

Change of *Mazhab* (School of Thought): The Effects on Inheritance in Islamic Family Law

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Abstract

Muslim scholars unanimously agreed that a Muslim can inherit the legacy of the deceased who is a Muslim without looking at gender status or position in society or rank of piousness possessed by the deceased and the beneficiaries. Muslim scholars also agreed that non-Muslims are not prohibited from inheriting the deceased's estate according to rules of inheritance in their religion, provided that they possess the same religion. However, there are discussions by Muslim jurists as regards to the inheritance between a Muslim and a non-Muslim. The issue of inheritance, as well as other issues regarding *fiqh*, is exposed to differences of opinions among scholars from different schools of thought (*mazhab*). This article comes to discuss change of *mazhab*, its effect on inheritance. In the end of this article, the study towards to the practiced law and some relevant cases in inheritance in Malaysia will be carried out. This research uses the methodology of library research which is applying qualitative approach of exploratory and descriptive. It is using method of content analysis technique in examining the data. Hence, the data of this research are collected through library research methods and consequently been processed, organized and analyzed. They are taken from journals, seminar proceedings, scientific magazines, printed media, electronic media, internet, and others.

Keywords: Inheritance, *Fiqh*, School of Thought (*Mazhab*), Effect, Islamic Family Law.

INTRODUCTION

Islam, being the religion of Allah and the way which covers all aspects of human life, is able to interact and provides best solutions for all human issues, whether it involves Muslim community or otherwise. *Ijtihad* (personal reasoning) which is done in order to permit or prohibits the new discovery is based on the exact authorities derived from Islamic legal sources and supported by the objectives of Shari'ah. These revelation-based rulings are able to compete with the new discoveries so that it would not harm humankind.

It need to be noted here that the practice of considering the views of all scholars in any issues is allowed in Islam due to the reason that such distinguish views normally stress on matters regarding *furu'* (branches). Probably we may find that the views from *Hanafi* sect is relevant on a particular situation and can also be irrelevant on other circumstances. It is noteworthy to say that their opinions or views are basically under the scope of *ijtihad*. On the other hand, they made *ijtihad* for the sake of public interest.

LITERATURE RIVIEWS

Al Quran and *al Sunnah* explain about the rulings as regard to inheritance. The rules of inheritance were introduced by Islam based on the nature of male and female (Ridzuan 1994). Allah had mentioned in the Quran to the effect that:

"God (thus) directs you as regards to your children's (inheritance): to the male a portion equal to that of two females..."

Al Quran (4:11)

Although the two sources of Islam describe the inheritance in detail, it does not mean that the explanation covers everything. There are matters related to this issue which has been laid down in general and it is up to the understanding of the scholars to interpret and to explain it to the public about the way to execute such matters.

There some matters related to inheritance have been laid down in general and it is up to the understanding of the scholars to interpret and to explain it to the public about the way to execute such matters. Generally, there are conditions for a person to be capable of inheritance, and the matters are:

- i. The death of the owner of the property has been approved by court's declaration or has reached the public (Al Dimasyqiy n.d.).
- ii. The beneficiary is alive at the time of the death of the owner of the property (the deceased) (Al Dimasyqiy n.d.).
- iii. The death of the deceased is not caused by the beneficiary, such as the beneficiary killed the deceased directly or indirectly or the beneficiary is happened to be a judge and that he punished the deceased with death penalty (in case where the deceased is one of the disputing parties) (Al Dimasyqiy n.d.).
- iv. The deceased is not a slave when the beneficiary is an independent person (Zaydan 1993).
- v. There is no difference of religion between the deceased and the beneficiary.

According to the Islamic Family Law, the rights of inheritance happen in three ways (Ibnu Rushd n.d.; Al Sharbiniy 1958):

First: Lineage i.e. the family relationship that exist between the beneficiary and the deceased, such as relationship between a person and his father, mother, siblings, uncle etc.

Second: Marriage, i.e. marital relationship that arise from a valid marriage contract between a husband and his wife.

Third: *Wala'*, i.e. relationship between a slave who has been released and his former master.

Malaysian legal systems were inherited generally from English legal systems, the administration of estate is also based on those systems. In fact, the bodies referred –generally after 1950- are Civil Court and the Land Office. The law that governs the matter of inheritance applied to Muslims as well as non-Muslims. The laws which become central spine that govern inheritance are Probate and Administration Act 1959 and Small Estates (Distribution) Act 1955 (Ridzuan 1994), whereas the law that governs intestacy especially for non-Muslims is the Distribution Act 1958. Before these laws come into enforcement, for Unfederated Malay States (i.e. Terengganu, Kelantan, Kedah, Perlis and Johore), the administration of estate was put under the Religious Authorities and Syariah Courts of each states (Ahmad Ibrahim 1991).

OBJECTIVES

1. Identify the differences of opinions among scholars from different schools of thought (*mazhab*) underlying inheritance in Islam.
2. Review key sources that discuss matters of inheritance in Islam

RESEARCH METHODOLOGY

In general, this research uses the methodology of library research. The author has conducted a research to study any form of ancient writing and now that relate to the study either directly or indirectly. Information obtained from books, journals, magazines, papers, printed media, electronic media, and internets and so on. Library research goes through the following phases:
Phase 1: Referring to the Quran verses that have connection with the examined issues, then reviewing Islamic jurists' interpretations of those verses.

Phase 2: Referring to the hadiths that have connection with the studied issues and reviewing the laws created by Islamic jurists based on those hadiths.

Phase 3: Examining the past Islamic jurists' views that have relation with the issues. These "past Islamic jurists" are not restricted to those of the four prominent sects, but also include the prophets' *sahabah* (friends) and Islamic scholars from every position.

Phase 5: Examining and revealing current Islamic scholars comments on whatever matter that has links with the studied issues.

Phase 6: Examining practiced law and some relevant cases in inheritance in Malaysia

FINDING AND RESEARCH DISCUSSION

Among the main issues which scholars are differentiated with each other concerning the law of inheritance are:

1. *Al Radd* (an act of giving the residue of the property to the beneficiary)

There are differences of opinions among Muslim jurists from the early period of Islam as regards to residue which is left after the distribution of the deceased's property. For example, a person died leaving a daughter and no other heirs. The daughter is entitled to receive half of

the total amount of the property. This is based on the Quranic verse which means to the effect that "...if only one, her share is a half" (An Nisa' 4:11).

The residue of the property after the portion of the daughter has been given shall be given to the daughter too if there is no heir who shall receive the portion. The giving of residue of the property is known as *al radd*. The same applies if the deceased left his heirs, and after the distribution of the property, there is residue left, the heirs are entitle to receive it by the way prescribed by the scholars. There are differences of opinions as regards to the issue of *al radd*:

The first view: Al Radd is not allowed. This is the view of Zaid ibn Thabit, Ibnu 'Abbas (in one narration), Imam Malik, Imam al-Shafi'iyy, Ibn Hazm and others. According to them, residue of the property shall be subjected to *bait al mal* to be benefited by Muslims at large (Ibnu Qudamah 1983; Ramly n.d.). Among their arguments are:

- i. Allah had explained in detail about rights of heirs of the deceased in the Quran (An Nisa' 4: 7, 11-12, 175-176). *Al Radd* is not based on the subsisting authorities. Therefore, it should not be practiced.
- ii. The saying of the Prophet (pbuh) which means to the effect that "*Verily, Allah has bestowed every person his right...*" In other narration, the Prophet (pbuh) had mentioned to the effect that "*Give the inherited property to person entitles to it*". Hadith narrated by Bukhariyy and Muslim (Al Zayla'iy n.d.).

The second view: *Al Radd* is permissible except between husband and wife (if one of them died). Person who has right to be given *al radd* is the nearest person to the deceased in terms of blood relation. For example, if there are two heirs of the deceased, one is nearer in blood relation to the deceased (such as a daughter who receives half of the property) than the other (such as a granddaughter who receives 1/6 of the property), then the person entitles to *al-radd* is the daughter. This is the view of Abd Allah ibn Mas'ud r.a (Al Sarakhsiy 1986; Zaydan 1993).

The third view: *Al-Radd* is permissible although between husband and wife (if one of them died). This is the view of Caliph 'Uthman ibn 'Affan r.a. and Jabir ibn Yazid r.a (Ibnu Qudamah 1983; Al Sarakhsiy 1986).

The second and the third view (on permissibility of *al-radd*) are based on the Quranic verse which means to the effect that "...*But kindred by blood have prior rights against each other in the Book of God.*" (Al Anfal 8:75)

This verse is actually has no relation with the verses of inheritance. It means that persons who are kindred by blood (*zawu al arham*) (whether they entitle to receive the portion of the property or not), has right over the property in their nature as kindred of the deceased. The verses of inheritance explained the portion prescribed by Allah to certain heirs of the deceased. Those verses have no relation with this verse. Therefore, an heir who receives his right from the

property of the deceased, shall also receive the residue of the property in his nature as kindred of the deceased, not in his capacity as the beneficiary.

The author viewed that the second opinion is strong and better, based on the arguments presented above. Only that the writer feels that verse 75 of al-Anfal is in form of generality. Therefore, it shall not only interpreted in accordance to the doctrine of *al radd*, but the scope of that verse shall be given a wider interpretation to include other kindred who are not categorized as 'beneficiary' of the deceased's property. According to the author, the doctrine of *al-radd* discussed by jurists is not 'compulsory'; it is just a matter of settlement of the residue of the property after the distribution took place. It shall only be categorized as 'permissible'. There might be other way to solve the problem of the residuary of the property, such as it can be given to other relatives who are not under the status of 'beneficiaries' of the property such as maternal grandfather, daughters children etc.

Looking back to the issue of *al radd* in cases involving law of inheritance in our country, because of the basic doctrine in Shafi'ie's school of thought not to give the right of inheritance to the heirs of the deceased except in manners prescribed by al Quran. Therefore residue of the property is under the management of the government (by putting it under *bait al mal*). This is the practice in Malaysia (Ahmad Ibrahim 1991).

The practice of putting the residue of the property left by the deceased under the management of *bait al mal*, although it can give benefits to Muslims at large, thinking of human's behavior lately and the system of administration of properties which does not follow Islamic law totally, the view on permissibility of *al-radd* shall be followed for the interest of Muslims at large. Moreover, some scholars of Shafi'ie such as Imam al-Nawawiy, al-Qadhiy Husain, al-Mutawalliy, al-Mawardiy, Ibn Suraqah, Imam al-Rafi'iy and others have issued a fatwa on permissibility of *al radd*. Their view is based on the system and management of the government which did not follow Islamic system and Islamic law. This might led to deviation against Muslims (Husayniy n.d.).

Regarding this issue, some Muslim countries have included *al radd* in their laws of inheritance. For example, Egypt (1994) has provided *al radd* for other than husband and wife. This provision is based on the view uttered by 'Abd Allah ibn Mas'ud r.a. The same goes in Sudan (1991).

2. Inheritance between Muslim and non-Muslim

Scholars are differed in their views regarding the issue of inheritance between Muslims and non-Muslims. Although they are unanimously agreed that non-Muslim beneficiaries are prohibited from inheriting the property of the Muslim's deceased. As regards to whether a Muslim can inherit the property of the deceased who is a non-Muslim, there is an opinion of the scholars that permits it. Among them are Caliph 'Umar al-Khattab (in one narration), Mu'adh ibn Jabal, Mu'awiyah ibn Abi Sufyan, Muhammad ibn al-Hanafiyyah, 'Aliy ibn Husain, Sa'id ibn al-Musayyib, al-Sha'biy, al-Nakha'iy, Yahya ibn Ya'mar and others. According to Ibn

Qudamah, their view was not received in an authentic way. Therefore, according to Imam Ahmad, the jurists agreed to the prohibition of inheritance between Muslims and non-Muslims (Ibnu Qudamah 1983).

Their view is based on the hadith of the Prophet (pbuh) which means to the effect that "*Islam is an increase, not a decrease.*" Hadith *sahih* (authentic) narrated by Abu Dawud and al Hakim (Al San'aniy 1960). This hadith shows that Islam has taken a step which gives benefits to Muslims, *inter alia*, not to decrease their rights such as to give a chance to non-Muslims to inherit their property. In the meantime, Muslims can inherit the non-Muslims property, because it will benefit them. It is as a Muslim can marry a non-Muslim (from *ahl al-kitab*) and not otherwise (Al San'aniy 1960).

Majority scholars do not allowed Muslims to inherit the property of non-Muslims. Among them are Caliph Abu Bakr, 'Umar (in other relation), 'Uthman, 'Aliyy, al-Zuhriyy, 'Ata', Tawus, 'Umar ibn 'Abd al-'Aziz, al-Thawriyy, Hanafiyy's school of thought, Shafi'iyy, Malik, Ahmad and others (Zaydan 1993). Among their arguments is the hadith of the Prophet (pbuh) which means to the effect that "*Neither a Muslim can inherit the property belongs to a non-Muslim nor a non-Muslim can inherit the property belongs to a Muslim*" (Ibn Hajar 1980; Al Nawawiy n.d.). This hadith clearly prohibits inheritance between Muslims and non-Muslims.

Basically, the author agreed with the view that prohibits Muslims from inheriting non-Muslims' property and it is the strongest view and it shall be practiced. However, in the meantime, the author viewed that the view that permits such inheritance can be exercised in the following situations:

- i. If a person lives in a *harbiy* state, it is permissible for him to inherit the property belongs to a non-Muslim, because non-Muslims' property is lawful for Muslims since the property is regarded as *al-fai'*.
- ii. A Muslim who lives in an Islamic state, but Islamic law does not fully implemented; then the property of a non-Muslim can be inherited by him. This is due to a reason that if the property is to be inherited by the heirs of the deceased who are non-Muslims, it will strengthen their position. Thus, it will create a loss for Muslims.

As regards to this matter, there are cases in Malaysia which create controversies among the disputing family members. One of them is the case of a Christian who had embraced Islam and then he died. He did not leave any Muslim beneficiary, except his wife and his daughter. Both of them had received their portions. The deceased also left his parents who are non-Muslims. The Religious Authority decided that the property shall be subjected to *bait al mal*. Both the parents had challenged the decision (Al Islam 1993). There is an opinion to settle this matter by relying to *mazhabs* other than Shafi'ie.

This matter cannot be settled by looking at other schools of thought based on two reasons:

Firstly: A non-Muslim cannot inherit the property belongs to a Muslim. This is unanimous agreement between scholars (Zaydan 1993).

Secondly: Since our country's economic system is monopolized by non-Muslims, therefore Muslims' properties shall not be given to non-Muslim beneficiaries because it will strengthen their possession over Muslims' properties.

Based on these facts, the author agreed with the decision of Religious Authority which gave the property to *bait al mal*, because it will, more or less, benefited the Muslims.

3. Malaysian Law of Inheritance

Some muslim countries such as Indonesia, for example, there is specific provision regarding the matter of inheritance. The law of inheritance is put under the Compilation of Islamic Law (Kompilasi Hukum Islam) (2001). This compilation of law consists of several chapters. The law of inheritance is included in the second book of the Compilation. It consists of six chapters and 43 articles. The first chapter deals with the interpretation of inheritance, predecessor, beneficiary, the deceased's estate, and other terms related. The second chapter deals with matters pertaining to categories of beneficiary and their duties and obligation. The third and fourth chapters deal with the form of distribution of estate including *radd* and *'aul* etc. The law, however, has flexibility when it has included *radd* into the law even though it was not recognized in the eye of the Shafie *mazhab* as was discussed previously.

In Malaysia, there is no specific provision regarding the matter of conversion and its relation to inheritance. Yet there is no, on the whole of this aspect, a written law deals with matters of inheritance for Muslims (Abdullah 2000), either at the central or state governments. However, the matter of inheritance of muslims is referred to Shariah law and Shafie *mazhab*.

According to Ahmad Ibrahim (1986), although there are provisions relating to personal law that govern by the state authority, there are also Federal law provisions that restrict the jurisdiction and the application of state law. For example, in the issue of inheritance of testate or intestate person, consideration must be given to Probate and Administration Act 1959 and Small Estates (Distribution) Act 1955 which results the Qadi is only given a power to confirm the portion that shall be given to the Muslim beneficiary.

In case ***Re Timah binti Abdullah (the deceased), Official Administrator v. Magari Mohihito & Anor*** (1941 MLJ 51), it was held that the law of inheritance in Federated Malay States is based on the Islamic law. Therefore, non-Muslim beneficiaries have no right to inherit the property of the Muslim deceased. In this case, a Japanese woman (Timah) had embraced Islam and married with a Malay Muslim man. They domiciled in Pahang. The woman died on 23 of April 1937. Non-Muslim heirs of the deceased (Magari Mohihito and another) claimed for the right of inheritance over the deceased's property. Gordon Smith J., in his decision, had dismissed the claim. The reasons, inter alia, is the law of inheritance in Federated Malay States is based on the

Islamic Law. Therefore, a non-Muslim cannot inherit the deceased's property who is a Muslim. He based his decision on Tyabji Principles of Muhammadan Law and the translation of Minhaj al Talibin by Howard.

But in some cases, the shariah law was not referred at all. For instance, the case of ***Eeswari Visualingam v. The Government of Malaysia*** (1990 1 MLJ 86; Kanun 1990 (2)), in this case the appellant had married his husband, Visualingam s/o Ponniah according to Hindu rites and their marriage was registered in 1950. However, the husband had embraced Islam and eventually changed his name to Abdul Hamid. The appellant did not apply for divorce although she refused to follow her husband to convert to the religion of Islam and still professing the Hindu religion. Her husband died in 1985 and he is a pensioner under Pension Act 1980. The appellant applied to the High Court for a declaration that she is still under maintenance of her husband as defined under Section 4 of the Pension Regulation (Amendment) Act 1983 and she has a right to obtain or to receive his husband's pension as provided under Section 15 of the Pension Act 1980. The judge of the High Court, Ajaib Singh J. had dismissed her application.

The appellant appealed to the Supreme Court. Hashim Yeop Sani SCJ allowed the appeal and she is declared as a widow and has a right to receive her husband's pension. The basis of this decision was that there is no evidence to show that their marriage has been dissolved. In this matter, Hashim J. uttered "There is no evidence to show that the marriage has been dissolved. With that, the appellant has claimed as a widow as defined under Pension Act. In our view, the facts that the husband had embraced Islam did not affect her right under the Pension Act 1980 and Pension Rules 1980".

CONCLUSION

The very purpose of the writer here is to highlight on how far we can negotiate with such distinguish views as well as the practice of the school of laws in solving marital issues in Islamic Family Law. Nevertheless, it need to be noted here that the practice of considering the views of all scholars in any issues is allowed in Islam due to the reason that such distinguish views normally stress on matters regarding *furu' al fiqh* (branches of jurisprudence). The *Quran* verses itself and *hadith* (whereby we can make allegorical interpretation). Probably we may find that the views from *Hanafi* school is relevant on a particular situation and can also be irrelevant on other circumstances. So as to other school of laws (*Maliki, Syafie, Hanafi, Zahiri* and others).

It is noteworthy to say that their opinions or views are basically under the scope of *ijtihad* (personal reasoning) which most of the *ijtihad* that they made are for a particular community. On the other hand, they made *ijtihad* for the sake of public interest. Therefore, the practice of changing school of laws in marriage matters and any other matters or issues that relate to it is permissible. However, it is still subject to several regulations and rules.

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