

The Challenge Faced by Shariah Law in Respect of Distribution of Inheritance in Multi-Ethnic Communities: Case Study in Beaufort, Sabah, Malaysia

¹Zaini Nasohah, ²Hayatullah Laluddin, ³Zuliza Mohd Kusrin, ¹Mohd al-Adib Samuri,

¹Amir Husin Mohd Nor, ¹Salmy Edawati Yaacob and ¹Mohd Rizal Muwazir

¹Department of Shariah, Faculty of Islamic Studies, Institut of West Asian Studies,

²Department of Shariah, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia,
43600 Bangi, Selangor, Malaysia

³Department of Shariah and Management, Academy of Islamic Studies, University of Malaya,
50603 Kuala Lumpur, Malaysia

Abstract: The Federal Constitution has granted jurisdiction over Islamic affairs to each state through the 2nd list of the 9th schedule. Based on this jurisdiction, the states have approved laws relating to the Muslim community including distribution of a deceased estate. In the context of a multi-ethnic Muslim community, state customary and traditional laws pose a rather significant challenge to the effective operation of Shariah Courts. Results of a study conducted in 2009 indicate that elements of ethnicity and custom have more or less constrained the Shariah Courts from carrying out this jurisdiction. It is observed that in addition to consulting the Shariah Courts, bumiputra communities in the study area continue to adhere to customs in matters relating to the distribution of inheritance. This study discusses this phenomena and attempts to deliberate on the approach adopted by courts in handling of the relevant cases.

Key words: Federal constitution, Shariah law, Shariah courts, inheritance, multi-ethnic communities, Malaysia

INTRODUCTION

Prior to the arrival of Islam, communities in Sabah adhered to different beliefs, many of which were based on animism or paganism. However with the advent of Islam, such beliefs gradually diminished as a result of many of these communities entering into the fold of Islam. Despite this development, customs deeply ingrained in these communities still continued to be practiced.

Even, with the existence of Islamic institutions which oversees the affairs of Muslims in Sabah such as the Sabah Islamic Religious Council and other similar organizations, customs maintained its dominance in daily practice of these communities. Disputes are usually settled in Native Courts, despite their customary laws being in conflict with Islamic law.

This is due to the strong influence that these customary laws have over these communities. In relation to estate administration, each ethnic group has its own customs which still remain dominant and have binding force on the communities, despite their conversion to Islam. Such circumstances pose many challenges to the function and jurisdiction of the Shariah Courts.

Arrival of Islam in Sabah: It is believed that Islam reached Sabah in 10th century AD. This is the era when Arab trading vessels arrived in Canton, China from Mendoro (Ma'i) located in the Sulu Archipelago not far from Sabah in 982 AD. It is also believed that Muslims settled in these islands after their arrival and subsequently influenced the local residents to convert to Islam, starting from the turn of the 14th century until 15 AD (Buyong, 2003).

This is supported with the existence of a Muslim tombstone in Bud Dato, Jolo dating 1310 AD. The spread of Islam in Sulu and Mindanao was then spearheaded by a Minangkabau cleric, Sharif Awliya al-Makhdun in 1380 AD and Arab cleric, Sharif Muhammad Kabongsuan in 1475 AD. From this point onwards, Islam continued to spread through the East coast of Sabah, particularly around Kinabatangan and Lahad Datu (Buyong, 2003) before eventually reaching the West coast of Sabah.

Prior to the coming of Islam, communities in Sabah adhered to various beliefs, many of which were based on animism or paganism. With the arrival of Islam however, these beliefs gradually faded away as a result of conversion to Islam. At the turn of the 20th century AD,

Islam began to spread throughout Sabah (Husin, 1990). In Sabah's modern history, the first Islamic movement was spearheaded by a number of organizations such as Persatuan Ikhwan Sabah, Persatuan Islam Putatan and Persatuan Islam Sabah.

These organizations played important roles until the establishment of the USIA in 1969 following Sabah's independence with Malaysia. In fact this development created a new atmosphere whereby communities which used to depend on customary laws in resolving their disputes were then introduced to Islamic law. Since, customary laws have long been in practice among these communities, it was difficult to discard them overnight. Thus, the Native or Customary Courts remained functional among these Muslim communities although to a lesser extent.

English law which was first introduced through the Royal Charter on 1 November, 1881 also recognized the use of native customary laws. This provision was made available under section 9 of the Royal Charter. This provision clearly states that matters of personal law among communities in North Borneo are based on local laws (Ibrahim, 1970).

The Provision under Section 10 of the Village Administration Ordinance 1913 states that all proceedings relating to Muslim personal law must be referred to the imam or kadhi (Hooker, 1980). In addition, section 10(1) of the Administration of Native and Small Estates Ordinance of 1941 clarify that distribution of inheritance must be based on laws or customs that apply to the deceased, be it native inheritance law or Islamic law.

However in reality the general nature of the law or custom provision under this ordinance has caused a conflict between customary law and Islamic law. This problem continued until the Conference of Native Customs Chiefs was held in 1936. As a result, a collection of Islamic and customary laws was compiled to serve as a guide for all community leaders (Ibrahim, 1970). This development was followed by several other changes which in general was perceived as aiming to clearly separate customary law and Islamic law and to ensure that customary laws that are in contradiction with Islamic law are no longer applied to Muslims (Nasohah, 2004). Nevertheless, such efforts could not resolve the problem entirely due to the strong connection these ethnic groups has with their ancestral customs despite their conversion to Islam.

Native courts and distribution of inheritance: The existence of various ethnic groups in Sabah has resulted in various forms of customary laws based on each ethnic group custom. Any disputes arising from these laws are

referred to the Native Courts. These courts then handle the cases in line with the custom of each tribe. In respect of inheritance, estate distribution for native residents is administered under the Administration of Native and Small Estate Ordinance 1941. In theory however, Native Courts will not handle cases involving Muslims. This is evidently, based on the provision under section 9 of the Native Courts Enactment 1992.

Nevertheless, in terms of its implementation, some members of native communities, despite their conversion to Islam still refer to the Native Courts in respect of cases relating to the distribution inheritance. There are also some who refer their case to both the Native and the Syariah Court. This results in the issuance of two different orders, hence leading to even more complications, firstly, in a conflict of jurisdiction and secondly in the question of which order to implement should there be any protest among heirs due to their disagreement.

In general, 29 ethnic groups are classified as natives and 12 as non-native in Sabah. These ethnic groups are further classified into three main groups-the Malay/Muslim indigenous group, the Non-Malay indigenous group and the Chinese. The Malay/Muslim ethnic groups are further divided into the Malay, Brunei, Suluk, Bugis, Bisaya, Bajau, Idahan, Dusun, Banjar, Tidong, Orang Sungai, Irranun, Kadayan and Coco tribes. For the purpose of this study, three ethnic tribes have been chosen as examples, to illustrate the extent of the influence of customary laws as regards to the distribution of inheritance.

Bajau: The Bajaus was once categorized as a group of sea nomads. They can be found in several areas such as the Sulu Archipelago, Sabah and in East Indonesia. In Sabah, the Bajau tribe lives in both the West coast and the East coast and communicates in different dialects.

Almost 100% of the Bajau tribe is Muslims. Although, nearly all of them are Muslims and many among them are well versed in religious matters, they have yet to fully implement faraid in matters of distribution of inheritance. In the Bajau community, for example when a husband dies, his entire estate passes on to his wife. The wife will have a monopoly on the estate and can distribute it at her own discretion. Traditionally, the estate will be distributed according to rank or succession within the family.

Idahan: This tribe can be found in Sabah's East coast, in Lahad Datu and Sandakan. The Idahans in Lahad Datu are all Muslims. In terms of customs, this tribe is also rich in customs and traditions. Many of these customs and traditions are closely connected to an economic activity

that has long been their focus the gathering of birds nests. Birds' nest or also known as Salag Madai is the main source of income for the Idahans. Some are willing to risk their lives in order to gather these nests and rivalry often arises over the gathering rights of this valuable commodity. Inheritance issues, relating to bird nest gathering rights are handled by the Native Courts led by the District Officer. To them, the inheritance of rights to gather birds' nest is best left to the Native Courts. Two methods of rights distribution have been practised from generation to generation. These methods are:

Temmak maya amak (Paternal distribution): This method of distribution applies when a husband has more than one wife. The Salag Madai estate will be distributed, depending on the number of wives, a man has and not on the number of children he has. The estate will be equally divided among his wives regardless of the number of children. Children of the deceased, regardless of whether they are sons or daughters will receive equal portions from their mother. If the husband is an Idahan but his wife is not then the estate will be equally divided among their children. In this case, the wife does not receive any portion of the estate.

Temmak maya inak (Maternal distribution): This method of distribution applies when a wife has two or more husbands at different times. The estate will be fairly divided among the husbands based on the number of children they have. Children of the deceased will receive equal shares regardless of their gender. Other forms of estate include land, money, house, cattle, crop and other valuable items are distributed based on faraid in the Syariah Court (Ghani, 2008).

Bisaya: The Bisaya tribe is predominantly found around the Beaufort district, followed by Kuala Penyu, Menumbok and Sipitang. The Bisaya tribe in Sabah differs from those in Limbang, Sarawak. In Sabah, all Bisayas are Muslims whereas majority of the Bisayas in Limbang, Sarawak is Christians with animist beliefs (Lokin, 2004). In the Bisaya community, much of the estate being claimed is in the form of cash, savings and land. Other properties such as furniture and so on are distributed among the heirs based on mutual agreement or are shared or jointly used by the heirs (Binsin, 1999).

Jewellery such as gold is normally distributed to daughters or granddaughters. If no distribution is made prior to death, all of the female deceased's necessities and clothing will normally be distributed to her female heirs (Ghani, 2008). Based on the above facts, it is clear that the application of customary law is still pervasive. Even

though, they have accepted the Shariah Courts as a point of reference based on Islamic law, in several matters relating to inheritance, customary law still binds them for certain reasons.

The jurisdiction of Syariah Court in distribution of inheritance in Beaufort district: The Shariah Court with jurisdiction to hear inheritance distribution related (Kusrin, 2012) applications, for Muslims in the Beaufort district is the Beaufort Subordinate Syariah Court. In line with provisions under the Syariah Court Enactment, the Syariah Subordinate Court in its mal jurisdiction can hear and decide on all cases and proceedings that the Syariah High Court is authorised to hear and decide, if the amount or value in dispute is no >100,000 Ringgit or is not measureable monetarily (not including hadhanah or joint matrimonial property).

In this case, the Syariah High Court under its mal jurisdiction can hear and decide on all cases and proceedings if all parties in those cases or proceeding are Muslims and if the cases or proceedings relate to:

- Betrothal, marriage, ruju, divorce, annulment of marriage (fasakh), nusyuz or judicial separation (faraq) or any other matter relating to the relationship between husband and wife
- Any disposition of claim to property arising out of any of the matters set out in subparagraph (i)
- The maintenance of dependants, legitimacy or guardianship or custody (hadhanah) of infants
- The division of or claims to hartasepencarian (jointly acquired property by husband and wife)
- Wills or gift made while in state of marad al-maut
- Gift inter vivos or settlements made without adequate consideration in money or moneys worth by a Muslim
- Wakaf or nazr
- Division and inheritance of testate or intestate property
- The determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled
- A declaration that a person is no longer a Muslim
- A declaration that a deceased person was a Muslim or otherwise at the time of his death
- Administration of mosque
- Other matters in respect of which jurisdiction is conferred by any written law

This means that the jurisdiction given to the Syariah Subordinate Court includes the distribution of inheritance as long as the amount in dispute is no >100,000 Ringgit.

Table 1: Statistics of inheritance distribution cases in the Beaufort Shariah Subordinate Court 2005-2007

Years	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.	Total
2005	15	17	23	18	10	25	22	21	22	15	17	19	224
2006	21	16	21	19	14	26	33	22	12	9	15	21	229
2007	28	14	37	29	20	21	24	18	16	17	15	10	249

Beaufort Shariah Subordinate Court

In addition, section 65 of this enactment also provides that if in the course of any proceedings relating to the administration or distribution of the estate of the deceased Muslim, any court or authority, other than the Shariah High Court or a Shariah Subordinate Court is under a duty to determine:

- The persons entitled to share in the estate or
- The shares to which such persons are respectively entitled

The Shariah Court may, on the application of any person who claims to be a beneficiary or his respective and on payment 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 to shares to which they are respectively entitled. According to court procedure, hearing normally takes place 2 weeks from the date the application is filed. For inheritance distribution cases, hearing is normally attended by the applicant, other heirs (if necessary) and legal representatives (for cases which require legal submissions). However, for cases heard in the Beaufort Shariah Subordinate Court, it is observed that applicants rarely appoint lawyers as the distribution cases to be resolved were not complicated. Through observation, it is found that this court gives applicants an option in determining the distribution of inheritance based on three methods:

Through faraid (faraid certificate and inheritance certificate): Through this method, all matters relating to the determination of entitlement and the authenticity of the heirs are determined by the court based on faraid law.

Agreement of heirs: The court will only approve a distribution which has been mutually agreed upon by all heirs. If any heir declines their right to a share of the inheritance, the court will order the individual to complete and sign the Disposal Declaration Form before the court.

Application: Based on this method, heirs will submit an application for the estate to be distributed based on what has been presented to the court on grounds and reasons acceptable to the court, based on the judgement and discretion of the Judge. When dealing with such applicants, the court or judge often faces various

challenges, particularly when an agreement has been made among the heirs which does not conform to Islamic law.

As mentioned before, there have been instances where although the case has been brought before the Shariah Court, the approach taken by the heirs (in coming to their agreement) still adheres to customary laws that contradict Islamic law. For example, applicants equally sharing the estate applied for. The approach used in the third method is based on the understanding that custom is an element still firmly upheld in the local community. Thus, the judges of Shariah Court are facing difficult challenges in dealing with cases of distribution of inheritance in Beaufort district, due to their concern for the satisfaction of all parties and the compliance with the Islamic law. Regardless of the challenges and obstacles, statistics show that communities in Beaufort district, mainly made up of the Bisaya tribe are highly aware of their obligation to settle their estate distribution in accordance to Islamic law. This is evident from the Table 1. Findings from a 3 year study shown increase in the numbers of inheritance distribution application cases each year. In fact, based on an overall record of cases application types, the number of inheritance distribution application case is the highest compared to other mal cases.

CONCLUSION

Each ethnic group has its own method in determining the distribution of inheritance based on traditional customs. In the context of Sabah state, these customary laws are still firmly held and practiced even by Muslims. This may be due to inadequate knowledge of Islamic law and the loyalty to ancestral customs and traditions. Such factors pose a difficult challenge to administrators of Shariah law, such as the Shariah Court and other relevant authorities in ensuring compliance with the Islamic law in a community which hold fast to the ancestral customs, regardless of its contradiction with Islamic law.

ACKNOWLEDGEMENT

This study is a part of the outcome of research which was conducted by using research funding of the FRGS/1/2011/SSI/UKM/02/28 project.

REFERENCES

- Binsin, D.A., 1999. Pusaka dalam Masyarakat Islam Bisaya di Sabah: Suatu Perbandingan dengan Pusaka dalam Islam. Bangi: Universiti Kebangsaan Malaysia.
- Buyong, J., 2003. Islam Membentuk Tamadun Penduduk Sabah: Sejarah dan Kejayaan, In. Islam di Sabah dan Sarawak. Bangi :FakultiPengajian Islam.
- Ghani, A., 2008. Amalan Masyarakat Islam Sabah dalam Pembahagian Harta Pusaka. Bangi: Universiti Kebangsaan Malaysia.
- Hooker, M.B.,1980. Native Law in Sabah and Sarawak. Singapore: Malayan Law Journal Pte. Ltd.
- Husin, M., 1990. Islam di Sabah. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Ibrahim, A., 1970. Inaugural Braddell Memorial Lecture: Towards a History of Law in Malaysia and Singapore. Singapore: Stamford College Press.
- Kusrin, Z.M., 2012. Comment Conversion and the Conflict of Laws in Respect of Spouse Right to Inheritance in Malaysia, Religion and Human Right 7.
- Lokin, S.A.H., 2004. Adat-adat Suku Bisaya. In. Mohd Sarim Hj. Mustajab (Ed.). Warisan Budaya Sabah, Etnisiti dan Masyarakat. Kota Kinabalu: Universiti Malaysia Sabah.
- Nasohah, Z., 2004. Pentadbiran Undang-Undang Islam di Malaysia Sebelum dan Menjelang Merdeka. Kuala Lumpur: Utusan Publications and Distributors.