revocable.

A disposition of the estate will only take effect after death, which is implying transfer of ownership for no consideration. Section 2 (1) Muslim Wills Enactment (Selangor) 1999 defined a will as an *iqrar* or admission of a person made during his lifetime with respect to his property or benefit thereof to be carried out for the purposes of charity or for any other purposes permissible under Islamic law after the testator's death.

In Malaysia, the Wills Act 1957 does not apply to muslims. Wills made by muslim must comply with syariah principles. Syariah court has the jurisdiction to adjudicate any disputes relating to such a will. However, there is no specific legislation on Islamic wills

⁷ Al-Sheikh Shamsuddin Ahmad al-Syarbini al-Khatib (n.d.). *Mughni Mukhtaj*. Vol. 3. Cairo: Dar al-Fikr. p 39 in Pawancheek Merican. (2005). *Islamic Inheritance Law in Malaysia*. Kuala Lumpur: Malayan Law Journal. p 101.

⁸ Muhammad Najib al-Mut'i (n.d.). *Majmu' Syarh al-Muhazzab*. Vol 15. Mesir: Matbaa'h Imam. p 33. See also Sayid Sabiq. 1995. *Fiqh al-Sunnah*. Vol 3. Beirut: Dar al-Fikr. p 295.

in Malaysia. Selangor was the first state that enacted the Muslim Wills Enactment (Selangor) 1999 (“the Enactment”) and followed by Negeri Sembilan namely Muslim Wills Enactment (Negeri Sembilan) 2004 whereby the former is applicable to Muslims residing in Selangor only and the latter in Negeri Sembilan.

For Muslims who intend to make a will for a charitable purpose or wakaf, the will or *wasiat* shall be made before a *Kadhi*. The dedicator must be in front of the *Kadhi* or witnessed by two persons qualified by Hukum Syarak to be such witnesses during the *wasiat* is made⁹. A will may be made orally or in writing or by gesture or signs. Section 3 (1) of the Enactment provides that any words, or indeed signs may be used provided they clearly indicate the testator’s intention that the property should pass to the legatee after his death. However, the Enactment provides that no claim regarding the validity of a will after the death of the testator will be accepted by the Syariah Court unless it is supported by documents written or signed by the testator¹⁰ or by oral testimony of two witnesses¹¹.

The Enactment further provides provision on guardianship over a minor’s person and property, conditions of the beneficiary, circumstances in which a will becomes invalid, revocation, acceptance and rejection and the doctrine of “*wasiyat wajibah*” or the obligatory bequest¹². At this time, the Enactment and the Muslim Wills Enactment (Negeri Sembilan) 2004 are the only statutory Islamic legislation on Muslims wills in Malaysia. The rest of the state will rely on the principles of hukum syarak which are open to be interpreted widely. It is strongly recommended that the authorities to enact a standard legislation on Islamic wills which is applicable throughout all states in Malaysia.

2.4 Nomination.

⁹ In the case of *Pengaruh Jabatan Hal Ehwal Agama Negeri Sembilan lwn Faridah Chin and Anor* (1995) 10 JH 195, the Court held that a will of a person to cremate his deceased body is invalid because of against hukum syarak.

¹⁰ Section 4 (1) of the Enactment.

¹¹ Section 4 (2) of the Enactment.

¹² Section 12-27 of the Enactment. Section 27 explains obligatory bequest which mean if a person dies without making any bequest to his grandchildren through his son who dies with him at the same time then his grandchildren are entitled to one-third of his estate.

Nomination is a process by which a person who has taken up insurance policies or has saved money in any institution, names certain persons to benefit from such insurance policies or savings in the event of his death¹³. In Malaysia, there are two types of nomination namely a nomination which has the effect of creating trust in favour of nominee as in the case of nomination of a life insurance policy made under section 23 of the Civil Law Act 1956 and a statutory nomination as in the case of nomination made under the Employees Provident Fund (EPF) Act 1991 or the Co-Operative Societies Act 1993.

Muslim scholars in Malaysia differ on the effect of nominations by Muslims. The *fatwas* in Pahang, Selangor, Negeri Sembilan and Kedah state that the property governed by nomination is not testamentary property and shall be divided by way of faraid. The fatwas in Perak and Kelantan mention that the nomination of the EPF is to be regarded as gifts that will take effect upon death¹⁴.

On 9th October 1973 the National Council of Religious Affairs issued a fatwa that nominees of the funds in EPF, Post Office Savings Bank, Insurance and Co-operative Societies can receive the money of the testator and it has to be divided among the persons entitled to them under the Islamic law of inheritance¹⁵. Malacca was the first state to adopt the said fatwa by amending the Administration of Muslim Law Enactment 1974. The Federal Government is now in the midst of standardising regulations to make the rules of Islamic inheritance mandatory for savings by muslims in government institution.

3.0 Wakaf

¹³ Pawancheek Merican. (2005). *Islamic Inheritance Law in Malaysia*. Kuala Lumpur: Malayan Law Journal. p. 146.

¹⁴ *Ibid* p 160..

¹⁵ The Conference of Rulers in its 117th meeting agreed with the said fatwa on the effect of nominations and recommended to the Attorney General office to amend the laws accordingly.

Wakaf used in Islamic law covers religious endowments and family trusts. A basic purpose of wakaf is a “good work” (*qurbah*), or “an approach to Allah” (*taqarrub*). Wakaf literally means detention or "tying up of the property in perpetuity" so as to prevent it from becoming the property of a third person. Technically it means the dedication of a property or giving it away in charity for the benefit of certain property for a good purpose pious, charitable or to seek Allah’s pleasure¹⁶.

According to *Imam Shafi'i*, *Imam Malik* and two disciples of *Imam Abu Hanifah*, *Abu Yusuf*, and *Imam Muhammad*, wakaf signifies the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the ownership of Allah in such a manner that its profit should be made use of for the good of mankind from beginning to the end¹⁷.

Jurisdiction over wakaf lies within the jurisdiction of the Syariah Court. Section 2 of Selangor Administration of Islamic Law Enactment 2003 (“the Enactment”) defined wakaf as any property from which its benefits or interest may be enjoyed for any charitable purpose whether as wakaf am (created for a general charitable purpose) or wakaf khas (created for a specified charitable purpose) in accordance with hukum syarak, but does not include a trust which is defined under the Trustee Act 1949¹⁸.

The administration of wakaf property in Malaysia is under the state matters. Under the administration of Majlis, wakaf can be divided into two kinds namely Public Wakaf (wakaf am) and Private Wakaf (wakaf khas). The income of wakaf am goes to baitul mal and for wakaf khas is applied to objects specified by the dedicator.

Public Wakaf means a dedication in perpetuity of the capital and income of property for religious or charitable purposes recognized by Islamic Law¹⁹. In other words it refers to the dedication that has benefit and profit for society and others. Private Wakaf in other

¹⁶See Sayid Sabiq. 1995. *Fiqh al-Sunnah*. Vol 3. Beirut: Dar al-Fikr. p 269.

¹⁷Muhammad Abu Zahrah. (n.d.) *Muhadharah Wi Waqf*. Vol.2. Mesir. Dar al-Fikr. p. 103. See also ibid p. 274.

¹⁸Similar definition can be found in other state administration of Islamic law.

¹⁹(1980) 1 MLJ 286, per Salleh Abas F.J in *Haji Embong v Tengku Nik Maimunah*.

words means a dedication in perpetuity of the capital of property for religious or charitable purposes recognized by Islamic law and the property so dedicated, the income of the property being paid to persons or for purposes prescribed in the wakaf²⁰. Specifically it means the dedication that has benefit and profit to someone or certain person.

The requirements of wakaf property are provided in the state enactment of administration of Islamic law. Every wakaf khas must be declared and validated by Sultan²¹. Majlis is the sole trustee of the wakaf property²². Section 8 (a) of the Enactment provides that notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of all wakaf, whether wakaf am or wakaf khas²³. Section 91 (2) (b) of the Enactment states that private wakaf made by certain person during death illness must be in writing before a witness. Any *wakaf* more than one third shall be invalid²⁴. When someone wants to create a wakaf, he is required to transfer his land to the Majlis. The Majlis then become the administrator of all wakaf property.

Every wakaf then shall be registered in the name of the Majlis as proprietor in accordance with the National Land Code 1965²⁵. Section 95 of the Enactment provides the Majlis shall prepare, issue and publish in the gazette a list of all properties, investments and assets and not forming part of the Baitulmal.

To sum up, all wakaf property is under the state administration or Majlis Agama Islam. In order to preserve the wakaf property in accordance with the law, all wakaf lands should be identified and registered in the name of the Majlis. From general observation, wakaf

²⁰ *Ibid.*

²¹ Section 91 (2) (a) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

²² "Majlis" refer to the state Majlis Agama Islam.

²³ Similar provision in section 61 of the Administration of the Religion of Islam (Federal Territories) Act 1993.

²⁴ Section 91 (1) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. Pahang, Malacca, Penang, Kedah and Perlis have the same application except Kelantan and Terengganu where ruler can validate it and the beneficiaries expressly sanction it.

²⁵ Section 90 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

lands or property in Malaysia are not being utilized effectively. It is strongly urged that this property should be utilized to the utmost for the benefit of Muslims community and the Majlis should play its role more effectively as the sole authority in managing the wakaf property.

4.0 Zakat

Zakat literally is derived from the word “zaka” which means grow (in goodness) or 'increase', 'purifying' or 'making pure'. Technically it means a certain fixed proportion of the wealth and of the each and every kind of the property liable to zakat of a Muslim to be paid yearly for the benefit of its beneficiaries in the Muslim community with certain conditions and requirements²⁶.

There are two types of *zakat* in Islam namely a flat fee imposed on each person known as *zakat al-fitr*, and a tax on wealth called *zakat al-mal*. *Zakat al-fitr* refers to the obligation of every Muslim to contribute a certain amount of staple food or pay an equivalent monetary amount in the month of Ramadan before *Eid al-Fitr*²⁷. *Zakat al-mal* is levied only on Muslims whose wealth exceeds a threshold with certain requirements²⁸.

In Malaysia, zakat is the responsibility of the Islamic Council of each state or Majlis. Section 86 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 provides that the state Majlis is empowered to collect zakat and fitrah due from every muslim in Selangor in accordance with hukum syarak. There are 14 Islamic Councils, one of each of the 13 states and one for the Federal Territory. Baitul Mal is the institutions, which manage the zakat. For example the Islamic Council of the Federal Territory of Kuala Lumpur has set up a Zakat Collection Centre for such purpose.

Based on section 81 (1) Administration of Islamic Law Selangor 2003 stated that fund to be known as baitulmal is to be established. It shall consist of money or property, movable or immovable which under Muslim law or the enactment accrues or is contributed by any

²⁶ Yusuf Al-Qardawi. (1997). *Fiqh az-Zakah*. 24th ed. Beirut : Mu`assasat al-Risalah, 1997. pp. 37-38. See also Sayid Sabiq. (1995). *Fiqh al-Sunnah*. Vol.1. Beirut: Dar al-Fikr. pp 246-247.

²⁷ Ibid p 917

²⁸ Sayid Sabiq. (1995). *Fiqh al-Sunnah*. Vol.1. Beirut: Dar al-Fikr. pp 256-283.

person to the fund. All money vested to Majlis who will administer the fund. Any investment of such asset may be sold, utilized and disposed of, the proceeds may be invested from time to time being an investment of trust fund²⁹. Section 94 (2) of Trustee Act 1949 Part II would apply to Majlis in respect of its investment activities.

The Majlis are not part of the Federal Government except for Federal Territory. They depend on the Islamic Religious Department which is a government department existing in each state to provide the administrative services and to implement the decisions of the Council. The Majlis is responsible to the Sultan or Ruler of each State. Zakat collection and distribution is one of the main functions of the Majlis.

Muslims are obliged to pay zakat on savings, business, shares, gold, corps, and earnings including zakat fitr. The fatwa authorities differ on the obligation to pay zakat of earnings. In 1997, National Fatwa Council issued a fatwa to pay zakat of earnings as an obligation³⁰. Most of the Muslims pay zakat mal and zakat fitr. They normally pay in month of December with a purpose to get rebate from income tax payment for a particular year.

The Majlis has the power to make regulations to determine the rate of value of zakat and fitrah portion payable by every Muslim, create procedures on collection, appoint amils, create penalties and provide punishment in relation to the collection and delivery of all proceeds of zakat and fitrah³¹. For example in Federal Territories, zakat on savings is levied at the rate of 2.5% on the lowest balance of a person's saving for the year, if the balance is not less than the nisab, zakat on income is 2.5% of a person's zakatable income (if not less than nisab), zakat on business is 2.5% of the zakatable assets of the business, zakat on shares is levied at 2.5% on the lowest value of the year of shares owned by the payer after deducting debts or loans on the shares, zakat on gold is 2.5% on the value of gold kept by a person for each year (if not less than nisab of 85 grams), zakat on corps or

²⁹ Section 60 of the Administration of Islamic Affairs (Terengganu) Enactment 2001 and the Administration of Islamic Law (Federal Territories) Act 1993.

³⁰ "Muzakarah (khas) Jawatankuasa Fatwa Kebangsaan held on 22nd June 1997. n.a 1st November 2006. <http://www.e-fatwa.gov.my...>

³¹ Section 87 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

rice is 10% of the field value of the rice harvested if this is more than 1,620 kg and zakat fitrah is about RM4.00 to RM5.00 per head³².

Institution of zakat is one of the most important bodies in developing the ummah. In Malaysia, the administration of zakat is in the hands of the state Majlis. There are 14 Islamic Councils and 14 Baitul Mal which manage the zakat differently. It is recommended that Malaysia to have a single zakat institution at federal level in order to ensure that the management of zakat property become more effective and dynamic.

5.0 Hibah

Hibah is one of means to distribute a property with a purpose to create mutual love and affection among Muslim and to help for those who are in need. *Hibah* is one of means to distribute one's assets in Islamic financial planning. *Hibah* is an Arabic term, derived from the word '*habubah*', which literally means 'passing' or 'blowing'. Technically, it means a contract where someone gives his wealth to others without the expectation of any consideration or exchange with the transferring effect on the ownership³³.

Hibah has now being commercialized and there are various hibah products that we may find in the market such as hibah harta which is offered by Bumiputra-Commerce Trustee Bhd.³⁴. Hibah is different with *wasiat* (will) or *faraid* whereby it involves the voluntary and unconditional giving or transfer of asset from a donor to a beneficiary and the appointment of trustee to hold an asset in trust on behalf of both parties. The asset distribution is decided and committed inter vivos unlike *wasiat* and *faraid* that only happen after the asset owner's death. In fact, neither offer nor acceptance is strictly necessary if someone makes a hibah and it is enough that the subject matter is brought by the donor and taken possession by the donee. In the case of *Roberts v Ummi Kalsum* (1966) 1 MLJ 163, per Raja Azlan Shah J, there are three essentials of a valid hibah under Muslim law namely, the declaration of gift by the donor, express or implied

³² n.a. 25th October 2006. [www.http.zakat.com.my](http://www.zakat.com.my).

³³ Sayid Sabiq. (1995). *Fiqh al-Sunnah*. Vol.1. Beirut: Dar al-Fikr. Pp277.

³⁴ It has been approved by Federal Territory Fatwa Council. n.a. 15th October 2006. www.bcb.com.my.

acceptance of the gift by the donee and the delivery of possession of the gift by the donor to the donee. Absence of any those elements will make hibah invalid.

One of the advantageous of hibah is it provides a flexibility to distribute an asset and creates mutual brotherhood amongst Muslims.. Any Muslim who makes hibah is actually entering into a contract to transfer his property without consideration. Under Hibah Harta contract, the issuer would participate in the “lafaz akad“, or verbal offer and acceptance of possession of the asset as required under the Syariah law.

At the moment there is no specific statute on hibah. Practically, hibah will be based on the law of contract. If the property related with immovable asset, the National Land Code 1965 has to be complied with. Since there is no comprehensive regulatory framework for hibah, for Muslims, they are bound by the principles of hukum syarak.

In Malaysia, if someone makes a hibah, it will be considered as a private contract which is created during the lifetime of both the donor and the donee. The hibah property will not form part of the donor’s estate, and therefore not subject to the Probate and Administration Act 1959 and Will Act 1959 and also rules of *faraid*. Hibah offers an alternative to Muslims to transfer their property to anyone effectively and time costly.

6.0 Harta Sepencarian.

Harta sepencarian or jointly acquired property is the asset of both parties acquired during marriage and also includes the property owned by one party before the marriage, but to which there has been substantial improvements made by the other party or by joint effort during marriage. Harta sepencarian also can be defined as the earnings or the property acquired as a result of joint labour of two spouses and includes the income derived from capital, which is the result of joint labor³⁵.

Harta sepencarian was recognized under Islamic law based on the syariah principle and it can be found in *Al-Umm* where Imam Syafii wrote that when a dispute occurs between

³⁵ Section 2 of the Islamic Family Law (Federal Territories) Act 1984, the Islamic Family Law (Selangor) Enactment 2003 and the Islamic Family Law (Perak) Enactment 2004. Similar provision in Islamic Family Law Enactment of other states with minor differences on its wording. Reference will be made mainly to the the Islamic Family Law (Selangor) Enactment 2003.

man and a woman in regard to articles or household furniture in their household as a result of their divorce or even though not separated or both husband and wife die or one of them dies and in the situation where both husband and wife die or one of the two of them dies a dispute arises among the heirs on one of the two sides the method for resolution in all cases are the same³⁶.

It is important to note that the jurisdiction of syariah courts to grant orders relating with harta sepencarian is provided under the state Islamic law of administration enactments. For example in section 63 (1) (b) (iv) of Selangor Enactment states that a Syariah High Court shall in its civil jurisdiction determine all actions and proceedings in which all the parties are muslim and which relate to the division of and claims to harta sepencarian. The Syariah court also has power to order the division of any assets acquired by them during their marriage by their joint efforts, or the sale of any assets and the division between the parties of the proceed sale when permitting the pronouncement of talaq or when making an order of divorce³⁷. A claim for harta sepencarian can be made arising from divorce, when a husband makes an application to practice polygamy³⁸ and after the death of the spouse³⁹.

In Malaysia, practically in syariah court, when granting a decree of divorce or judicial separation, the Court has the power to order one of the following to divide matrimonial property between the parties; or to sell such property and then divide the proceeds of the sale between the parties. In making such an order, the Court will consider the extent of the contribution made by each party whether in the form of money, property or work towards the acquisition of the assets, the debts incurred by either party for the benefit of both parties, and the needs of the minor children⁴⁰.

³⁶ Al-Syafii, Muhammad bin Idris. (1996). *Al-Umm*. Vol. 10. Beirut: Darul Qutaibah.p. 328 in Pawancheek Merican, *Islamic law of Inheritance*, Malayan Law Journal, 2005, Kuala Lumpur pp. 41-42. This is supported in the case of *Nor Bee v Ahmad Shanusi* (1978) Vol. 12 JH, where the Chief Kadhi of Pulau Pinang, Harussani Zakaria decided that harta sepencarian is recognized under hukum syarak based on the principles of life sharing and services provided by wife.

³⁷ Section 122 (1) of the Islamic Family Law (Selangor) Enactment 2003. Section 58 (1) of the Islamic Family Law (Federal Territories) Act 1984.

³⁸ Section 122 (1) and 23 (10) the Islamic Family Law (Selangor) Enactment 2003.

³⁹ See *Hajah Saudah bt Che Mamat v Hanafi Haji Daud* (1997) 11 JH 21.

⁴⁰ Section 122 (2) (a) (b) (c) of the Islamic Family Law (Selangor) Enactment 2003.

Where such property is acquired by the sole effort of one party only, the Court shall consider the extent of the contribution made by the other party who did not acquire the property, to the welfare of the family, looking after and caring for the family, and the needs of the minor children⁴¹. Subject to these considerations, the Court may divide the assets of the proceeds of sale.

The Court will generally award the party who acquired the property a bigger share. The Court has also powers to deal with properties, which were disposed off with the intention of reducing a person's means to pay maintenance or of depriving the other party of the rights to the properties⁴².

Procedurally, if the disposition is still pending, the aggrieved party may apply to the Court for an injunction to prevent the disposition. The application can be made when any matrimonial proceeding is pending, an order for the division of assets (jointly acquired during the marriage) has been made but not complied with and an order for the maintenance of a wife or former wife or child has been granted.

Harta sepencarian is a Malay customary practice which becomes a syariah rule. It has been incorporated into the state Islamic family law enactment. A claim for harta sepencarian can be brought by a muslim upon lifetime divorce or divorce upon death. In short, we may conclude that harta sepencarian provides fair legal distribution of property which is acquired during the existence of marriage between husband and wife.

7.0 Conclusion

This chapter provides a general overview of the administration of Islamic law of property in Malaysia specifically in the matter of the administration of estate, wakaf, zakat, hibah,

⁴¹ Section 122 (3), (4) of the Islamic Family Law (Selangor) Enactment 2003.

⁴² Section 122 (4) of the Islamic Family Law (Selangor) Enactment 2003. See *Roberts @ Kamaruzzaman v Umi Kalthum* (1966) 1 MLJ 163.

and harta sepencarian. From the foregoing discussion, it is clearly showed that the law applicable to Muslims property in Malaysia is Islamic law.

In matters relating with the administration of estate, the distribution of estates is governed by the Probate and Administration Act 1959 (Revised in 1972), the Rules of the High Court 1980 and the Small Estates Distribution Act 1955. The jurisdiction of Syariah Court on this matter is only pertaining to the issuance of a “Sijil Faraid”. Other matters rest with the jurisdiction of the High Court or the Land Administrator.

Selangor was the first state that enacted legislation on Islamic wills known as Muslims Will (Selangor) Enactment 1999 and later followed by Negeri Sembilan. As regard to wakaf, zakat, hibah, and harta sepencarian, the main legislations refer to are the administration of religion of Islam and the Islamic family law enactment of the states. Section 25 of the Civil Law Act 1956 confirms the applicability of Islamic law to the administration of Muslim’s property. There is still a need to improve the legal framework of the administration of Islamic law of property in Malaysia especially in the matter of standardization. This effort will not be successful without cooperation and supports of all state authorities including individuals or bodies involved in judiciary and advocacy practice.

REFERENCES

- Abdul Hamid bin Haji Mohamad. *Administration of Property in Malaysia: A Civil Law and Syariah Law Perspective* [2002] 3 MLJ 1.
- Al-Sheikh Shamsuddin Ahmad al-Syarbini al-Khatib (n.d.). *Mughni Mukhtaj*. Vol. 3. Cairo: Dar al-Fikr.
- Al-Syafii, Muhammad bin Idris. (1996). *Al-Umm*. Vol. 10. Beirut: Darul Qutaibah.
- Muhammad Abu Zahrah. (n.d.) *Muhadharah Wi Waqf*. Vol.2. Mesir. Dar al-Fikr.
- Muhammad Najib al-Mut’i (n.d.). *Majmu’ Syarh al-Muhazzab*. Vol 15. Mesir: Matbaa’h Imam.
- ”Muzakarah (khas) Jawatankuasa Fatwa Kebangsaan held on 22nd June 1997. n.a 1st November 2006. <http://www.e-fatwa.gov.my...>
- n.a. 25th October 2006. www.http.zakat.com.my.
- n.a. 15th October 2006. www.bcb.com.my.
- Pawancheek Merican. (2005). *Islamic Inheritance Law in Malaysia*. Kuala Lumpur: Malayan Law Journal.
- Sayid Sabiq. 1995. *Fiqh al-Sunnah*. Vol. 1. Beirut: Dar al-Fikr.
- Sayid Sabiq. (1995). *Fiqh al-Sunnah*. Vol.3. Beirut: Dar al-Fikr..
- Yusuf Al-Qardawi. (1997). *Fiqh az-Zakah*. 24th ed. Beirut : Mu`assasat al-Risalah, 1997.

Acts/Enactments

- The Administration of the Religion of Islam (State of Selangor) Enactment 2003.
- The Administration of the Religion of Islam (Federal Territories) Act 1993.
- The Administration of Islamic Affairs (Terengganu) Enactment 2001
- The Islamic Family Law (Selangor) Enactment 2003.
- The Islamic Family Law (Federal Territories) Act 1984.
- The Islamic Family Law (Perak) Enactment 2004.
- The Muslim Wills Enactment (Selangor) 1999
- The Muslim Wills Enactment (Negeri Sembilan) 2004.

Cases

- Hajah Saudah bt Che Mamat v Hanafi Haji Daud* (1997) 11 JH 21.
- Haji Embong v Tengku Nik Maimunah* 1980) 1 MLJ 286.
- Nor Bee v Ahmad Shanusi* (1978) Vol. 12 JH,
- Pengarah Jabatan Hal Ehwal Agama Negeri Sembilan lwn Faridah Chin and Anor* (1995) 10 JH 195.
- Roberts @ Kamaruzzaman v Umi Kalthum* (1966) 1 MLJ 163.
- Tengku Nik Maimunah & Anor v Hassan Bin Othman & Anor* (1982) 2 MLJ 264.