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ADMINISTRATION OF PROPERTY IN MALAYSIA: A CIVIL LAW AND SHARIAH LAW PERSPECTIVE

By

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Introduction

As usual I prefer to speak about the law in practice, rather than the law as such. So, in this paper, I shall focus more on the practical aspects of the law relating to administration of properties.

First, I shall divide "property" into two categories, i.e. "estate" and "non-estate" properties. The word "estate" here means the property of a deceased person, or "pesaka", not a rubber, oil palm or housing estate. So, when we talk about "administration of estate" we are actually talking about the administration of the property of a deceased person. That, in fact, will be the focus of this paper.

As everybody must die one day, everybody, no matter how poor he is when he is alive, will have an "estate" when he dies. How much his estate is worth is another question. So, technically speaking, at least, someone will have to administer it. On the other hand, if a person is smart enough or lucky enough to have some property, he, unless he is incapacitated, may not want or may not trust another person to administer it. One exception, may be, if he places a particular property of his on trust for a certain purpose, e.g. wakaf. (I shall not touch on the commercial management of properties by Property Managers as I know next to nothing about it.)

Administration and distribution of estates

Estates are of two types: testate and intestate. Testate estate is an estate of a deceased person who dies leaving a will. He is called the testator. An intestate estate is the estate of a deceased person who dies without leaving a will.

The Malays very seldom make a will. I think that the main reasons are, first, a great majority of them are poor. They do not have much property that would necessitate the making of a will as to how it should be administered and eventually distributed. They do not have the cash to pay lawyers to prepare the will. Secondly, as to how the property is to be divided is clearly spelt out in the Al-

Quran itself and, most Muslims do not want to contravene it. Thirdly, it is their life's philosophy that this worldly riches, except charity, is of no use and will be of no assistance to them in the next world. Only their good deeds done when they were alive that matter then. So, they want to go with a clean break. They do not want to cling on to their worldly properties and prevent their distribution until, say, 21 years after the death of the last surviving grandchild.

During the nine-and-half years that I was at Penang High Court, there was only one case involving a will made by a Muslim. That could have been a perfect test case. He was Muslim. The beneficiary was a non-Muslim. It was contested by his brother, a Muslim. Fortunately for the parties but unfortunately for the law, and may be for the lawyers too, the case was settled midway through the trial.

We now come to intestate estate. This is the estate of a deceased person who does not leave behind a will. As I have said earlier, everyone leaves an estate when he dies. It has to be administered and distributed. Unfortunately, in most cases, this is not done.

I am not concerned that the Malays do not make wills. It does not really matter. But, what I am more concerned about is that they do not take out Letters of Administration and/or have the property properly distributed. I have seen cases where as many as four or five generations have passed away, yet the estate (land) remained unadministered and undistributed. Application for administration and/or distribution will only be made when the land, or a part of it, is acquired by the Government or someone, usually a businessman, comes along and offers to buy it from one of the beneficiaries. In the latter case, it is the intended purchaser who finances the application and provides the know-how.

In one such application, the applicant draws up a family tree of four generations, each generation consists of only one son until it comes down to him. Of course, I refused to accept it as true.

This failure or neglect to take out Letters of Administration can be understood in the socio-economic context of the Malays. First, the land is too small and the beneficiaries too many. It is too troublesome, costly by their standard and not worthwhile to assemble all the beneficiaries, get the consent of all of them, make the application and go through the whole process when, in the end, a person may only get a small fraction of the land. Secondly, it is the inaptitude. So long as there is no dispute among them, nobody will take the initiative to do anything.

Administration of testate estate

When a person dies leaving a will, the executor will prove the will in the High Court. The law is provided in the Probate and Administration Act, 1959. The procedure is provided in Order 71 (for non-contentious probate proceedings) and Order 72 (for contentious probate proceedings) of the Rules of the High Court 1980. Having obtained the probate, it becomes his duty to administer the estate

according to the will. The will may be contested on various grounds like it was not the last will of the testator, it was forged, it was made under undue influence, the testator was not in proper frame of mind when he made it. This usually leads to protracted trial and appeals. Such cases usually involve non-Muslims, especially Chinese, because the Chinese usually make wills, their estates are comparatively big, the heirs have the means to engage lawyers to represent them in court and they are more litigious when it comes to money and the Chinese testators usually discriminate their daughters. So, they challenge the wills.

Until the estate is finally distributed the executors normally come back to court to ask for various orders, may be to substitute one of the executors and so on.

Wills Act 1949 is not applicable to Muslims. It is clear that the intention is that Muslims are not to be governed by the principles of the English common law regarding wills. It is also clear that the law applicable is the Islamic law or "hukum syarak". That is clearly provided by the Federal Constitution. The Ninth Schedule, List 1 – Federal List, paragraph 4(e), inter alia, provides:

"4….

(e) Subject to paragraph (ii), the following:

(i)……succession, testate and intestate; probate and

letters of administration….

(ii) the matters mentioned in paragraph (i) do not include Islamic personal law relating to….gifts or succession, testate and intestate;"

List II – State List, paragraph 1, inter alia, provides:

'…..the Islamic law relating to succession, testate and intestate…gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;….."

Talking about Muslim wills, it appears quite clearly that they are to be governed by the substantive Islamic law. For the non-Muslims we have the Wills Act 1949 and the common law principles to apply. They are well documented and easily accessible to lawyers and judges alike. The authorities and precedents are there, in abundance. A lawyer, even if he has never drawn up a will before, can easily look up the many books on precedents and draw up a will if his client wants him to do so.

What happens if a client goes to a lawyer and ask him to draw up a will according Islamic law? Where does he turn to? The principles are all scattered in the fiqh books (kitab-kitab fiqah) accessible only to Arabic-educated Muslim scholars. Most lawyers and all judges are not Arabic scholars. And most Arabic scholars are not practicing lawyers. To make it worse, as usual, there are various opinions even on the same point. I once asked an ex-Mufti during the lunch break at a seminar whether it is permissible, according to Islamic law, for a testator to make a will giving a portion of his property to a non-Muslim. His answer was “no”. I went to the seminar hall. There, another Islamic scholar was saying it was permissible.

Under such circumstances how is the lawyer going to advise his client? The law must be certain in the first place.

Precedents do not exist at all. Even if a lawyer knows the substantive Islamic law of wills, he has no precedents to refer to as to the form.

So, I am not surprised if, when a Muslim instructs his lawyer to draw up a will, his lawyer will end up using a precedent available to him, which is in accordance with the English common law.

So, there is a need for a law to be made, somewhat similar to the Wills Act 1949 which, in my view, should contain more detailed provisions extracted from the syariah principles. Once those principles are reduced to “written law”, they will become “the law” applicable. Then there is certainty. And the law then becomes accessible to practicing lawyers and judges alike.

The same, I think, should be done to the Trustee Act 1949, for the same reasons.

Administration of Intestate Estate

Intestate estates are of two types: small estate and a non-small estate. (We do not call it “big estate”. The law does not use such words.) Currently, a “small estate” is an estate consisting of wholly or partly of immovable property not exceeding RM600,000 in total value. Other than that is a “non-small estate.” It goes without saying that a great majority of Malay/Muslim estates are “small estates”. Distribution of small estates are within the jurisdiction of the Land Administrators. Administration and distribution of non-small estates are within the jurisdiction of the High Court. Many people who talk about transferring the jurisdiction over distribution of Muslim estates from the civil court to the Syariah Court miss this point. They think that that the jurisdiction over the distribution of all Muslim estates lies with the Civil Court and, therefore they want to transfer it to the Syariah Court.

Distribution of small estates

This is provided for in the Small Estates Distribution Act, 1955 (Act 98). The procedure is comparatively simple and cheap. An application is made to the Land Administrator. An inquiry is held. The land administrator obtains the “sijil faraid” from the Syariah Court that determines the portion each beneficiary is entitled to the estate. He makes the distribution order accordingly. Appeal goes to the High Court.

Section 19 of the Act provides, briefly, 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.

It is under this provision that reference is made to the Syariah Court for the “sijil faraid”. Unfortunately, until now, there is no proper procedure for such a reference. Requests are made by letter, stating the names of the beneficiaries and their relationship to the deceased, sometimes by the Land Administrator and sometimes by the solicitor acting for the beneficiary. The Syariah Court relies on the facts stated by the applicant, which are not even under oath and calculates the share each beneficiary is entitled to. It is done administratively. He then issues the certificate. I think the procedure is not satisfactory. The facts submitted to him may not be true or only partly true. As I have said earlier, the claim by one male descendent whose family tree consists of one male descendent each generation for four generations was also backed by a “sijil faraid”. Clearly the beneficiary, if he was really one, was not telling the whole truth.

I am of the view that there should be procedure for a formal application somewhat similar to the application made by Land Administrators in land acquisition cases to the High Court whether to deposit the award money into court or to get it paid out to the rightful person. The application should be supported by affidavits. Sufficient notice should be given to interested parties. Opportunity for them to intervene, if they want to, should be made available. This is to ensure that no beneficiaries are excluded, intentionally or otherwise and that they get their rightful share. Even God’s law, if not properly administered, will lead to injustice.

As I have said, under section 19 of the Act, if a difficult question arises before the Land Administrator on matters other than Islamic law and Malay custom, the question may be referred to the High Court for decision. The law, I believe, envisages questions of land law, contract etc. In my ten years as a High Court Judge I did not come across a single such reference. I believe that such questions rarely arise before the Land Administrator. I also did not come across any appeal from the Land Administrator.

The maximum value of a small estate is now fixed at RM600,000. It used to be only RM25,000 in 1980's. So, a great majority of Muslim estates in this country fall under the category of "small estate". The reason for the increase is for the benefit of the public. First, as I have pointed out, the procedure for the distribution of a small estate is simpler and cheaper. Secondly, estate duty is exempted on small estates. Thirdly, sureties are not required as in an application for a letter of administration in he High Court. Fourthly, the Land Administrator has all the information about lands and may counter-check and verify the register of titles very easily. Fifthly, the Land Administrator himself makes the endorsement on the title after the order is made.

In spite of that, unfortunately, for reasons that I have mentioned earlier, the percentage of Malay/Muslims applying for distribution is very small. I think this is an area that we should look into. I do not think that the procedure can be made simpler. But, perhaps it can be impressed on the public the importance of distribution, activate their initiative and provide he know-how. Practicing lawyers may not be able to do that as they may be accused of touting. As Chairman of the Advocate and Solicitors Disciplinary Board, I have far too many complaints to handle already. I do not want more, what more to be the cause of it. May be the Legal Aid Bureau, the Legal Aid Committees of the Bar and even the private sector may want to consider venturing into this area.

Distribution of non-small estates

Application is made to the High Court, first for the grant of a Letter of Administration and, following that for a vesting order. Before making the vesting order the applicant would submit a "sijil faraid". The distribution order is made in accordance with the "sijil faraid".

Administration of Wakaf land

At present, when someone wants to create a wakaf he is required to transfer his land to the Majlis Agama Islam. The Majlis then administers it. Legally, there should not be any problem. If the wakafs are not properly administered, it is due to human problems, not legal problems.

Old wakafs are more problematic. From what I came across in Penang, these wakafs were created more than 100 years ago. Until a few years ago, some (or may be many) such wakafs remained registered in the name of the original donors, their descendants and even in the name of non-Muslims who had purportedly bought them and there is nothing on the register of title to say that it is, or part of it, is wakaf land. Others are leased to non-Muslims. Yet others, very valuable lands, are occupied by ground tenants paying unreasonably low rentals. I believe there are illegal occupants as well on such lands. Even though, in Penang, since 1959 the law provides that wakaf lands vest in the Majlis Agama

Islam without any assignment, conveyance or transfer, not all of them, at least until a few years ago, (I do not know the position now even though I believe it is still the same) have been registered in the name of the Majlis nor their administration taken over by the Majlis.

I will mention two cases that I heard myself when I was in Penang. The first is the case of G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang (1993) 2 M.L.J. 166. In that case the land in dispute was originally alienated to a Muslim in1836 and remained so until 1927 even though it was charged to a Chettier a few times. In 1927 a Chinese bought it. In 1975 a Chinese Doctor became the registered owner. In 1980 he sold it to G. Rethinsamy, a lawyer. There was no endorsement in the register of title that any part of the land was a wakaf land. But note that the National Land Code is not applicable to wakafs.

On the land there was a Muslim graveyard. The oldest existing tombstone dates back to 1920. Part of the mosque (the main building of he mosques was on the adjoining land) was also occupying the part of the said land.

In 1984 G. Rethinasamy obtained an indefeasible title to the whole lot. He gave notice to the Majlis to vacate the part of the mosque and the graveyard that were on the land. Subsequently, he filed a suit in the High Court for vacant possession. The Defendants put up a number of defences including wakaf. I found that it was wakaf land dismissed the suit. Appeal to the Court of Appeal was withdrawn later.

The other case is Tan Kim Luan v. Sabariah Binti Md. Noor (1995) 1 C. L. J 323. Wakaf of the property was made on 8th February 1887. Even though the Administration of Muslim Law Enactment 1959 provides for the vesting of wakaf lands in the Majlis did not take over the adminstration of the property. On 2nd August 1991 Sabariah, one of the heirs of the donor, leased the house to Tan Kim Luan for RM350 per month. On 28th November 1992 Tan Kim Luan leased it to another Chinese for RM2,000 a month. A dispute arose between Sabariah and Tan Kim Luan. Tan Kim Luan filed a suit praying for declaration and injunction. One of the defences put up by Sabariah was wakaf. I held that the land was wakaf land and by virtue of the provision of section 90 of the Administration of Muslim Law Enactment 1959 (Penang) the land vests in the Majlis Agama Islam and therefore Sabariah has no power to deal with it, be it to lease it or whatever. Appeal to the Court of Appeal was withdrawn after I gave my grounds of judgment.

These are two examples that show that there is a need for the Majlis to identify all the wakaf land, cause them to be registered in the name of the Majlis, administer them and, even develop them, where possible. This is a serious problem that has to be tackled quickly and effectively. At the very least, all wakaf lands should be identified, registered in the name of the Majlis and their administration taken over by the Majlis. We require managers not “penceramahs”. May be you all can help.

Jurisdiction of Civil and Syariah Courts in administration and distribution of estates

I do want to enter into an argument over the provisions of the Federal Constitution regarding the jurisdiction over administration and distribution of estates of Muslim in this country: which court has or should have such jurisdiction, the Civil Court or the Syariah Court? I do not want to be accused of pre-judging the issue in case the issue comes up before the Court of Appeal of which I am a member.

At present, probate actions are exclusively within the jurisdiction of the High Court. These wills are made in accordance with the Wills Act 1949 which is only applicable to non-Muslims. Besides, the English common law is applied. Muslims seldom make wills.

In the case of administration and distribution of intestate estates, the jurisdiction over small estates lies exclusively with the Land Administrators, not the Civil Court. Only appeals go to the High Court. In my ten years as a Judge of the High Court I did not come across a single such appeal. The Land Administrators are trained, experienced and specialized officers. They have ready access to the particulars about land and their titles.

Administration and distribution of non-small estates lies with the High Court.

Jurisdictin of Civil and Syariah Courts over wakaf property

Wakaf is outside the ambit of the National Land Code. Unfortunately, there has been no decided cases as to what it means. However, I do not think it goes so far as to mean that it cannot be registered under the provisions of the National Land Code or that an endorsement of wakaf cannot be made in the register of title. It would be ridiculous, for example, to say that since the National Land Code is not applicable to wakaf lands, therefore the Land Administrator has no power to register the Majlis as the registered owner of wakaf lands and issue the title over wakaf lands to the Majlis. If the Land Administrator has no such power, who has?

Jurisdiction over wakaf lies within the jurisdiction of the Syariah Court. What that really means is anybody's guess. Does it mean that any suit affecting wakaf lands must be heard by the Syariah Court? What if the cause of action is, for example, tenancy and/or contract (as in Tan Kim Luan's case)? Bear in mind that tenancy and contract are federal matters within the jurisdiction of the Civil Court. Looking at the Constitutional provision closely, it appears, that that is not the case. What are within the jurisdiction of the Syariah Court in respect of wakaf lands are the issues of Islamic law relating thereto. That, I think, is what it should be.

Should jurisdiction over administration and distribution of estates of Muslims be transferred to the Syariah Court?

As I have said above, the proponents of this idea miss one very important point, that is, a great majority of Muslim estates are small estates that are within the jurisdiction of the Land Administrators, not the Civil Court. The Land Administrators have the register of the titles with them, they have the particulars about the land, they are trained in land law, and they have experience in land matters, including the value of the lands in their respective districts. If they have any problem regarding questions of Islamic law they may refer it to the Syariah Court. If they have any problem regarding land law etc., they may refer the question to the High Court.

Probate actions are exclusively within the jurisdiction of the High Court. So is administration and distribution of non-small estates. 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. Books and reports on authorities and precedents, local and English, are in abundance. Most of the cases involve non-Muslim Estates.

What are the objections to the Land Administrators and the High Court handling those cases? What is so unIslamic about them doing it? After all, if a question of Islamic law arises, the question will be referred to the Syariah Court for determination. As a matter of practice, no distribution order of an intestate estate is made without the “sijil faraid” and they are made according to the “sijil faraid”. True that the existing Wills Act 1949, may, in certain aspects, contravene the Islamic law. But, Muslims in this country, hardly makes a will. Even the Wills Act 1949 is not applicable to Muslims. If a Muslim wants to draw up a will in accordance with the Islamic law, he is free to do so. There is no law to say that he cannot do it or that it will be illegal.

I do not think that it is wise to hand over the jurisdiction over distribution of small estates to the Syariah Court. Even the Civil Court does not have the capacity, the expertise and the experience to handle them and does want to take over the jurisdiction from the Land Administrators. Are the Syariah Court judges more knowledgeable about Malaysian land law? Do they know more than Land Administrators about land administration, including land valuation? Do they have all the facts about lands as the Land Administrators have? What rules are they going to apply?

Similarly, I do not think it is wise to transfer the jurisdiction over administration and distribution of non-small estates of Muslims to the Syariah Court. First, Syariah Courts are State Courts whose jurisdictions are limited to a particular State. If a person dies leaving property in more than one State, which is common nowadays, multiple applications will have to be made, one in each State. That will involve extra expenses and costs. If there is an appeal, the appeal from a Syariah High Court goes to the Syariah Court of Appeal in that State. Again there

will be multiple appeals and with it extra expenses and costs. To make it worse, the Syariah Court of Appeal in one State is not bound by the decision of the Syariah Court of Appeal in another State. On the same set of facts, there may be conflicting decisions.

At present, there is a Central Registry at the office of the Registrar of High Court Malaya in Kuala Lumpur. The Registry keeps a record of all applications for letters of administration, probate and distribution of small estates since 1st January 1946. Every time an application for distribution, probate or letter of administration is made in any High Court or Land Office in Peninsular Malaysia, a search is made at the Central Registry to determine whether an application had earlier been made in respect of the same estate. Only upon confirmation being obtained that no previous application had been made in respect of the same estate, that the proceeding, be it in the High Court or before the Land Administrator anywhere in Peninsular Malaysia, will proceed. This is to avoid duplication or multiplicity of such applications.

If the jurisdiction is handed over to the Syariah Court, it looks as if there will have to be one Central Registry in each State, and starting from the current date. How are we going to check whether there were earlier applications? It looks as if we will still have to rely on the Civil Court's Central Registry. Why make a simple thing difficult? We should try to make a difficult thing simple. That is my philosophy.

The deceased may be a Muslim and his beneficiaries must necessarily be Muslims. But, that does not mean that no non-Muslim will ever have an interest in the estate. Consider this example. A person enters into a sale and purchase agreement to sell his land to a non-Muslim but before the period for the completion of the contract is over and/or before the land is transferred to the purchaser, he dies. If the heirs apply for the letter of administration, the purchaser certainly wants to intervene. Being a non-Muslim, he cannot do so because the Syariah Court has no jurisdiction over non-Muslims. Similarly the land may have been charged to a non-Muslim. The same problem will arise.

A Muslim may die leaving shares other than those listed as "Syariah Shares". Is the Syariah Court going to exclude those shares from the list of assets of the estate?

What Rules is the Syariah Court going to follow? Even the rules relating to civil procedure have just been introduced. Those rules are adopted mainly from the Subordinate Court Rules 1980 and the Syariah Court Judges, with respect, are still trying to comprehend it, there being no precedents or text books to assist them.

Probate, administration and distribution orders are common law procedures. These are procedural, not substantive law. Syariah Court Judges are not familiar with them.

If the civil procedure of the Civil Court has to be adopted for use in the Syariah Court, of course with some modifications, it looks as if the rules and regulations now used at the Land Office and the High Court concerning applications for probate, administration and distribution of estates will have to adopted for use by the Syariah Court, if the jurisdiction over probate, administration and distribution of Muslim estates are to be transferred to the Syariah Court. If that is so, then my question is: what is so "unIslamic" about those rules and regulations? Do they become "Islamic", if they are not, when they are used in the Syariah Court? I think it is easier if someone will point out which rule and regulation that are being used now that are unIslamic and have them amended, as least in so far as they are applicable to Muslims.

Furthermore, without any basic knowledge, without any training, without any experience and without any precedents to guide them, I seriously doubt whether the Syariah Court Registrars and Judges are sufficiently equipped for the job. Bear in mind that the rules and regulations will be completely new and foreign to all the officers and Judges of the Syariah Courts, from the lowest right up to the Syariah Chief Justices. And, with 14 Syariah Courts of Appeals, each is not bound by the decision of the other (in fact some people even hold the view that even the subordinate Syariah Courts are not bound by the decisions of the more superior Syariah Courts even in the same State) one can imagine the confusion that it will cause. In the end I fear that all the Muslims will get is the brand name not the quality. I am impressed by the view expressed by Charles Le Gai Eaton, a Swiss-born, Cambridge-educated, teacher, journalist and former officer of the British Diplomatic Service and currently Consultant to the Islamic Cultural Centre in London in his book "Islam And The Destiny Of Man" that even an ugly building is "unIslamic". Similarly, something done, even in the name of Islam, may not be "Islamic" if the result is prejudicial to the Muslim ummah. That is my view. We can always agree that we cannot agree.

Back to the main question. What is the rational for wanting to transfer the jurisdiction to the Syariah Court? I can only see two arguments: first, to increase the jurisdiction of the Syariah Court hoping, with that, "to raise the status" of the Syariah Court. With respect, in my view, that is not the way. The way to increase the status of the Syariah Court is to improve its efficiency. Respect has to be earned. I fear that the transfer of jurisdiction will have negative results that will cause unnecessary hardships to Muslims that Muslims themselves will lose confidence in the Syariah Court, thus doing a disservice to Islam.

The second argument, may be, is to ensure that the distribution is done according to Islamic law. My question is: is the present distribution not in accordance with Islamic law? It is the Syariah Court that determines the shares each beneficiary is entitled to. It may be said that a question may arise whether a person is a beneficiary under the Islamic law. That again is a question of Islamic law which the Land Administrator or the High Court will refer to the Syariah Court

for determination. What is required is to provide proper procedure in the Syariah Court for applications for the determination of questions of Islamic law to be made to ensure that all interested parties are notified and sufficient evidence produced before the Syariah Court to enable it to make the decision. The present practice of making the request for “sijil faraid” by letter is clearly not a satisfactory procedure.

Thank you.