

***Farā'id* in the Pahang State of Malaysia: theory and
practice**

BY

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The candidate confirms that the work submitted is his own work and that appropriate credit has been given where reference has been made to the work of others

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ABSTRACT

This present study concerns *farā'iḍ* and its application in Pahang State, Malaysia, from the theoretical and practical aspect. *Farā'iḍ* is the law concerning intestate inheritance and is the subjects of the most detailed legal provision revealed in the Quran. Because of its importance the Prophet urged his companions to acquire this particular knowledge and warn them that '*ilm al-Farā'iḍ* or the science of estate distribution is the first knowledge that will be taken away from his *ummah* or society. Since *farā'iḍ* literally means obligations, many have assumed that it is an obligatory law, which Muslims have no choice but to obey. The study, however, concludes that it is not an obligation for Muslims to dispose of their inheritance in accordance with the fixed fractional shares prescribed in the Quran, as the rules of *farā'iḍ* also acknowledge a form of distribution or settlement based on the concept of mutual agreement, as can be seen in the principle of *al-Takhārīj*.

Practically, the study found that there are two settlement methods applicable in the State of Pahang: *farā'iḍ* and mutual agreement. Nevertheless, the study revealed that the percentage of Muslim cases settled by *farā'iḍ* is much lower than that of those settled by mutual agreement, the main reason for this being that settlement by mutual agreement is much faster than settlement by *farā'iḍ*. It was also found that the advice given by the officer in charge also played an important part in influencing the claimants' decision to settle their case by mutual agreement.

An examination of the Muslim cases settled by the authoritative agencies revealed that there are settlements, which are not in accordance with the principles of Islamic law and *farā'iḍ* in particular. This was due to three factors. Firstly, the acts themselves; secondly, the decisions of the High Court; and thirdly, the mistakes made out of ignorance by the officer in charge. A study of the cases of Muslim inheritance also revealed that *farā'iḍ* as applied in the State of Pahang continues to be based on the traditional law of the *Shāfi'ī* school and up to the present day no attempt been made in Malaysia to follow the example of other Muslim countries such as Egypt, Syria, Sudan, Tunisia and Pakistan in reforming the law.

TABLE OF CONTENTS

	Page
Acknowledgement	i
Abstract	iii
Table of Contents	iv
Map of Pahang State	viii
Note on Transliteration	ix
List of Statutes	xi
List of Tables	xiii
List of Maps	xiii
List of Flow charts	xiii
List of Graphs	xiv

Chapter One

Introduction And Research Background

1.0	Introduction	1
1.1	Objectives of the Study	2
1.2	Significance of the Study and Survey on Previous Work	2
1.3	Limitation of the Study	10
1.4	Research Methodology	12
1.5	Organisation of the thesis	17

CHAPTER TWO

Farā'iq: Review and Discussion on its General Principles

2.1	Introduction	26
2.2	Property and Inheritance In Islam	27
2.3	Definition of <i>Farā'iq</i>	29
2.4	<i>Farā'iq</i> According to the Shāfi'ī School of Law	31

2.4.1	Condition And Cause Of The Succession	59
2.4.2	Order In The Distribution Of Inheritance	62
2.5	Discussion On The Rule Of Priority Among Heirs	65
2.6	The Superimposition Theory	67
2.7	Alternative Distribution Methods	69
2.8	Conclusion	70

CHAPTER THREE

Islam and Law of Succession in the State of Pahang: Historical Background.

3.1	Introduction	80
3.2	The State of Pahang: Historical Background	80
3.3	The spread of Islam into the State	82
3.4	The Development of Succession Law in the Malay States	89
3.4.1	Early Aboriginal Tribes	89
3.4.2	Malay Customary Law	91
	<i>i) Adat Perpateh</i>	93
	<i>ii) Adat Temenggung</i>	95
3.5	Law of Succession During the Malay Sultanates Era	98
3.6	Law of Succession During the Period of Western Colonisation	99
3.7	Conclusion	104

CHAPTER FOUR

The Present Administration of Muslim Inheritance in the State of Pahang.

4.1	Introduction	114
4.2	The Categories of Inheritance	114
4.3	The Administration of “Normal Estate”: Act and Agency	116
4.4	The Administration of “Simple Estate”: Act and Agency	118
4.5	The Administration of “Small Estates”: Act and Agency	119
4.5.1	The Collector of Land Revenue	121
4.5.2	The Small Estate Officer	124
4.5.3	The <i>Penghulu</i> or Village Headman	125

4.5.4	The <i>Qāḍī</i> or <i>Sharī'ah</i> Court Judge	126
4.6	The <i>Sharī'ah</i> Court and Its Problem	128
4.7	The Amendment of Article 121 of Federal Constitution and Its Effect on the Role of the <i>Sharī'ah</i> Court	128
4.8	The Settlement Process	135
4.8.1	The Procedures of the Settlement Process and its duration	138
4.8.2	Problems Associated with the Settlement Process	146
	i) Administrative aspects	147
	ii) Social Aspects	151
4.9	Conclusion	153

CHAPTER FIVE

Settlement By *Farā'id* and Mutual Agreement: Analytical Survey on Claimants' Preference.

5.1	Introduction	167
5.2	Methodological Approach	168
5.2.1	Design of the Questionnaire	168
5.2.2	Distribution of the Questionnaire	169
5.3	<i>Farā'id</i> vs Mutual Agreement: Data From the Settlement Agencies	170
5.4	<i>Farā'id</i> vs Mutual Agreement: Finding from the Questionnaire Survey	173
5.4.1	Settlement By <i>Farā'id</i> and Its Influential Factors	175
5.4.2	Settlement By Mutual Agreement and Its Influential Factors	181
5.4.3	Analysis on the Respondents' Perception Toward the Settlement Methods	187
5.5	Conclusion	191

CHAPTER SIX

Analysis on Cases of Muslim Inheritance

6.1	Introduction	197
6.2	Methodological Approach	197
6.3	Form of Cases Settled by the Settlement Agencies	199
6.4	Cases Settled Against the Principles of Islamic law and <i>Farā'id</i> .	201
	6.4.1 Cases Involving Interest	201
	6.4.2 Cases Pertaining to the Land of Group Settlement Area	204
	6.4.3 Cases Pertaining to the Land of Malay Reservation	208
	6.4.4 Cases of Nomination	212
6.5	Cases Referred to the <i>Sharī'ah</i> Court	216
	6.5.1 Cases of <i>Farā'id</i>	217
	6.5.2 Cases of <i>Waṣiyyah</i>	220
	6.5.3 Cases of <i>Hibah</i>	227
	6.5.4 Cases of Jointly Acquired Property	230
6.6	Conclusion	236

CHAPTER SEVEN

Conclusion	249
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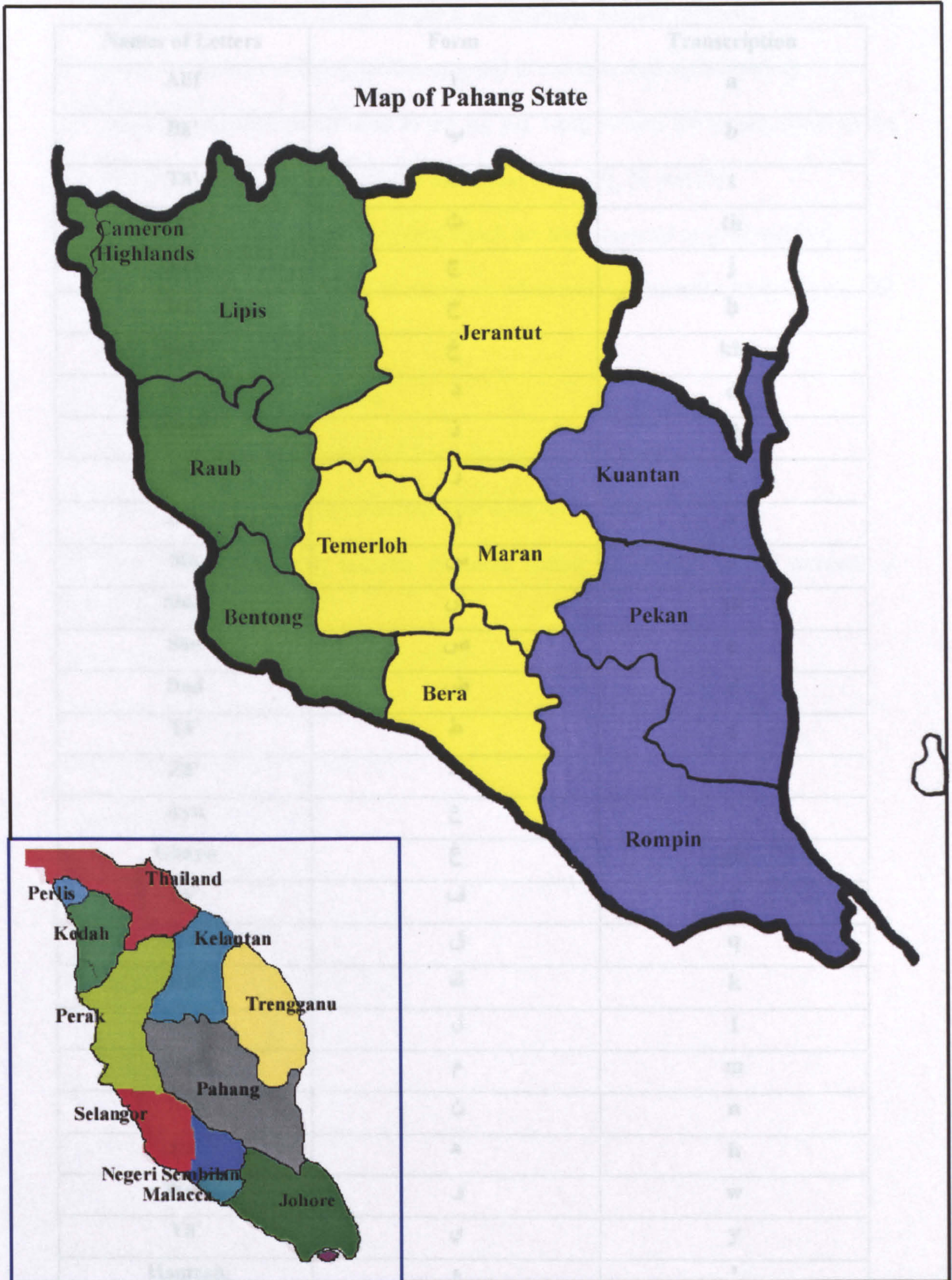
REFERENCES	268
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APPENDICES	285
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Appendix A: Data Compiled from the Agencies

Appendix B: Questionnaire

Appendix C: Translation of Cases



TRANSLITERATION OF ARABIC WORDS

Names of Letters	Form	Transcription
Alif	ا	a
Bā'	ب	b
Tā'	ت	t
Thā'	ث	th
Jim	ج	j
Hā'	ح	ḥ
Khā'	خ	kh
Dāl	د	d
Dhāl	ذ	dh
Rā'	ر	r
Zay	ز	z
Sīn	س	s
Shīn	ش	sh
Sād	ص	ṣ
Dad	ض	ḍ
Tā'	ط	ṭ
Zā'	ظ	ẓ
Ayn	ع	ʿ
Ghayn	غ	gh
Fā'	ف	f
Qāf	ق	q
Kāf	ك	k
Lām	ل	l
Mīm	م	m
Nūn	ن	n
Hā'	ه	h
Waw	و	w
Yā'	ي	y
Hamzah	ء	'

Notes.

1. The transliteration of Arabic words is alphabetical and not phonetic. The prefixed word or sun-letters (*Huruf al-Shamsiyyah*) is transliterated alphabetically.
2. Short vowels are transliterated as [a], [i], [u]. Long vowels are transliterated as the short vowels but marked with top diacritical lines; [ā], [ī] and [ū].
3. There are two diphthongs in Arabic which are transliterated as [aw] and [ay]
4. The nunation of the indefinite nouns or adjectives are transliterated as [an], [in] and [un].
5. Double letter is written twice
6. Definite article [al] is separated from the noun with a dash
7. The attached pronoun is joined with the noun with a dash
8. The letter ta' used to indicate feminine ending or termed as *ta' marbuta* is transliterated with [ah].

List of Statutes

Malaysian Federal Constitution

Probate and Administration Act 1959 (Act 97).

Small Estates (Distribution) Act 1959 (Act 98).

Small Estate (Distribution) Regulation, 1955

Public Trust Corporation, Act, 1995

Shariah Courts (Criminal Jurisdiction) Act 1965 (Act 355).

Pahang Administration of Islamic Law Enactment, 1991.

Selangor Administration of Muslim Law Enactment, 1952.

High Court Rules, 1980.

Customary Tenure Enactment.

Land Act (Group Settlement Area), 1960.

Estate Duty Enactment 1941.

Malay Reservation Enactment 1933.

Age of majority Act, 1971.

Partnership Act, 1960.

Legitimacy Act, 1961.

Guardianships of Infants Act, 1961.

The National Land Code.

Rules of High Court, 1980.

Estate Duty Enactment, 1941.

Trustee Act, 1949.

Oath and Affirmation Act, 1949.

Contracts Act 1950.

Evidence Act, 1950.

Presumption of Survivorship Act, 1950.

Public Trustee Ordinance, 1950.

Adoption Ordinance, 1952.

Mental Disorders Ordinance, 1952.

Registration of Adoption Ordinance, 1952.

Will Ordinance, 1959.

Civil law Act, 1959.

Limitation Ordinance, 1959.

Tunisian Code of Personal Status, 1958.

Syrian Law of Personal Status, 1953.

Egyptian Law of Inheritance, 1943.

Moroccan Code of Personal Status 1958.

LIST OF TABLE

		Page
Table 1.1 :	Advantages and Disadvantages of qualitative Analysis	16
Table 2.1	Male Heir in Detail	34
Table 2.2	Female Heirs in Detail	34
Table 5.2	Reasons Influencing Claimants to Settle their Case by <i>farā'iq</i>	175
Table 5.3	Reasons Influencing the Claimants to Settle their Cases by Mutual Agreement	181

LIST OF MAPS

Map iv	Map of Pahang State	iv
Map 4.1	Administrative zones of Small Estate unit in the State of Pahang	125

LIST OF FLOW CHARTS

Flow Chart 4.1	The Categories of Inheritance and the Administrative Agencies	116
Flow Chart 4.2	The Management of Islamic Affairs under the Administration of the Islamic Religious Law Enactment 1956	133
Flow Chart 4.3	The Management of Islamic Affair under the Administration of the Islamic Religious Law Enactment 1991	133
Flow Chart 4.4	The Administrative Procedures involved in the Settlement Process	139

LIST OF GRAPHS

		Page
Graph 1	<i>Farā'iḍ</i> vs Mutual Agreement at Small Estate Unit (East Zone)	171
Graph 2	<i>Farā'iḍ</i> vs Mutual Agreement at Small Estate Unit (West Zone):	172
Graph 3	<i>Farā'iḍ</i> vs Mutual Agreement at Small Estate Unit (Middle Zone)	172
Graph 4	<i>Farā'iḍ</i> vs Mutual Agreement at Amanah Raya Corporation	173

CHAPTER ONE

Introduction and Research Background

1.0 Introduction

Property can be regarded as one of the most important aspects of human life. It is part of our endeavours to own and possess things and material legally. When a person passes away the crucial question that arises is how and to whom should the property be distributed. Different societies have developed their own rules and practices to deal with this problem. Generally, a society's law concerning the distribution of inheritance derives from either customary or religious laws. In the modern age, however the statutes or acts passed by government also play an important role in providing some solutions.

In Muslim society, the law of succession is divided into two main branches: the law of testate inheritance, known as *waṣiyyah*, and the law of intestate inheritance, known as *farā'id*, which will be the main focus of this research. In Islam, *farā'id* is given precedence over *waṣiyyah*, as the law itself takes into account that the benefit of the close relatives, especially those who have suffered both emotionally and financially by the death, must be given the utmost priority. Therefore, the testamentary power such person is restricted to one third of the property, while the remaining two thirds is ordered to be distributed among close relatives.

1.1 Objectives of the Study

As the title of this thesis suggests, the present study concerns with the Islamic law of intestate inheritance known as *farā'iḍ* as it exists in the State of Pahang, in both its theoretical and practical aspects.

The theoretical discussion aims (i) to explain the general principles of *farā'iḍ* as applied in the State of Pahang, (ii) to discover whether *farā'iḍ* is the only method available to Muslims in disposing of their inheritance or whether any other options might be applied.

The discussion of the practical aspects of *farā'iḍ* aims (i) to examine how *farā'iḍ* was applied under the present administrative system in managing the settlement of Muslim cases, (ii) to investigate to what extent *farā'iḍ* have been used by Muslim claimants in settling their cases, (iii) to study the cases settled by the settlement agencies in order to assess their compatibility with the rules of *farā'iḍ* and the principles of Islamic law in general.

1.2 Significance of the Study and Survey on the Previous Work

Farā'iḍ is regarded as one of the most important branches of Islamic law and the subject of the most detailed provisions revealed in the Quran. The Prophet himself is reported to have said “ *Learn the law of intestate inheritance (farā'iḍ) and teach it to people, for I am someone who will be taken from you, and this knowledge will be taken from you and*

calamities will ensue, until two men will one day disagree about the obligatory appointment and will not find anyone to judge between them".¹ The Prophet also warned his community that *farā'id* would be the first area of knowledge to be removed from the Muslim community and therefore it is not surprising that *farā'id* has received a great deal of attention from the Muslim jurists and scholars up to the present day.

However, most of the work done by the traditional jurists concerning *farā'id* has concentrated only on the substantive theoretical aspects such as the competence to inherit, the impediments to inheritance, the categories of heirs and the calculation of the shares rather than the administrative aspects. In fact, most of the traditional law-books of whatever school include a discussion on *farā'id*. For example, *Minḥāj al-Ṭalibīn* of al-Nawawī (Shāfi'ī school),² *al-Sharḥ al-Kabīr bi Ḥashiyat al-Dasūqī*" of al-Dardīr (Mālikī school),³ *Bidāyah al-Mujtahid* of Ibn Rusḥd (Mālikī school),⁴ *Kashshāf al-Qinā' 'An Matn al-Iqnā' li Ibn Qudāmah* of al-Bahūti (Ḥanbali school).⁵

The subject of *farā'id* also been explored in the book of Quranic exegesis including the *Jāmi' al-Bayān 'An Ta'wīl Ay al-Qur'ān* of al-Ṭabarī,⁶ the *Tafsīr al-Qur'ān al-'Aẓīm* of Ibn Kathīr al-Qurashī,⁷ the *al-Jāmi' li Aḥkām al-Qur'ān* of al-Qurṭubī,⁸ the *Rūḥ al-Ma'ānī fi Tafsīr al-Qur'ān al-'Aẓīm wa al-Sab'i al-Mathānī* of al-Alūsī,⁹ and the *Aḥkām al-Qur'ān* of Ibn 'Arabī¹⁰.

Farā'id has also attracted Western scholars, and there is a wealth material either translated from Arabic into English or written by the scholars themselves. Among the

translations is the work of Rumsey, who in 1880 translated the *al-Sirājiyyah* of the Ḥanafī school under the title *Muhammadan Law of Inheritance and Right and relations Affecting It*.¹¹ In 1914, Ruxton translated the *Mukhtaṣar of Sīdī Khalīl* of the Mālikī school, calling his translation *Mālikī Law*.¹² Also in 1914, Howard translated the *Minhāj al-Ṭālibīn* of al-Nawawī of the Shāfi‘ī school entitling the book *Minhāj-et-Talibin*, and as recently as 1991 Keller translated the *‘Umdah al-Sālik wa ‘Uddah al-Nāsik* of Ibn al-Naqīb of the Shāfi‘ī school under the title *The Reliance of the Traveller*.¹³

Meanwhile among the works written by the western scholars is the “Mīrāth” by Schacht in the Encyclopaedia of Islam¹⁴ who examines the law of inheritance in the Quran and the Prophet’s tradition. Perhaps the most detailed work on the subject in English is Coulson’s *Succession in the Muslim Family* (1971).¹⁵ Coulson concentrates the discussion on the differences between the major Islamic schools of law. He also discusses the major changes introduced into the modern Middle Eastern countries as well as the Indian sub-continent.

David Stephen Power in his thesis *The Formation of Islamic Law of Inheritance* (1979)¹⁶ provides an analytical discussion of the rule of *farā’id* from a western perspective and at the same time considers the superimposition theory, which will be examined in chapter three. Another works of Power that has often been referred to by scholars of the subject is *Studies in Quran and Hadith: The Formation of Islamic Law of Inheritance* (1986).¹⁷

In his review, Edge has noted that the book is considered controversial and has not been accepted by many scholars because the author suggests that some of the important rules

of inheritance were developed at a later time, from Quranic material and *ḥadīth* that have been lost.¹⁸

Pearl in his book entitled *A Textbook on Muslim Personal Law* (1987)¹⁹ discussed *farā'īd* in the chapters concerning Muslim family law. In 1998, Pearl and Wenski produced another book called *Muslim Family Law*,²⁰ which concentrates on the application of Muslim law by focusing on cases settled in the Great Britain and the Indian sub-continent.

Another aspect of *farā'īd* which has also attracted the attention of Western scholars, concerns the various reforms made to the law. For instance Anderson, has discussed these new developments in various articles and books including "*Sharia and Civil Law* (1955)²¹, *Islamic law in Africa* (1955)²², *Law and Social Force in Islamic Culture and History* (1957)²³, *Reform in Family Law in Morocco* (1958)²⁴, *The Tunisian Law of Personal Status* (1958)²⁵, *Islamic Law in Modern World* (1959)²⁶, *Recent Reform in the Law of Inheritance* (1965),²⁷ and *Law Reform in the Muslim World* (1976).²⁸ The author, besides discussing the concept, the workings of Islamic law and the pressure for reform, emphasises his reservation concerning *farā'īd*, which does not recognise the rule of representation. He termed the exclusion of the predeceased son's son by the son a lacuna and urged reform so that the rule of representation should be recognised. Representation in the context of inheritance as defined by Khan is a descendant or remote descendant of a predeceased of the propositus taking the position of the deceased relative and being treated exactly of the status of the deceased relative.²⁹ This rule is not accepted by the

farā'id because in Islam primary heirs e.g. parents, children and spouses have fundamental right to inherit in a specified manner and never be excluded. No other relation can be treated on a par with these primary heirs e.g. grandparents cannot precisely take the same position as that of the parents and similarly the grandchildren cannot be treated similarly with children as heirs. The rule of representation cut the very root of this concept.³⁰

It is unfortunate that most of the modern Middle Eastern scholars' works have not been translated into English and are only accessible to those who can read and understand Arabic. Most of their works concentrate on the substantive law of *farā'id* as revealed in the Quran, *ḥadīth* and judicial consensus, and at the same time compare the traditional law with the modern law. These writers in some instances provide the reader with rich information from the primary sources i.e. the work of traditional jurists from various Islamic schools of law, both Sunnī or Shī'ī. Among these works are *al-Tarikah wa al-Mirāth fī al-Islām* of Musa Muḥammad Yūsuf (1967),³¹ *al-Aḥwāl al-Shakhṣiyyah* of Muṣṭafa Shaḥāṭah al-Ḥusaynī (1969),³² *al-Aḥwāl al-Shakhṣiyyah li al-Miṣriyyīn al-Muslimīn fīqhan wa Qadā'an* of Muḥammad al-Dijwī, (1972),³³ *al-Mawārīth fī al-Sharī'ah al-Islamiyyah fī Ḍau' al-Kitāb wa al-Sunnah* of Muḥammad 'Alī al-Ṣabūnī (1979),³⁴ *al-Wāsiṭ fī Aḥkām al-Tarikah wa al-Mawārīth* of Zakariyya al-Bārī (1979),³⁵ *al-Mausū'ah al-Fiqhīyyah* of Wizārah al-Auqāf wa al-Shu'ūn al-Islamiyyah (1982),³⁶ *Aḥkām al-Uṣrah fī al-Jāhiliyyah wa al-Islām* of Ibrahīm Fauzī (1983),³⁷ *al-Fiqh al-Islāmī wa Adillatuh* of Wahbah al-Zuḥaylī (1989).³⁸ However, among these books only that of Ibrahīm Fauzī has successfully made an analytical study of the rules of *farā'id*, arguing

that some of the rules developed by judicial analogy are not compatible with the Quranic law.

However, if there is a shortage of works in English by the Middle Eastern scholars, this is certainly not the case as far as writers from India and Pakistan are concerned. They include Ameer Ali's *Mohammedan Law* (1929),³⁹ Moulavi Babu Sahib's *The Law of Inheritance in Islam* (1979),⁴⁰ Fyzee's *Outlines of Muhammadan Law* (1976),⁴¹ Muhammad Ullah's *The Muslim Law of inheritance* (1981),⁴² Abdul Rahman Doi's *Shariah, The Islamic Law* (1984),⁴³ and Mohammad Mustafa Ali Khan's *Islamic Law of Inheritance; A New Approach* (1989).⁴⁴

As regard the work of Malaysian scholars, a great deal of research has been carried out on Islamic family law and the administration of Islamic law but few have concentrated on the subject of *farā'id*. Among the scholars, one who has made an enormous contribution to the field of Islamic family law is Ahmad Ibrahim. His valuable works include *Islamic Law in Malaya* (1960),⁴⁵ *The Shariah Court And Its Place In The Malaysian Judicial System* (1985),⁴⁶ *Harta Penama (Nomination)* (1985),⁴⁷ and *Recent Development In the Shariah Courts In Malaysia* (1995).⁴⁸ However, his work on *farā'id* entitled *The Distribution of Estates According to the Shafii Law* (1976),⁴⁹ describes only the working of *farā'id* in accordance with the understanding of the Shāfi'ī school without discussing the actual obstacles faced by the settlement agencies and the Muslim claimants in settling their cases.

A similar approach has been adopted by Abdul Kadir Ismail in his *Sistem Pusaka Islam* (Islamic System of Inheritance) (1987)⁵⁰ except the author extends the discussion by giving a general overview of the inheritance law in other legal systems, but in many instances he fails to provide references.

In 1983 a seminar on the law of inheritance was conducted by Faculty of Sharī'ah of the National University of Malaysia. The papers presented in this seminar have been compiled by Rizduan Awang in his *Undang-Undang Mengenai Pentadbiran dan Pengurusan Harta Pusaka Orang Islam Di Malaysia* (Law Concerning the Administration of Muslim Estate in Malaysia), published in 1988.⁵¹ The book however, did not discuss any of the new developments and reforms carried out in other Muslim countries since the experience of these countries will be of considerable value to those attempting to improve the management of inheritance in Malaysia and Pahang in particular.

The latest book published on the subject of *farā'iq* was the work of Abdul Rashid Abdul Latiff's *Undang-undang Pusaka Dalam Islam: Satu kajian Perbandingan* (Law of Inheritance in Islam: A Comparative Study) (1997).⁵² This work, as its title suggests, presents the subject in the form of a descriptive comparative review between the Sunnī schools, although it can be argued that it is important to give local readers information on Shī'ī opinion so that they may determine which of these schools is closer to the Quranic law. Also this work does not consider the actual problems faced by claimants in settling their inheritance cases since it more emphasises the theoretical aspects of the subject.

There are also foreign scholars interested in researching the development of Islam in Malaysia but most of them tend to focus on the conflict between Islamic and Malay customary law. One scholar, however, who has contributed greatly to matters pertaining to customary influence in Malaysia is Hooker. His works provide useful information on the background and the workings of *Adat* or Malay customary law in the area of inheritance and estate distribution. Nevertheless, Hooker has devoted less attention to the *Adat Temengging*. Among his work are *Readings in Malay Adat Laws* (1968),⁵³ *A Note on the Malayan Digest* (1968),⁵⁴ *Adat Laws in Modern Malaya* (1972),⁵⁵ *The Personal Laws of Malaysia* (1976),⁵⁶ and *Islamic Law in Southeast Asia* (1984).⁵⁷

Among other writers who have also contributed much to the matter of Islamic legal institution in the country are Abdul Majed Mackeen, *Contemporary Islamic Legal Organisation in Malaya* (1969)⁵⁸ and Moshe Yegar, *Islam and Islamic Institutions in British Malaya* (1979).⁵⁹ Both writers have analysed the role of the *sharī'ah* court and the problems faced by the Islamic legal institutions after the country gained its independence in 1957. Lee and Ackerman in their book entitled *Sacred Tensions: Modernity and Religious Transformation in Malaysia* (1997) examine the development and practice of Islam and other religions in the country. Its analyses provide an insight into how established and charismatic religions fit into the framework of modernisation and secularisation throughout the world.

Considering the works of the scholars mentioned above, it can be concluded that no research has been undertaken to investigate the position and the development of *farā'id*

under the present administration or to examine the problems faced by the agencies and claimants in settling cases of inheritance. In addition, no research has been carried out on the compatibility of settlements made by the agencies with the principles of *farā'īd* and of Islamic law in general. Therefore, it is the intention of the present study to shed some light upon these matters, so far neglected by others.

It is therefore hoped that this research will make a new contribution to the body of knowledge of the subject of *farā'īd* and the administration of Muslim inheritance, and at the same time will be able to help those who wish to pursue further studies in the area.

1.3 Limitations of the Study

This present study, due to limitations of time and financial constraints, concentrates on only one state of Malaysia, namely the State of Pahang, which is that situated on the east coast of Peninsular Malaysia (see Map in page iv)

Generally, under the present administration, four agencies are involved in settling the cases of Muslim inheritance i.e. the *sharī'ah* courts, the High Court, the Small Estate Unit and the Amanah Raya Corporation. This present study, however, focuses on only two of these: the Small Estate Unit and Amanah Raya Corporation, since they are the authoritative bodies responsible for managing and settling the cases of Muslim

inheritance. While the *sharī'ah* court and High Court are a judicial institution and thus do not handle the settlement process.

In studying the cases settled by these agencies, the researcher was only able to examine the cases settled by the Small Estate Unit as the Amanah Raya Corporation did not grant permission to study its cases in detail although it did allow the researcher to look through general records and to conduct a questionnaire survey of its clients. According to the manager of Amanah Raya Corporation, the general information regarding the cases in question could be obtained from the general records and therefore there was no need to examine the files. It should be noted that it is the Corporation's policy that settled cases cannot be shown to any third party even for the sake of research because they are considered as strictly confidential.

Unfortunately, not all the information of such cases is contained in the general record books. This became clear when the researcher studied their general records it only gave basic information such as when the application was made and settled, the form of the cases and the type of settlement method used, but the decision made by the officer was not recorded. Therefore, in order to study whether the settlement of such cases are compatible with principles of Islamic law and *farā'iḍ*, the actual file of cases need to be examined. The strict regulations of the Amanah Raya Corporation, however, allowed the researcher only to investigate types of settlement method applied (1995-1999).

1.4 Research Methodology

The present study involves both theoretical and empirical investigations concerning the Islamic law of intestate inheritance known as *farā'iḍ* and its development and application in the State of Pahang. Therefore, both library-research and fieldwork survey have been used as the main approaches to achieve the objectives of this study.

Regarding the theoretical aspect, enormous efforts have been made to discover the subject of *farā'iḍ* from its primary sources: the Quran, *ḥadīth* and the works of the traditional Muslim jurists from all schools of Islamic law, be they Sunnī or Shī'ī. However, the researcher has chosen the work of Abū Shujā' al-Iṣfihānī⁶⁰ (d. 593 H) of the Shāfi'ī school known as the *Matn al-Ghāyah wa al-Taqrīb*⁶¹ as the basis to explain the general principles of *farā'iḍ*. This text was chosen because it has been used for centuries by Muslims in the State of Pahang to teach beginners the subject of Islamic law and *farā'iḍ* in particular. The text will be translated and elaborated, and in the interest of discussion, views from other schools will be discussed. This theoretical part of the study, besides examining the principles of *farā'iḍ*, will seek to discover whether or not there are other options other than *farā'iḍ* which can be applied by Muslims to settle the distribution of their inheritance.

As for the practical aspects, a fieldwork survey has been employed as the main approach in order to conduct an in-depth investigation of the development and application of

farā'iḍ in the State of Pahang including the problems faced by the agencies and claimants, and the preferences of claimants regarding the settlement methods.

This fieldwork survey has been conducted twice. The first survey was carried out from November 1996 to January 1997 (3 months), while the second was conducted from March 1999 to September 1999 (6 months). The first survey was intended to establish a contact with the settlement agencies in order to obtain a general view of how the present administrative system is managing the settlement of Muslim inheritance and its problems. This survey revealed an interesting fact that under the present administration there was another settlement method other than settlement by *farā'iḍ*, which can be applied by the claimants in order to settle their cases which is settlement by mutual agreement. A study of the agencies' general records suggested that *farā'iḍ* was seldom being used by Muslim claimants. This states of affairs required some explanation. Therefore, semi-structured interviews with officers and staff of the agencies were conducted to discover what the explanation might be, and also to get more information on the settlement process and its procedure. The interviewees were Mr. Muhammad bin Abdullah (Head Director of the Small Estate Unit), Mr. Aziz Bin Ali (Small Estate Officer of the Middle Zone), Mrs Rosnaha Bt Osman (supporting staff at the Small Estate Unit of the Middle Zone), Mr. Kam Ian Hai (Manager of Amanah Raya Corporation of Pahang State branch), Mr. Abdul Rahman Yunus (Shariah High Court Judge of Pahang State) and finally Professor Tan Sri Ahmad Ibrahim (Dean of Law Faculty of the International Islamic University).

However, in order to assess the validity of the information and reasons given by the staff of the agencies as to why *farā'iq* was less favoured by Muslim claimants, it was necessary therefore to discover the precise reason from the claimants themselves, because they are the ones who decide how their case will be settled, whether by *farā'iq* or by mutual agreement. Hence, for the purpose of investigating the claimants' preferences in regard to the settlement methods, the second fieldwork survey was conducted from March 1999 to September 1999 (6 months). The survey involved the use of questionnaires, which were distributed at both agencies. However, in order to ensure that the design of the questionnaire is clear and uncomplicated, a pilot survey had been conducted earlier among twenty claimants at both agencies. Based on the responses of these claimants, a few adjustments were made to the questionnaire in order to make it clearer as well as to avoid sensitive questions.

The questionnaire consists of two sections. The first section is concerned with the background of the respondent, while the second consists of thirteen open-ended questions, as it aims to give total freedom for the respondent to state his or her reasons. Thus, it is more likely to reflect the full richness and complexity of the views held by the respondent. The questions set in the questionnaire are not influenced by the literature on the subject as no previous study has been conducted on this particular matter; thus the researcher has made full use of personal observation and information gathered during the survey while preparing the questionnaire. (See Appendix B, which presents the questionnaire in full).

The literature does however suggest that the data gained through interviews and open-ended questionnaire are regarded as qualitative.⁶² The term “qualitative research” is used as a generic term for a number of investigative methodologies that include ethnography, participant observation, naturalistic and field research. According to Descombe qualitative research strategies are especially suited to small-scale analysis in which the researcher uses methods that allow him or her to get first hand information about the problem being studied.⁶³ Strauss and Corbin have argued, when an event or a social process is difficult to study quantitatively, a qualitative method is not only generally more suitable but can also provide intricately detailed understanding and is thus commonly used for studying organisations, groups and individuals.⁶⁴

Therefore, data gained from the questionnaire survey will be analysed qualitatively bearing in mind the advantages and disadvantages of the qualitative analysis as suggested by literature as shown in Table 1.1. This is in conformity with the objectives of the survey, which are to discover the actual reasons which have influenced the claimants’ preferences, and to analyse their perceptions of the settlement methods, especially *farā’iḍ*. However, the simple statistic on the percentage of respondent who settled their case by *farā’iḍ* and by mutual agreement will be calculated in the hope that it will make the presentation of the findings and its discussion much clearer.

Table 1.1: Advantages and Disadvantages of Qualitative Analysis

Advantages of Qualitative Analysis	Disadvantages of Qualitative Analysis
1. The data and the analysis are grounded in reality	1. The data may be less representative
2. There is a richness and detail to the data	2. Interpretation is bound up with the “self” of the researcher
3. There is tolerance of ambiguity and contradiction	3. There is a possibility of decontextualizing the meaning
4. There is the prospect of alternative explanations	4. There is the danger of oversimplifying the explanation

Source: Descombe, Martyn, *The Good Research Guide for Small-Scale Social Research Projects*, Open University Press, Philadelphia, 1998, pp.173-176.

The questionnaire was distributed at both agencies among the claimants who had already decided what type of settlement method they were going to choose. This type of sampling, where the targeted respondents are already known is categorised by the literature as stratified sampling. Descombe defined it as one in which every member of the population has an equal chance of being selected in relation to their population within the total population.⁶⁵ The significant advantage of stratified sampling over pure random sampling is that the researcher can control the selection of the sample in such a way as to guarantee that only suitable individuals are covered by it and in proportion to the way they exist in the wider population. Its representativeness therefore is high.⁶⁶

With regard to the issue of the validity of the data within the context of qualitative research, the size of the sample is of secondary importance as long as the data and the method applied are correct and accurate as well as on target.⁶⁷ All these criteria have been taken into consideration while conducting the survey to ensure its validity and reliability.

The *second* survey was longer than the first since it had a wider scope: to study the form of the cases settled by both agencies and the compatibility of the settlements with the principle of Islamic law and of *farā'iḍ* in particular. However, as mentioned earlier the researcher only managed to study the cases of the Small Estate Unit (from 1990 to 1999) as the Amanah Raya Corporation withheld permission to examine the files of the cases settled by them. The task of gathering the data and information concerning the cases from the agencies' general record books was not an easy one because the data was still uncomputerised, therefore much time and patience was required.

1.5 Organisation of the Thesis

The thesis is organised into two main parts. Part I concerns the theoretical and historical aspects of *farā'iḍ* and its development in the State of Pahang. This part consists of three chapters including this introductory chapter. Chapter two presents the general principles of *farā'iḍ* while chapter three discusses the succession law in the state from the historical point of view. Part II concerns the practical aspects of the application of *farā'iḍ* under the present administration of inheritance in the State of Pahang. This part consists of four chapters. The first three chapters discuss the findings of the fieldwork survey according to the respective topics i.e. the settlement process, the claimants' preferences, the form of the cases settled by the agencies and the compatibility of these settlements with the principles of Islamic law and of *farā'iḍ* in particular. The final chapter concludes the thesis. A summary of each chapter is given below.

Chapter 1: Introduction and Research Background briefly considers the objectives of the thesis, its limitations and significance as well as the methodology adopted in researching the subject.

Chapter 2: *Faraid*: Review and Discussion on its General Principles attempts to achieve two main aims. The first is to provide a clear picture of the workings of *farā'iḍ* as understood by the Shāfi'ī school. In the interests of a wider discussion, the views of other Sunnī and Shī'ī schools are also considered. The workings of *farā'iḍ* are presented and analysed, drawing on the work of Abū Shujā' al-Isfihānī (d. 593 H) known as "*Matn al-Ghāyah wa al-Taqrīb*" of the Shāfi'ī school. The text will be translated and commented on. Secondly this chapter aims to discover whether there is a method other than *farā'iḍ* which can be used by Muslims in distributing their inheritance.

Chapter 3: Islam and the Law of succession in the State of Pahang: Historical Background reviews the development of succession law among the early indigenous people of the Malay State and discusses the assimilation of Islamic law and *farā'iḍ* in particular and its effect on Malay customary law.

Chapter 4: The Present Administration of Muslim Inheritance in the State of Pahang highlights two main aspects. Firstly, a brief description is given of the legal acts and settlement agencies involved under the present administration in managing the settlement of Muslim cases. Secondly the chapter discusses the settlement process, its

procedures and duration and the problems faced by the agencies and claimants during the process.

Chapter 5: Settlement by *Farā'iḍ* and Mutual Agreement: Analytical Survey of the Claimant's Preferences as well as the factors that influence their preference. This chapter is presented mainly based on the finding from the fieldwork survey.

Chapter 6: Analysis of Cases of Muslim Inheritance. The discussion in this chapter is related to the fieldwork survey. As its title suggests, this chapter, besides identifying the form of cases settled by the agencies also examines whether the decisions made by the officers of the settlement agencies in settling such cases were in agreement with the principles of Islamic law and *farā'iḍ* in particular.

Chapter 7: Conclusion. This chapter sums up all the findings presented in the earlier chapters.

The Appendices provide copy of raw data and a copy of the questionnaire as well as the copy of representative cases included in the thesis.

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CHAPTER TWO

Farā'iḍ: Review and Discussion on Its General Principles

2.1 Introduction

This chapter will examine the law concerning the distribution of intestate inheritance in Islam known as *farā'iḍ*. The discussion begins with a review of the definitions of property and inheritance in the context of Islam: whether all the deceased's possessions can be inherited or whether limitations imposed by Islamic law. The workings of *farā'iḍ* and its general principles are discussed based on the work of Abū Shujā' al-Iṣfihānī (d. 593 H) the famous Shāfi'ī jurist, whose book on Islamic law is known as *Matn al-Ghāyah wa al-Taqrīb*. For the sake of balance, views from other schools of law including the Shī'ī (Imāmiyyah) will also be highlighted.

As there are distinct differences between the Shāfi'ī and other Sunnī schools with the Shī'ī law, this chapter will try to allocate the root of these differences, although both Sunnī and Shī'ī schools similarly claim that the Quran and *Sunnah* are the main sources for the development of *farā'iḍ*. Finally the chapter investigates whether *farā'iḍ* is the only choice available to Muslims of distributing their inheritance or there are other options approved by Islamic law.

2.2 Property and Inheritance in Islam

Property is an important aspect of human life and in the view of Islam it can be owned in three ways: (i) through personal efforts to possess it (ii) through contracts that transfer ownership of such properties from one person to another as in the case of trade for instance, and (iii) through succession,¹ which will become the main focus of discussion in this chapter. However, before proceeding to consider the subject of succession and the laws governing it, it is necessary to understand first the meaning of property as defined by Islamic law and what kinds of property can be inherited under the Islamic law of succession.

Islam holds that it is the duty of mankind as the caliphs of God on earth to execute the trusts and responsibilities as already determined.² In other words, the true owner of any property is God and man is merely the guardian and administrator of the property.³ In this context, all of God's creatures, whether they are to be found on the earth, in the sky or in the sea, are created for the benefit of mankind.⁴ Man is given the right to own property, to gather, to expand and to use it according to the guidelines and regulations that have been ordained by Islam.

Madkhūr noted that property as commonly understood by society is something that appeals to man's natural interests and that can be kept for use whenever needed. He argued that this understanding is inadequate and it can be rejected because there may be something that does not attract man's natural interests but is still considered as a

property, such as medicine, which, even though it is bitter and not naturally liked by many, is still considered as a property.⁵

Zaidān on the other hand defined property as every single thing that can be controlled and made use of.⁶ According to this definition, these two important characteristics determine whether something can be considered as property or not. Falling within this category, therefore, are, for example houses, clothing, vehicles, accessories, plants, money and so on. However, according to Zaidān direct control is not a condition that determines whether or not something can be regarded as property, such as in the case of the fishes in the sea, birds in the sky, wild animals in the forests, minerals beneath the surface of the earth and pearls that are still in the oceans. All these are considered as a property in the view of Islam.⁷

Nevertheless, things prohibited by Islamic law even though they can be controlled and made use of, such as liquor, pigs, carrion, food that endanger health and so on cannot be considered as property. Finally, all property to be distributed among the heirs definitely must be property that has been acquired and owned legally by the deceased. In other words, if, for instance, the property is known to be the proceeds of a robbery, it must be left aside as it cannot be considered as the deceased's possession.⁸

Muslim jurists, however, have different opinions with regard to *manfa'ah* (usufruct) and *ḥuqūq* (rights), on whether or not these can be included in the definition of property and can be inherited from the deceased. In this matter, the Shafi'i and Mālikī schools are of

the same opinion, which is that *manfa'ah* and *ḥuqūq* are valuable property and can be inherited.⁹ The Ḥanafī school on the other hand, holds a contrasting opinion: that *manfa'ah* and *ḥuqūq* cannot be inherited unless they include monetary value like in *ijārah* (rental contract) and *i'ārah* (loan contract).¹⁰

From the above discussion it can be concluded that inheritance from the view of the Shāfi'ī school, consists of all lawful property of whatever kind left by the deceased, whether movable or immovable, as well as *ḥuqūq* (rights), without taking into account whether these have a monetary value or not, such as the *ḥuqūq al-'Ainiyyah* (the rights attached to something material) like *ḥaq al-Irtifāq* (the right to utilise something) or *ḥuqūq al-Shakhṣiyyah* (individual rights) like *ḥaq al-Khiyār* (the right to withdraw from a business transaction) and *al-Diyah* (blood money).¹¹

In the matter of the distribution of intestate inheritance, *farā'id* is the law provided by Islam for Muslims to settle their case. The following section will explore in detail the definition of *farā'id* and its general principles.

2.3 Definition of *Farā'id*

The law of intestate inheritance in Islam is known as *farā'id* or *mīrāth* but *farā'id* is the most commonly used term and appear in the *ḥadīth*: “*ta'alamū al-Farā'id*” which means learn the laws of inheritance.¹² Literally, *farā'id* is a plural form of the word *farīḍah*, which means fixed obligations.¹³ Therefore, *farā'id* can be defined as the law regarding

the devotional acts in respect of the wealth of a person after the certainty of his or her death or on the assumption of his or her death.¹⁴

Farā'id is considered to be one of the most complicated branch of Islamic law. It calls for a thorough knowledge of arithmetic in order to calculate the various shares of the legitimate heirs of the estate left by the deceased. Furthermore, compared to other subject of Islamic law, *farā'id* is also the most detailed legal provision prescribed by the Quran. It is due to this close tie with the Quran, that it was the part of Islamic law least affected by reforms made by the Muslim countries in the early of 19 th century.¹⁵ The supreme purpose of *farā'id* as described by Coulson is to be a material provision for surviving dependents and relatives, for the family group bound to the deceased by mutual ties and responsibilities, which stems from blood relationship.¹⁶ Therefore, it can be observed that *farā'id* tends to distribute the deceased's property to as many heirs as possible in order to building and keeping the family relationships strong.

The importance of *farā'id* has prompted Muslim jurists to elaborate its concepts and principles. In the Shāfi'ī school of law, for example the work of Abū Shujā' al-Iṣfihānī Aḥmad ibn Ḥusayn ibn Aḥmad (d. 593 H) known as *Matn al-Ghāyah wa al-Taqrīb* is among the well-known text, written around 485 H which has been widely used in teaching the subject of *farā'id* and Islamic law in general.¹⁷

That the work of Abū Shujā' al-Iṣfihānī has been so widely used is probably due to its characteristic concentration on the essentials of the subject, which makes it easy for the

beginner in particular to understand and memorise the subject. At the same time, his work was also highly appreciated by many Shāfi'ī scholars, who produced various works in order to elaborate and comment upon it. These include *Kifāyah al-Akhyār fī Ḥall Ghāyah al-Ikhtisār* by Abī Bakr al-Dimashqī (d. 829), *Fath al-Qarīb al-Mujīb* by Muḥammad ibn Qāsim al-Ghāzī (d. 914 H), *al-Iqnā' fī Ḥall Alfāz Abī Shujā'* by Khatīb al-Sharbīnī (d. 877 H) and "Ḥāshiyyah al-Bājūrī" by Ibrahīm al-Bajūrī (d. 1276 H). It is worth mentioning here that Abū Shujā' al-Iṣfihānī was of the early generation of Shāfi'ī jurists as he was born in 443 H, earlier than other famous Shāfi'ī scholars such as al-Ghazālī (b.450 H), al-Nawawī (b. 630 H), Tāj al-Dīn al-Subkī (b. 727 H), Ibn Ḥajar al-'Asqalānī (b. 773 H), al-Ṣuyūfī (b. 911 H), Zakariyya al-Anṣārī (b. 852 H), Ibn Ḥajar al-Ḥaithāmī (b. 909H).

2.4 *Farā'id* According to the Shāfi'ī School of Law

The researcher has chosen the work of Abū Shujā' al-Iṣfihānī as the basis of the following description of the working of *farā'id* and its general principles, as it has been commonly used in the State of Pahang in teaching the subject of Islamic law for beginners.

The text of *Matn al-Ghāyah wa al-Taqrīb* covers most of the fundamental subjects of Islamic law including that of inheritance. Its brevity serves to emphasise the main points of the subject in accordance with the view of the Shāfi'ī school of law without mentioning the differences of perception among the jurists. The text consists of 16

chapters;¹⁸ chapter 7 concerns the law of succession and consists of two sections. The first section deals with *farā'id* and the second with *waṣīyah*. The present work however will concentrate on the first section, which comprises 13 texts (text 169 to 181). Each text will be translated and commented on when necessary by reviewing opinions from other schools of law, both Sunnī (Ḥanafī, Mālikī and Ḥanbalī) and Shī'ī (Imāmīyyah) as well as reference to modern Arab legislation in particular the Egyptian Inheritance Law of 1943 and the Syrian Law of Personal Status of 1953.

i: Text 169:

فَصْلٌ وَالْوَارِثُونَ مِنَ الرِّجَالِ عَشْرَةٌ الْإِبْنُ وَالِابْنُ وَالِابْنُ وَإِنْ
 سَفَلَ وَالْأَبُ وَالْجَدُّ وَإِنْ عَلَا وَالْأَخُ وَإِنْ تَرَ أَخِي الْعَمُّ وَالِابْنُ
 الْعَمُّ وَإِنْ تَبَاعَدَ وَالزَّوْجُ وَالْمَوْلَى الْمُعْتَقُ.
 وَالْوَارِثَاتُ مِنَ النِّسَاءِ سَبْعٌ الْبِنْتُ وَبِنْتُ الْإِبْنِ وَالْأُمُّ
 وَالْجَدَّةُ وَالْأَعْنَحُ وَالزَّوْجَةُ وَالْمَوْلَاةُ الْمُعْتَقَةُ.
 وَمَنْ لَا يَسْقُطُ بِحَالٍ خَمْسَةُ الزَّوْجَانِ الْأَبْوَانِ وَوَلَدُ الصُّلْبِ.

Translation

Section (on *farā'id*): The male successors are ten in number and they are i) son ii) son's son and below (other male agnates descendants)¹⁹ iii) father iv) father's father and above (other agnates' ancestors) v) brother vi) brother's son and below (other agnates'

descendants) vii) paternal uncle however far they are (including father's half brother) viii) son of paternal uncle and below (their descendants) ix) husband x) patron (in the sense that the patron is heir to an enfranchised slave but not vice versa).

While the female successors are seven in number and they are i) daughter ii) son's daughter iii) mother iv) grandmother and other ancestresses (mother's parent and above) v) sister vi) wife vii) patroness.

Those who cannot be dropped (from the distribution scheme) under any conditions are five in number and they are i) husband ii) wife iii) mother iv) father v) children of the deceased.

Elaboration

In this text, the author draws attention to two main points: Firstly an enumeration of the sharers on both the male and female sides; secondly an enumeration of the heirs who cannot be excluded from the distribution scheme.

There are two ways that jurists describe these heirs. Firstly in a brief way, or *sabīl al-Ijāz* as the author did and secondly in detail, or *sabīl al-Bast*.²⁰ The male heirs in brief are ten in number while in detail, there are fifteen as shown in Table 2.1 below.

Table 2.1: Male heirs in Detail.

1. Son	6. Consanguine brother	11. Father's consanguine brother
2. Son's son and below	7. Uterine brother	12. Son of father's full brother
3. Father	8. Son of full brother	13. Son of father's consanguine brother
4. Grandfather and above	9. Son of consanguine brother	14. Husband
5. Full brother	10. Father's full brother	15. Patron

Source: Taqiyyuddīn Abī Bakr Bin Muḥammad al-Ḥusaynī, *Kifāyah al-Akhyār fī Ḥalli Ghāyah al-Ikhtiṣār*, Beirut, Dār al-Khair, 1991, p. 328

If all male heirs mentioned above are living, only three of them will inherit, as they are the closest heirs to the deceased compared to other. They are father, son and husband.²¹

There are seven female heirs according to *sabīl al-Ijāz* (in brief). In detail or *tarīq al-Baṣṭ* they are 10 individuals as shown in the table 2.2 below.²²

Table 2.2: Female Heirs in Detail

1. Daughter	3. Mother	5. Mother's mother	7. Consanguine sister	9. Wife
2. Son's daughter and below	4. Father's mother	6. Full sister	8. Uterine sister	10. Patroness

Source: Taqiyyuddīn Abī Bakr Bin Muḥammad al-Ḥusaynī, *Kifāyah al-Akhyār fī Ḥalli Ghāyah al-Ikhtiṣār*, Beirut, Dār al-Khair, 1991, p. 328.

If all the female heirs mentioned above are living, only five of them will inherit. They are daughter, son's daughter, mother, full sister and wife as they are the closest relative to the deceased compare to others. If all heirs from both male and female side as mentioned above are present, only five of them will inherit and they are as mentioned by the author in the third paragraph of the text, i) husband ii) wife iii) mother iv) father v) children of the deceased

All the heirs mentioned above, according to the Shāfi'ī and other Sunnī schools, may be placed in three main categories i.e. *aṣḥāb al-Furūḍ* or Quranic sharers, '*aṣabah* or agnates and *dhawū al-Arḥām* or cognates. The *dhawū al-Arḥām*, according to an early ruling of the Shāfi'ī school could not inherit; however later jurists stated that they could inherit in the case of *al-Radd* when the *bait al-Māl* was not being administered justly by the ruler.²³

The Shī'ī school however, did not recognise the concept of '*aṣabah*'²⁴ and therefore heirs in their system fall into two categories i.e. (i) heirs by specific reasons i.e. marriage and *walā'* such as in the case patronage or the position of *Imām* (religious leader), and (ii) heirs by blood relationship: this group is divided into three categories based on their degree of closeness to the deceased without distinguishing whether they are from the agnate (*aṣabah*) or cognate (*dhawū al-Arḥām*) side. The first category consists of parents and the deceased's children and their descendants. The second consists of deceased's brothers and sisters as well as the grandfather and grandmother. Finally, the third category consists of the deceased's paternal and maternal uncle and aunt and their

descendants. Of these three, the upper will exclude the lower. For example, an heir from the first category will exclude the heirs from the second category even though he or she is the only heir in that category. The same principle is applied in each category where the nearer will exclude the more remote.²⁵

ii:Text 170

وَمَنْ لَا يَرِثُ بِحَالٍ سَبْعَةُ الْعَبْدِ وَالْمَدْبَرِ وَأُمُّ الْوَلَدِ
وَالْمُكَاتَبُ وَالْقَاتِلُ وَالْمُرْتَدُّ وَأَهْلُ الْمِلَّتَيْنِ.

Translation

Those who cannot inherit in any circumstances are seven in number: i) slave ii) the slave who has been given a contract to be freed after his master's death²⁶ iii) the slave who has been given a contract to his freedom after he or she can fulfil the condition prescribed by their master.²⁷ iv) a female slave who has given birth to her master's child²⁸ v) Murderer vi) apostate vii) member of two religions.

Elaboration

In this text, the author specifies the preventative causes or impediments to succession scheme i.e. slavery and its categories, homicide, apostasy and difference of religion.

i) Slavery and its category

The first cause is slavery regardless of its category whether *mudabbar*, *mukātab* or *ummu al-Walad*. This impediment, however, has no practical effect in the modern world and therefore it has not been mentioned in the modern legislation such as in the Egyptian Inheritance Law of 1943 and the Syrian Law of Personal Status of 1953.

ii) Homicide

The second cause, which can lead to the total exclusion, is being a murderer of the owner of the property. This is in accordance with the *ḥadīth*, which stated, "*the murderer will not inherit*".²⁹

The Sunnī and Shī'ī schools all agree that intentional or unjustifiable killing are unlawful acts, which prevent the killer from succeeding to the property. However, there is a considerable divergence among the schools as to the precise circumstances in which homicide constitutes a bar to inheritance.

In this matter, the ruling of the Shāfi'ī school is more rigid than the others. This is because in the view of the Shāfi'ī school the killer cannot inherit from his or her victim. This principle covers every case of homicide, whether it was deliberate or accidental, direct or indirect, actionable (punishable offence) or non-actionable that is a homicide resulting from exercising a legal duty such as in the case of *al-Qiṣāṣ* or retaliation. In

other words, any heir (whether minor or lunatics) that has had a hand in the death of the deceased, no matter how it occurred, is prevented from the succession scheme.³⁰

In the Ḥanafī school, the principle rests firmly upon the criterion of causation in homicide and stresses that only a direct (deliberate or accidental) or actionable homicide can debar the killer from succession scheme.³¹ In the view of the Ḥanbalī school, any actionable homicide whether deliberate or accidental, direct or indirect, is regarded as an impediment to succession scheme but not non-actionable homicide. Minor and lunatics are not debarred from inheriting even if they are guilty of deliberate and unlawful homicide, because they are not legally capable of forming a criminal intent.³²

The Mālikī school's view is that actionable homicide committed deliberately constitutes a bar to inheritance. In the case of accidental homicide, the killer will not be prevented from the succession scheme but cannot inherit from *al-Diyah* or blood money. Minors and lunatics are not to be excluded, as they are by the Ḥanafī school even if they are found guilty.³³ Probably because the view of this school is more rational and produces a greater benefit for the public, it has been adopted by the Egyptian Inheritance Law of 1943³⁴ and the Syrian Law of Personal Status of 1953.³⁵

Under Shī'ī law the principle of impediment is based upon the presence of criminal intent. Therefore, only a deliberate homicide will constitute a bar to succession. Regarding minors and lunatics, the Shī'ī view is similar to that of the Ḥanafī and Mālikī schools.³⁶

iii) Apostasy

The third factor of being prevented from the succession is an apostasy or *murtadd*. A *murtadd* is one who voluntarily renounces the Islamic faith.³⁷ The jurists are unanimously agreed that an apostate cannot inherit from a Muslim but they differ in regard to whether property left by an apostate can be inherited or not. The Shāfi'ī³⁸ concur with the Mālikī³⁹ and Ḥanbalī⁴⁰ schools in holding that the estate of an apostate cannot be inherited by their Muslim heirs but must be forwarded to the *bait al-Māl* or state treasury. This is because the property was regarded as *al-Fai'* or spoils of war.

The Ḥanafī school however, divides the property of a male apostate into two categories. First, there is the property he amassed before becoming an apostate. This property can be inherited by his or her Muslim heirs. Second, there is the property gained after his apostasy. This property cannot be inherited as it is regarded as *al-Fai'* and therefore must be forwarded to the *bait al-Māl*. Where the apostate is a woman, her property according to the Ḥanafī school can be inherited by her Muslim heirs. Also her apostasy will not incur the death penalty, because of the *ḥadīth* which prohibits killing a woman.⁴¹

Under Shī'ī law, however while an apostate cannot inherit from a Muslim, a Muslim can inherit from an apostate. If the apostate takes refuge and dies in the *dār al-Ḥarb* or abode of conflict,⁴² leaving behind non-Muslim descendants, his or her property remaining in the *dār al-Islām* or territory of Islam⁴³ will be given to the *Imām* or religious leader.⁴⁴

There are no specific provisions concerning this matter in either the Egyptian Succession Law of 1943 and the Syrian Law of Personal Status of 1953. Therefore, it has been assumed that in such case, the judgement would be based on that of the Ḥanafī school of law, the official school followed in the both countries.⁴⁵

iv) Difference of religion

Finally difference of religion is also regarded as a cause leading to the total exclusion from succession because of the clear ruling of the *ḥadīth* "A Muslim cannot inherit from a non Muslim and a non Muslim cannot inherit from a Muslim."⁴⁶ On this basis, all the Sunnī schools hold that Muslims and non-Muslims cannot inherit from each other. However, the Shī'ī school considers that a Muslim can inherit from a non-Muslim but not vice versa.⁴⁷

Apart from these four preventative causes to succession, the Egyptian Inheritance law of 1943 and the Syrian Law of Personal Status of 1953, also provides that non-Muslims can inherit from each other and the difference of country does not prevent succession between Muslims or between non-Muslims except where the law of that country prevents it.⁴⁸

iii: Text 171

وَأَقْرَبُ الْعَصَبَاتِ الْإِبْنُ ثُمَّ ابْنُهُ ثُمَّ الْأَبُ ثُمَّ أَبُوهُ ثُمَّ

الأخ لِلأبِ وَالْأُمِّ ثُمَّ الأَخُ لِلأبِ ثُمَّ إِبْنُ الأَخِ لِلأبِ وَالْأُمِّ ثُمَّ
 إِبْنُ الأَخِ لِلأبِ ثُمَّ العَمُّ عَلَى هَذَا التَّرْتِيبِ ثُمَّ إِبْنُهُ فَإِنْ
 عُدِمَتِ العَصَبَاتِ فَالْمَوْلَى المَعْتَقُ.

Translation

The closest male agnate is the deceased's son then his son then the deceased's father then his father (grandfather), then his full brother, then his consanguine brother, then the son of his full brother, then the son of his consanguine brother, then his paternal uncle, then his son. If there are no such male agnates then the patron will inherit.

Elaboration

In this text, the author enumerates the male heirs of the deceased in order of the closeness of their relationship to the deceased in order to indicate that in the case of *'aṣabah* the fundamental rule applied is that the nearer in degree to the deceased will exclude the more remote. The closeness of such heirs to the deceased is measured or determined according to three grounds. Firstly, class: the heirs are divided into three categories: descendants, ascendants and collaterals. The descendants will exclude the last two classes and the ascendants will exclude the collaterals. Secondly, degree: within the particular class, priority is based on the degree of nearness to the deceased. Thus sons exclude all lower male descendants such as son's son as the father excludes other ascendants such as the grandfather. Thirdly, strength of blood tie: if the surviving heirs

in a particular class are equal in degree the priorities will be based on the strength of blood tie, so that the full brother will exclude the consanguine brother and the consanguine brother will exclude full brother's son.⁴⁹

The word *'aṣabah* literally means male agnates or paternal relationship.⁵⁰ Ibn Manẓūr noted that a man's *'aṣabah* are his sons and his paternal relatives who unite together to protect and defend him from his enemy.⁵¹ In legal terminology, it can be defined as those who are called to take their share only after the *aṣḥāb al-Furūd* have taken theirs.⁵² This group consists of the male agnates who are related to the deceased exclusively through male links as mentioned in the text, as well as female heirs who become agnate by law as explained below.

In the Shāfi'ī school of law as well as other Sunnī schools, the *'aṣabah* is divided into three categories: firstly the *'aṣabah bi nafsihi* (agnates in his own right), secondly the *'aṣabah bi ghairih* (agnates through the right of others) and finally the *'aṣabah ma'a ghayrih* (agnates through the existence of another).⁵³

The *'aṣabah bi nafsih* (agnates through his own right) are the deceased's male relatives who are not related to the deceased through a female link. This can be when;⁵⁴

- * there is no one between him and the deceased, as in the case of the deceased's father or son.
- * or there is someone between him and the deceased, but not a female, such as the deceased's grandfather (father of the deceased's father), the

deceased's son's son, the deceased's full brother or half brother from the same father.

The *'asaba bī ghairih* (agnates through the right of others) are any female of the *aṣḥāb al-Furūd* who requires someone else to be recognised as an agnate and with whom she participates in this agnatic share.⁵⁵ This category is confined to four types of females when they co-exist with males of equal degree and whose share if alone is one-half, and if there are more than one, is a portion of two-thirds. They are:

- * the deceased's daughter (with son),
- * the deceased's son's daughter (with equal son's son)) and so on down
- * the deceased's full sister (with full brother)
- * the deceased's half sister from the same father or consanguine sister (with consanguine brother)

Under the above conditions, they inherit as female agnates and not in their own right (as *aṣḥāb al-Furūd*) but in the right of their male counter-parts, hence they are agnates through the right of others.

The *'asaba ma'a ghayrihi* (agnate through the existence of another) are females of the *aṣḥāb al-Furūd* who require someone else in order to become *'aṣabah* but with whom she does not share the agnatic share.⁵⁶ The females of the *aṣḥāb al-Furūd* that fall into

this category are the deceased's full and consanguine sisters. They will inherit as female agnates with the daughter or son's daughter if there is no other nearer male agnatic heir⁵⁷

In the Shāfi'ī and other Sunnī schools the heirs from the group of *'aṣabah* even when they are female, are preferred over the *dhawī al-Arḥām* or cognates. In the Shī'ī school however, the concept of *'aṣabah* and the supremacy of the male *'aṣabah* is not recognised at all as mentioned earlier. Therefore, all heirs by blood relationship are treated similarly whether they are from the mother's side or cognate (*dhawī al-Arḥām*) or the father's side or agnates (*'aṣabah*). The priority among these heirs is based on their degree of closeness to the deceased. The differences between the *Sunnī* and *Shī'ī* schools in treating the male and female heirs will be further discussed in section 2.5.

In the following texts (from text 172-178) the author concentrates on describing the share of the *aṣḥāb al-Furūḍ* the primary heirs as prescribed in *al-Āyāh al-Mawārīth* or verses of inheritance (Q. 4: 11, 12 and 176).

iv: Text 172

وَالْفُرُوضُ الْمَذْكُورَةُ فِي كِتَابِ اللَّهِ تَعَالَى سِتَّةُ النِّصْفِ
وَالرُّبْعِ وَالثُّمْنِ وَالثُّلثَانِ وَالثُّلثِ وَالسُّدُسِ.

Translation

The fixed shares mentioned in the Quran are six in number: half, quarter, one eighth, two thirds, one-third and one sixth.

Elaboration

Those heirs whose share has been fixed by the Quran in one of the three verses of inheritance mentioned above are known as *aṣḥāb al-Furūd*. This group of heirs consists of nine individuals:

- i) husband,
- ii) wife or wives,
- iii) mother
- iv) father
- v) daughter (s)
- vi) Uterine brother (s) or brother on the mother's side
- vii) Uterine sister (s) or sister on the mother's side.
- viii) Germane sister (s) or full sister
- ix) Consanguine sister (s) or sister on the father's side

Regarding the sharers in this category, jurists of both Sunnī and Shī'ī School have unanimously agreed that this category are primary heirs under rules of *farā'id* and so the heirs from other categories can only take their share after every single sharer in this group

has taken theirs. The share allocated for each sharer in this group is described by the author in the following texts.

v: Text 173

فَالنِّصْفُ فَرَضٌ خَمْسَةَ الْبِنْتِ وَبِنْتِ الْإِبْنِ وَالْأُخْتِ مِنَ الْأَبِ
وَالْأُمِّ وَالْأُخْتِ مِنَ الْأَبِ وَالزَّوْجِ إِذَا لَمْ يَكُنْ مَعَهُ وَلَدٌ.

Translation`

Half of the property is assigned to five individuals: (i) daughter (ii) son's daughter (iii) full sister (iv) consanguine sister (v) husband

Elaboration

Those who are eligible to receive half of the inheritance as described by the author in the text only obtain this under certain conditions.

A daughter gets half of the inheritance if she is the only surviving daughter as prescribed

in Q. 4: 11 (وَإِنْ كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ) which means “If only one, her share (the

daughter) is a half.”

A son's daughter gets half under two conditions: (i) when he is the only son's daughter and (ii) in the absence of a daughter. The share of a son's daughter is determined by an *ijmā'* or juristic consensus.⁵⁸

The full sister of the deceased gets half of the inheritance if she is the only full sister living as prescribed in Q. 4: 176 (وَلَهُ أُخْتٌ فَلَهَا نِصْفُ مَا تَرَكَ^ع) means "if a man dies

leaving a sister, but no child". The word "أُخْتٌ" or sister in this verse also includes the consanguine sister. Thus if the consanguine sister is the only surviving sister, she also will get half of the inheritance.

Finally the husband also gets half on condition that deceased left no son or son's son, as mentioned in Q. 4:12 (وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَاجُكُمْ إِنْ لَمْ يَكُنْ لَهُنَّ وَلَدٌ^ع) means

that "in that which your wives leave, your share is a half if they have no child".

vi: Text 174

وَالرُّبُعُ فَرَضُ الْإِثْنَيْنِ الزَّوْجِ مَعَ الْوَالِدِ أَوْ وَلَدِ الْإِبْنِ وَهُوَ فَرَضُ
الزَّوْجَةِ وَالزَّوْجَاتِ مَعَ عَدَمِ الْوَالِدِ أَوْ وَلَدِ الْإِبْنِ.

Translation

A quarter of the property is assigned to two individuals: (i) husband if his own children or his son's children are living (ii) it is the share of the wife or wives provided that neither her own children nor son's children survive.

Elaboration

In this text, the author stressed that son's children are given the priority to inherit over the daughter's children. This is another example of how the Sunnī schools preferred the son's children over the daughter's children. This is because son's children are from category of *'aṣabah* while the daughter's children are from the category of *dhawū al-Arḥām*. Under the Sunni law *'aṣabah* is given the priority over the *dhawū al-Arḥām*. The Shī'ī law in contrast, make no distinction between a daughter's children and a son's children. Both of them will reduce the share of the husband from half to one fourth and reduce the share of the wife from one fourth to one eighth as prescribed in Q.4: 12.⁵⁹

For the husband one fourth (*فَإِنْ كَانَ لَهُنَّ وَلَدٌ فَلَكُمْ الرُّبْعُ مِمَّا تَرَكَنَّ*) means that “

if they (the wives) leave a child, you get a fourth of that which they leave”). While for

the wife or wives their share is one eighth (*فَإِنْ كَانَ لَكُمْ وَلَدٌ فَلَهُنَّ الثُّمُنُ مِمَّا تَرَكَتُمْ*)

which mean that “ if you leave a child, they get an eighth of that which you leave”.

vii: Text 175

وَالثُّمْنُ فَرَضُ الزَّوْجَةِ وَالزَّوْجَاتِ مَعَ الْوَلَدِ أَوْ وَلَدِ الْإِبْنِ

Translation

One eighth is the share assigned to the wife or wives whose children or son's children are living.

Elaboration

The share of the wife or wives if the deceased's children are living is prescribed in Q. 4:12 as stated above. If the deceased leaves more than one wife, they will share the one eighth equally.

viii: Text 176

وَالثُّلْثَانِ فَرَضُ أَرْبَعَةِ الْبَنَاتِ وَبِنْتِي الْإِبْنِ وَالْأُخْتَيْنِ مِنَ
أَبٍ وَالْأُمِّ وَالْأُخْتَيْنِ مِنَ الْأَبِ.

Translation

Two-thirds is the share of four individuals: (i) two daughters (ii) two sons' daughters (iii) two full sisters (iv) two consanguine sisters.

Elaboration

In this text the author states that the above individuals get two-thirds from the inheritance when they are two in number such as two daughters, two sons' daughters and so on. But in fact "two" here means any number greater than one. This is clearly indicated in the Q.

4:11 (فَوْقَ اثْنَتَيْنِ) where the meaning is two or more.

Therefore, two daughters or more will share two thirds of the inheritance as prescribed by

Q. 4: 12 (فَإِنْ كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ) which means that "if there

are two females for them two thirds of the inheritance". Two sons' daughters (or more) will share two thirds if the deceased leaves no surviving son. This share is based on an *ijmā'* or juristic consensus.⁶⁰ Two-thirds of the inheritance is also the share assigned to two full sisters or more in the absence of the deceased's daughters or the son's daughters.⁶¹ It is also the share assigned to two consanguine sisters or more as prescribed

in Q. 4:176 (فَإِنْ كَانَتَا اثْنَتَيْنِ فَلَهُمَا الثُّلثَانِ مِمَّا تَرَكَ) which means that “if there two sisters, they shall have two thirds of the inheritance”.

ix: Text 177

وَالثُّلْثُ فَرَضُ اثْنَيْنِ الْأُمُّ إِذَا لَمْ تُحْجَبْ. وَهُوَ لِلْإِثْنَيْنِ
فَصَاعِدًا مِنَ الْإِخْوَةِ وَالْأَخَوَاتِ مِنْ وَلَدِ الْأُمِّ.

Translation

One third is the share of two individuals: (i) mother if not prevented (ii) it is for two or more of the uterine siblings.

Elaboration

In the case of the mother, her share is one third if not prevented by the son or son's children as prescribed in Q. 4: 11 (فَإِنْ لَمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَتْهُ أَبْوَاهُ فَلِأُمِّهِ الثُّلْثُ)

which means that “If the deceased left no children and the parents are the only heirs, the mother has a third”.

One third is also the share of uterine siblings when they are two or more in number. This

is in accordance with Q. 4: 12 (*فَإِنْ كَانُوا أَكْثَرَ مِنْ ذَلِكَ فَهُمْ شُرَكَاءُ فِي الثُّلُثِ*) which

means that “if they are more than two, they shall share the one third”.

x: Text 178

وَالسُّدُسُ فَرَضُ سَبْعَةِ الْأُمِّ مَعَ الْوَالِدِ أَوْ وَلَدِ الْإِبْنِ أَوْ ابْنَيْنِ
فَصَاعِدًا مِنَ الْإِخْوَةِ وَالْأَخَوَاتِ، وَهُوَ لِلْجَدَّةِ عِنْدَ عَدَمِ الْأُمِّ
وَلِبْنَتِ الْإِبْنِ مَعَ بِنْتِ الصُّلْبِ. وَهُوَ لِلأُخْتِ مِنَ الْأَبِ وَالْأُمِّ.
وَهُوَ فَرَضُ الْأَبِ مَعَ الْوَالِدِ أَوْ وَلَدِ الْإِبْنِ وَفَرَضُ الْجَدِّ مَعَ
عَدَمِ الْأَبِ. وَهُوَ فَرَضُ الْوَاحِدِ مِنَ وَلَدِ الْأُمِّ.

Translation

One sixth is the share of seven individuals: (i) the mother if her children or son's children or two or more of brothers or sisters are living (ii) the grandmother if the mother is no longer living (iii) the son's daughter if the deceased's daughter is living (iv) the sister on the father's side (consanguine sister)⁶² and also the sister from the same father and mother (full sister) (v) the father if the deceased's children or son's children are living (vi) the grandfather if the father is no longer living (v) a single brother or sister on the mother's side (uterine sibling).

Elaboration

The mother, if her children and her son's children are living, gets one sixth as prescribed

in Q. 4:11 (وَالْأَبَوِيَّهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِن كَانَ لَهُ وَلَدٌ) which

means that “for parents a sixth share of inheritance to each if the deceased left children”.

The mother also gets one-sixth if two or more brothers or sisters of the deceased are

living as stated in Q. 4:11 (فَإِن كَانَ لَهُ إِخْوَةٌ فَلِأُمِّهِ السُّدُسُ) which means that “if

the deceased left brothers or sisters, the mother has a sixth”.

The grandmother and above on either mother's or father's side receives one sixth. The share of the grandmother has not been mentioned in the Quran but was determined by the *sunnah* where the Prophet gave one sixth to the grandmother in the absence of mother. If there is more than one grandmother, they will share the one-sixth equally.⁶³

The son's daughter, if the deceased's daughter is living gets one sixth as stated in the *ḥadīth* that the prophet said that “for the daughter, half and for the son's daughter one sixth and the remainder is for the sister”⁶⁴

The father also get one sixth if the deceased's children or deceased's son's children as

prescribed in Q.4: 11 (*وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ*)

which means that “for parents, a sixth share of inheritance to each if the deceased left children”.

The grandfather's share is like the father, thus he is called upon to inherit only when the father does not exist.⁶⁵ Finally a single uterine sister or brother as stated in t Q.4:12

(*وَلَهُ أَخٌ أَوْ أُخْتٌ فَلِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ*) which means “if the deceased left a

brother or a sister, each one of the two gets one sixth”.

xi: Text 179

وَتَسْقُطُ الْجَدَّاتُ بِالْأُمِّ وَالْأَجْدَادُ بِالْأَبِ، وَيَسْقُطُ وَلَدُ الْأُمِّ مَعَ
أَرْبَعَةِ الْوَالِدِ وَوَلَدِ الْإِبْنِ وَالْأَبِ وَالْجَدِّ، وَيَسْقُطُ الْأَخُ لِلْأَبِ
وَالْأُمِّ مَعَ ثَلَاثَةِ الْإِبْنِ وَالْإِبْنِ وَالْأَبِ وَيَسْقُطُ وَلَدُ الْأَبِ
بِهِؤَلَاءِ الثَّلَاثَةِ وَبِالْأَخِ لِلْأَبِ وَالْأُمِّ.

Translation

The grandmother is excluded by the mother and the grandparents are excluded by the father, and the mother's children are excluded by four individuals: (i) deceased's children, his son's children and his father and grandfather. The full brother is excluded by three individuals: son and son's son and father. The consanguine brother is excluded by those three individuals and by the full brother.

Elaboration

In this text, the author explains the rule of *al-ḥajb* or exclusion among the heirs by blood relationships. As far as the rules of *farā'id* are concerned, there are two types of exclusion. First, there is *ḥajb bī al-waṣf* or exclusion due to the specific reasons, which prevent the heirs from the succession scheme such as being a killer of the *propositus* or being an apostate, as mentioned earlier (see discussion of text 170). Second, there is *ḥajb bī al-Shakhs* or exclusion by person, which means that the existence of the nearest heirs to the deceased will exclude the more remote. This type of exclusion may occur in two situations. Firstly the exclusion of such heirs due to the existence of nearer heirs known *al-Ḥajb al-Ḥirmānī* or total exclusion such as when the grandmother is excluded by the mother, the grandfather by the father, the son's son by the son, the consanguine brother by full brother and so on.⁶⁶

Secondly is *al-Ḥajb al-Nuqṣānī* or a partial reduction of a share due to the claims of other living heirs: for instance the existence of the deceased's children reduces the husband's share from half to one fourth and the wife's share from one third to one sixth.⁶⁷

xii: Text 180

وَأَرْبَعَةٌ يُعَصِّبُونَ أَخَوَاتِهِمْ إِبْنُ وَإِبْنُ إِبْنٍ وَالْأَخُ مِنَ الْآبِ
وَالْأُمُّ وَالْأَخُ مِنَ الْآبِ.

Translation

There are four individuals who can agnatis their sisters and they are a son, a son's son, a full brother and a consanguine brother.

Elaboration

This text enumerates the four male heirs who can agnatis a female heirs either to become as (i) '*aṣabah bi ghairih*' which means agnate through the right of others or (ii) '*aṣabah ma'a ghairih*' or agnate through the existence of another. Both of these categories have been explained in the discussion of text no. 171. Regarding to the allotted share, the male gets double the share received by the female heirs as prescribed in Q. 4:11

(لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثِيَيْنِ) which means that "to the male a portion equal to that of two

females".

xiii: Text 181

وَأَرْبَعَةٌ يَرِثُونَ دُونَ أَخَوَاتِهِمْ وَهُمْ الْأَعْمَامُ وَبَنُو الْأَعْمَامِ
وَبَنُو الْأَخِ وَعَصَبَاتُ الْمَوْلَى الْمُعْتَقِ.

Translation

There are four individuals who can inherit but not their sisters: they are the paternal uncle and his male descendants, the male descendants of the brother and the male agnates of the patron.

Elaboration

In this final text concerning the subject of *farā'id*, the author once again indicates that according to the Shāfi'ī school a male heir is always given priority over his sister. The sister is excluded because they are in the category of *dhawū al-Arḥām* or cognates.⁶⁸

Literally, *dhawū* means owners while *arḥām* is the plural form of *al-Raḥm*, which means womb or uterus or kinship.⁶⁹ In legal terminology, it means relatives from the female line (mother or daughter) who are neither from the *aṣḥāb al-Furūḍ* nor from the *'aṣabah*.⁷⁰ The Shāfi'ī school hold that this category can only be called to inherit when there are no heirs from the *asḥāb al-Furūḍ* or the *'aṣabah*.⁷¹

The following are the four main categories of *dhawū al-Arḥām*: (i) deceased's false grandparents⁷² such as his mother's father, his paternal grandmother's father, his maternal grandmother's father (ii) descendants of deceased's daughters and son's daughter and below (iii) deceased's brother's daughter (whether full brother or half brother from either parent), his sister's son and below (iv) his paternal aunts and above, maternal uncles and aunts and above.⁷³

As regards patrons, they are allowed to inherit from a slave that they have set free, in accordance with the *ḥadīth* which says "*patronage is like the blood relationship; it can neither be sold nor bought*"⁷⁴

The following sections of this chapter will consider matters, which have not been mentioned by Abū Shujā' in the text such as the elements of succession, the basis for succession and the order of distribution of the inheritance. These matters were probably excluded from the texts because the author's intention was to make his exposition of the subject short and easy for the beginner to understand. Therefore, he concentrated on describing the categories of heirs and their shares as fixed by the Quran, and the principle of exclusion in general.

2.4.1 Condition and Cause of the Succession

According to the Shāfi'ī school, there are three conditions under which succession can take place: (i) the death of the property's owner in reality or by court ruling (ii) the existence of heirs (iii) clearance of any factors, which debar the heirs from the succession scheme. Other Sunnī (Ḥanafī, Mālikī and Ḥanbalī school) and Shī'ī (Imāmiyyah school) concur on this matter.⁷⁵

Regarding the basis of succession, all Sunnī and Shī'ī schools have unanimously agreed that the qualification for succession is based upon three factors, i.e. *al-Qarābah* or blood relationship, *al-Nikāḥ* or marriage and *al-Walā'* or patronage.⁷⁶ However, the Shāfi'ī and Mālikī schools stated that in default of heirs of the first three categories, the inheritance will be forwarded to the *bait al-Māl* (State Treasury)⁷⁷ in accordance with the statement of the prophet "*I am the heir for him who has no heir, he will be under my responsibility and I will inherit from him*".⁷⁸

In this matter the Egyptian Inheritance Law of 1943 accepts the first three factors as the basis for succession.⁷⁹ However, the Syrian Law of Personal Status of 1953 confines the basis for succession to two reasons that is the *al-Qarābah* and *al-Nikāḥ* since the case of *al-Walā'* is no longer in existence in the present day.⁸⁰

- i) *al-Qarābah* or heirs by blood relationship. They are the deceased's descendants (sons and sons' children whether male or female), the deceased's ancestors (parents and

grandparents) and the deceased's siblings (brother and sisters) as well as the paternal or maternal uncles and aunts and their descendants.⁸¹

Among this type of heirs are those: (i) who will inherit merely as *aṣḥāb al-Furūd* such as the mother, (ii) who will inherit as *aṣḥāb al-Furūd* and '*aṣabah* together such as the father, (iii) who will inherit as '*aṣabah* only such as the deceased's brothers, and (iv) who will inherit as *dhawū al-Arḥām* such as maternal uncle.⁸²

ii) *al-Nikāḥ* or marriage

Once the marriage is legally valid, the spouse is entitled to inherit from his partner's estate even when his or her partner dies before the occurrence of intercourse between them.⁸³

For the cases of *ṭalāq al-Raj'ī* or revocable divorce the jurists of both Sunnī and Shī'ī schools have unanimously agree that the wife may inherit from her husband's property.⁸⁴

A similar ruling have been inserted in Section 11 of Egyptian Inheritance law of 1943 and section 268 (2) of Syrian Law of Personal Status of 1953.

However, the jurists' views differ in the case where the husband divorces his wife with *ṭalāq al-Bā'in* or irrevocable divorce during his death illness in order to exclude her from the succession. In the opinion of the Ḥanafī school, if the wife is still in her '*iddah* (waiting period before she can remarry) she is still entitled to inherit and the unjust or bad intention of her husband is to be disregarded. The Mālikī school holds that she can still

inherit even if she has finished her *'iddah* and has remarried as she is deemed to deserve to inherit in her own right without any limitation.⁸⁵

The Shāfi'ī school however, holds that once the divorce becomes irrevocable divorce, the wife loses her right to inherit regardless of the intention of her previous husband,⁸⁶ the Ḥanbalī school considers that the wife can still inherit as long as she has not remarried.⁸⁷ Finally, in the view of the Shī'ī school she is entitled to inherit as long as she is still in her *'iddah* and within the period of one year from the date of the divorce.⁸⁸

Regarding this case, the Egyptian Inheritance Law of 1943 and Syrian Law of Personal Status of 1953⁸⁹ are in accordance with the view of the Ḥanafī school; but in the researcher's opinion the ruling of Mālikī school is more just because the wife has been treated unfairly, and therefore she should be given the chance to inherit without any limitation.

iii) *al-Walā'* or patronage

Regarding the case of patronage case all the jurists agree that the patron or patroness may be heir to an enfranchised slave but not vice versa.⁹⁰

2.4.2 Order in the Distribution of Inheritance

Prior to the distribution of the inheritance among the heirs, there are a number of obligations which need to be discharged as prescribed by the Quran in the following verses

- i) (مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ) which means “(the distribution in all cases is) after the fulfilment of the deceased’s will or the payment of debt.”⁹¹
- ii) (مِنْ بَعْدِ وَصِيَّةٍ تُوصُونَ بِهَا أَوْ دَيْنٍ) which means “after payment of legacies you may have bequeathed, or of debt.”⁹²

As a matter of fact, although the Quran mentions the settlement of the deceased’s will before the payment of a debt, in practice it seem that the payment of debt is given the priority over the fulfilment of the deceased’s will. It was reported from ‘Alī ibn Abī Ṭālib said that “you read this verse “ *after the settlement of wasiyyah and debt*” but the prophet settled the debt before the *wasiyyah*”.⁹³ This is probably because the matter of debt involves the rights of other parties, which in whatever circumstances have a prior claim. *Wasiyyah* however, does not involve the rights of other parties, and represents only the wishes of the deceased.

According to the Shāfi‘ī school, these obligations are to be discharged in the following order: (i) settling the *ḥuqūq al-‘Ainiyyah* or right associated with the estate which has a

monetary value such as the right of the seller to receive proceeds of the sale or the right of the mortgagee in a mortgage; (ii) funeral expenses, which should be deducted from the property left by the deceased without superfluity of expenses yet without deficiency; (iii) the payment of debts if any; (iv) the fulfilment of the deceased's will if any; (v) the distribution of the residue of the estate among the legal heirs.⁹⁴ This sequence or order of settling the deceased's property as mentioned above is agreed upon by both the Ḥanafī⁹⁵ and Mālikī⁹⁶ school but the Ḥanbalī⁹⁷ school holds that when a person dies, the burial expenses must have priority, even if there are some unsettled claims on the deceased's property. Secondly, the payment of debts if any. Thirdly, the fulfilment of the deceased's will if any and finally the distribution among the rightful heirs.

In regard to *waṣiyyah*, the Egyptian Inheritance Law of 1943 and the Syrian Law of Personal Status 1953 provided that priority must be given in settling the *waṣiyyah al-Wājibah* or obligatory bequest before the ordinary bequest. The *waṣiyyah al-Wājibah* is a new provision created to protect the interest of orphan grandchildren. Under the Egyptian Inheritance law of 1943, this provision was designed to apply to both the son's son and son's daughter.⁹⁸ However, under the Syrian law only son's son is allowed to benefit from this provision.⁹⁹

In regard to distributing the inheritance among the heirs, the Shāfi'ī, Mālikī and Ḥanbalī schools consider that it should be proceed in the following order (i) firstly to the *aṣḥāb al-Furūq* or Quranic sharers, (ii) to the *'aṣabah al-Nasabīyyah* or agnate by blood relationship, (iii) to the *al-Mu'tiq* (patron), (iv) to the *bait al-Māl* (state treasury). If the

administration of the *bait al-Māl* was unstable due to unjust ruler then (v) the doctrine of *al-Radd* or return will be applied, i.e. the remainder of the estate is distributed once again to the *aṣḥāb al-Furūd* other than the spouse then to the '*aṣabah* and (vi) in the absence of those mentioned in group (v) above the residue of the property will be given to the *dhawū al-Arḥām*.¹⁰⁰

According to the Ḥanafī school, however, the estate goes (i) to the *aṣḥāb al-Furūd* (ii) to the '*aṣabah al-Nasabīyyah* (iii) to the '*aṣabah al-Sababīyyah* i.e the patron and if these heirs do not exist then (iv) the principle of *al-Radd* will be applied; that is, the inheritance will be redistributed to the *aṣḥāb al-Furūd* (other than the spouse) and '*aṣabah* then (v) to the *dhawū al-Arḥām* then (vi) the residue if any will be given to the spouse by the means of *al-Radd* then (vii) to the *maulā al-Muwālah* or succession by contract or friendship. (viii) Legatee (*mūṣā lahī*) for more than one third (ix) if there still a remainder it the will be forwarded to *bait al-Māl* or state treasury.¹⁰¹

Regarding this matter, the Egyptian Inheritance Law of 1943 and the Syrian Law of Personal Status of 1953 follow the view of Ḥanafī school but suspend the priority of the '*aṣabah al-Nasabīyyah* so that they can inherit only after redistribution to the spouse under the principle of *al-Radd*. For the sake of clarity, the order of distribution according to the Egyptian and Syrian laws is as follows:¹⁰²

- (i) *Aṣḥāb al-Furūd*
- (ii) '*Aṣabah al-Nasabīyyah*

- (iii) *al-Radd* to other than spouse
- (iv) *Dhawū al-Arḥām*
- (v) *al-Radd* to the spouse if the *dhawū al-Arḥām* was not in existence
- (vi) '*Aṣabah al-Sababīyyah*¹⁰³
- (vii) Inheritor by claim (by the *propositus* before he or she passed away)
- (viii) Legatee for more than one third
- (ix) *Bait al-Māl* or State treasury

2.5 Discussion on the Rules of Priority Among Heirs

As mentioned earlier, according to the Shāfi'ī and other Sunnī schools, among the heirs other than the *aṣḥāb al-Furūd*, the male heir is given priority over the female. For instance, the son's son is given priority over the son's daughter. This is because the son's son is regarded as '*aṣabah* while the son's daughter is regarded as *dhawū al-Arḥām*. In the Sunnī schools the '*aṣabah* group is given priority to inherit before the *dhawū al-Arḥām*. However, the Shī'ī school directs that heirs other than the *aṣḥāb al-Furūd* are to be treated similarly whether male or female. The difference in treatment of the heirs can be seen in the following examples.

- (i) If the son is the sole heir he will take all the inheritance as '*aṣabah* after receiving his prescribed share as *aṣḥāb al-Furūd*. But if the sole heir is the daughter of the deceased, she cannot take all the inheritance, as is the case with son. She can only take her prescribed share (half of the inheritance) while the residue of the inheritance will be

forwarded to the *bait al-Māl* or state treasury. Under Shī'ī law, she is entitled to all the property (half as prescribed for her and the other half in accordance with on the principle of *al-Radd*) since female heirs is treated similarly to male heirs.¹⁰⁴

(ii) If the deceased is survived by mother and daughter, according to Sunnī schools the mother takes one sixth and the daughter takes half while the residue will be taken by a male agnate (by the grandfather if living, if not, the residue will be given to the deceased's brother if living, if not the residue of the inheritance will be given to the deceased's consanguine brother. If, however, there are no male agnates the residue of the inheritance will be forwarded to the *bait al-Māl*). Shī'ī law however, provides that the residue of the inheritance goes to the daughter.¹⁰⁵

(iii) If the deceased is survived by the father, mother and daughter's son. The father will take two third and the mother one third, while the daughter's son will receive nothing. Shī'ī law however, allows the father to take one third, the mother one sixth and the daughter's son half.¹⁰⁶

The main reason given by the Sunnī schools for establishing the principle which favours the male heirs over the female is based on the *ḥadīth* narrated by Ibn 'Abbās "give the residue of the inheritance to the closest male heirs after the Quranic sharers have taken their prescribed share".¹⁰⁷ Therefore, the Sunnī schools divide the heirs into three categories. They are *aṣḥāb al-Furūd*, *'aṣabah* and *dhawū al-Arḥām*.¹⁰⁸ Between the last

two categories priority is given to the male *'aṣabah* in accordance with the *ḥadīth* narrated by Ibn 'Abbās.

The Shī'ī school, however do not recognised the concept of *'aṣabah* or agnates and the supremacy of male agnates as they consider that the *ḥadīth* narrated by Ibn 'Abbās to be a *maudū'* or fabricated *ḥadīth*.¹⁰⁹ They perceive the preservation of the concept of *'aṣabah* in the Sunnī schools as a continuation of the practice of the Arab customary law which had been totally abrogated by the Quran. According to Shī'ī school the Quran has laid down a totally new law of succession replacing the Arab customary law. From the perspective of Sunnī schools, however, Islam did not establish a new law but merely modified the existing Arab customary law by superimposing upon it a new category of sharer previously excluded from the succession. These male agnates still inherit but as secondary heirs, which means that they only inherit the residue of the inheritance left by the newly created sharer *aṣḥāb al-Furūd*.¹¹⁰

2.6 The Superimposition Theory

The conservation of the concept of *'aṣabah* in the Sunnī schools has led to the establishment of the superimposition theory. The theory has been emphasised by western scholars such as Robertson Smith,¹¹¹ Coulson,¹¹² Schacht¹¹³, Power,¹¹⁴ and Cilaro¹¹⁵ in order to promote the conclusion that the Islamic law of inheritance is derived from pre-Islamic Arab customary law; and that the group of *'aṣabah* as defined by Islamic law are identical to the male heirs of tribal customary law and that among these male heirs the

same rule of customary law is applied as in the Islamic law of succession: that is the nearer will exclude the more remote. They therefore argue that *farā'id* has been influenced by Arab customary law.

It is true, as we have seen, that all Sunnī schools acknowledge that there is a connection between Arab customary law and *farā'id* in respect of the rules of priority among the heirs but this does not mean that customary law has the upper hand on Islamic law and *farā'id* in particular. This is because according to Islamic law, customary practices can be accepted as long as they do not contradict the principles of Islamic law. In Islamic law such a customary practice is known as *al-'Urf*, which is divided into two categories: (i) *al-'Urf al-Fāsid* or disapproved custom such as drinking liquor, eating pork, gambling and so on. (ii) *'Urf al-Salīm* or approved custom.¹¹⁶

Shalabī noted that the Prophet, when faced with the question of customary practice, took different stands for example (i) to accept the practice such as in the case of trading, which is based on willingness: of marriage custom, where the woman who is proposed through her guardian and has the right to receive the dowry and is married in front of two witnesses; of the principles of *shūrā* or consultation and so on; (ii) to reject the practice, as in the case of female infanticide, of polyandry marriage and so on; (iii) to accept with amendments such as in the case of *al-Qiṣāṣ* or retaliation and of slavery which can only be accepted in time of war and so on.¹¹⁷

Therefore, the reapplication of the concept of '*aṣabah*', with a few amendments, in the rule of *farā'id* should not be considered as a controversial issue. Under the Arab customary law the '*aṣabah*' group only consisted of male agnates who were capable of fighting for the honour of their tribe. Thus, the elderly and minor were excluded. Under the rules of *farā'id* however, '*aṣabah*' has been reorganised to include those who were excluded by Arab customary law i.e. (i) female heirs such as in the case of '*aṣabah bi Ghairih*' and '*aṣabah ma'a ghairih*' as was discussed earlier, (ii) the elderly and minor. Another major difference is that under the Arab customary laws, '*aṣabah*' was the primary heirs who excluded other family members, while under the rules of *farā'id*, the '*aṣabah*' is no longer considered as the primary heir but as the secondary heirs who only take their share of the remainder of the inheritance after the *aṣḥāb al-Furūd* have taken their share.

2.7 Alternative Distribution Method

In the preceding discussion, we have examined the general working of *farā'id*, the law concerning the distribution of intestate inheritance based on the strictly defined fractional shares prescribed by the Quran. Perhaps the literal meaning of *farā'id* (obligations) may lead to the assumption that Muslims have no option in distributing their inheritance other than *farā'id*. However, the survey of the rules of *farā'id* has shown that in reality the Muslims can divide their inheritance by mutual agreement, as can be seen in the rule of *al-Takhāruj*. Literally *al-Takhāruj* means mutual withdrawal.¹¹⁸ While legally it can be defined as a process of voluntary renunciation of the prescribed share, whether with reimbursement or not, by one or more heirs with the consent of the other heirs

involved.¹¹⁹ All Sunnī schools viewed that the rule of *al-Takhāruj* can be applied as long as there is mutual consent among the heirs. In the Shāfi'ī and Mālikī school the rule of *al-Takhāruj* is known with *al-Ṣulḥ* which means a peaceful settlement.¹²⁰ For example a mother may agree with her son that if he pays her a certain amount of money he can take her prescribed share of the inheritance.¹²¹ This settlement method also can be found in the Egyptian Inheritance Law 1943¹²² and Syrian Law of Personal Status 1953.¹²³

It was reported that a case of *al-Takhāruj* had occurred during the time of caliph 'Uthmān bin 'Affān, who ruled that the wife of Abdul Raḥmān bin 'Auf whom he had divorced during his death sickness, was still entitled to inherit. In this case, however, the divorced wife voluntarily renounced her prescribed share (one eighth) when other wives agreed to reimburse her with a certain sum of money.¹²⁴

It can be concluded from the above description that the Islamic law also allowed Muslims to settle their case without reference to the fractional share prescribed by the Quran as long as the settlement was based on pact. This rule indeed is of some importance as it leaves free to settle the distribution of the deceased's property peacefully.

2.8 Conclusion

In this chapter, the discussion has concerned the Islamic law of intestate inheritance known as *farā'id*. As well as describing the workings of *farā'id* and its principles as enunciated by the Shāfi'ī school and summarised in the work of Abū Shujā' al-Iṣfihānī

(*Matn al-Ghāyah wa al-Taqrīb*), the chapter has reviewed perceptions of other Sunnī and Shī'ī school in order to broaden the context of the discussion.

Regarding the workings of *farā'id*, the chapter has shown that there are no major differences between the Sunnī schools as they unanimously accepted the concept of *'aṣabah*. The Shī'ī school however, do not recognise the concept of *'aṣabah* and its priority, probably due to their different approach to the understanding of the verse regarding inheritance and their acceptance of certain *hadīth*.

The chapter finally stressed that as well as using *farā'id*, Muslims can distribute their inheritance in accordance with the rule of *al-Takhāruj*. The rule of *al-Takhāruj* indicates that the distribution of inheritance in Islam does not have to be based on the system of fractional share described by the Quran but can also be settled by mutual agreement among the heirs.

Notes to Chapter Two

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- ¹ Zaidān, 'Abdul Karīm, *Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah*, Baghdād, Maktab al-Quds, 1985, p. 216.
- ² Quran 2: 30.
- ³ Quran 2: 284.
- ⁴ Quran 2: 29.
- ⁵ Madkhūr, Muḥammad Salām, *al-Madkhal al-Fiqh al-Islāmī*, Dār al Naḥḍah al-'Arabīyyah, Cairo, 1969, p. 484-85.
- ⁶ Zaidān, *Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah*, p. 216.
- ⁷ Ibid.
- ⁸ Ibid.
- ⁹ al-Sharbīnī Muḥammad ibn Aḥmad, *Mughnī al-Muḥtāj*, Egypt, Muṣṭafā al-Bābī al-Ḥalabī wa Aulāduh, 1958, vol 3, p. 3. See also al-Dardīr, Aḥmad ibn Muḥammad, *al-Sharḥ al-Kabīr bi Ḥāshiyah al-Dasūqī*, Egypt, Muṣṭafā al-Bābī al-Ḥalabī wa Aulāduh, vol. 4, p. 457. See also, Ibn Rusḥd, Muḥammad ibn Aḥmad al-Qurtubī, *Bidāyah al-Mujtahid wa al-Nihāyah al-Muqtaṣid*, Egypt, Muṣṭafā al-Bābī al-Ḥalabī wa Aulāduh, 1975, vol. 2, p.211.
- ¹⁰ al-Zayla'ī, 'Abd Allāh ibn Yūsuf, *al-Tabyīn al-Haqā'iq*, Maṭba'ah al-Amīriyyah, Egypt, n.d., vol.6, pp.202-203.
- ¹¹ See al-Bujayrīmī, Sulaimān ibn 'Umar, *Sharḥ Manhaj al-Tullāb*, Egypt, Muṣṭafā al-Bābī al-Ḥalabī Wa Aulāduh, 1958, vol 3, p.244. See also al-Sharbīnī, *Mughnī*, vol 3, p.3. See also Ibn 'Ābidīn, *Ḥāshiyah*, vol. 5, p.537. See also al-Ḥaṣrī Aḥmad, *al-Tarikah wa al-Waṣaya fī al-Fiqh al-Islāmī*, Maktabah al-Aqṣā, Jordan, 1972, p. 7. See also Mūsā Muḥammad Yūsuf, *al-Tarikah wa al-Mirāth fī al-Islām*, Dār al-Ma'rifah, Cairo, 1967, pp. 73-74.
- ¹² Nāṣif, Maṣṣūr 'Alī, *al-Tāj al-Jāmi' lī al-Usūl fī Aḥādīth al-Rasūl*, Istanbul, al-Maktabah al-Islamiyyah, n.d, vol. 2, p. 250.

- ¹³ Wehr, Hans, *A Dictionary of Modern Written Arabic*, Macdonald and Events Ltd., London, 1980, p. 706.
- ¹⁴ Moulavi, Babu Sahib, *The Law of Inheritance in Islam*, Singapore, 1979, p.2.
- ¹⁵ Mayer, Ann, Elizabeth, "Inheritance", in Esposito, John, L., *The Oxford Encyclopedia of the Modern Islamic World*, New York, Oxford University Press, 1995, Vol. 2, p. 203.
- ¹⁶ Coulson, N.J., *Succession in the Muslim Family Law*, Cambridge University press, Cambridge, 1971. p. 1.
- ¹⁷ This text was also known as *Matn Abī Shujā'*, *Matn al-Taqrīb* and *Ghāyah al-Ikhtisār*.
- ¹⁸ The book begin with the chapter on purification, praying, zakāh, fasting, pilgrimage, trade, *farā'id* and *waṣṣyah*, marriage, jināyah, hudūd, holywar, hunting, slaughtering animals, horse riding and archery, vow, justice and law of evidence and finally freeing the slave.
- ¹⁹ Comments in the bracket are from the researcher.
- ²⁰ Taqiyyuddīn Abī Bakr ibn Muḥammad al-Ḥusaynī, *Kifāyah al-Akhyār fī Halli Ghāyah al-Ikhtisār*, Beirut, Dār al-Khair, 1991. p. 328. See also al-Zuḥaylī, Wahbah, *al-Fiqh al-Islāmī wa Adillatuh*, Damascus, Dār al-Fikr, 1989.p. 281.
- ²¹ Taqiyyuddīn, *Kifāyah*, p. 328,
- ²² Ibid, see also al-Zuḥaylī, *al-Fiqh*, p. 281.
- ²³ al-Nawawī, *Minhāj al-Ṭālibīn*, Egypt, Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī, 1338 H., p. 75. See also al-Sharbīnī, *Mughnī*, vol. 3, p. 6.
- ²⁴ al-Rāwindī, Sa'īd ibn 'Abd Allāh, "Fiqh al-Quran", in Marwārīd, 'Alī Asghar, *Silsilah al-Yanābī' al-Fiqhiyyah*, Beirut, Dār al-Turāth, 1990, vol. 22, p. 238.
- ²⁵ al-'Jarābulṣī, 'Abd al-Azīz ibn al-Barrāj, "al-Muhadhdhab" in Marwārīd 'Alī, *Silsilah al-Yanabi' al-Fiqhiyyah*, Beirut, Dār al-Turāth, 1990, vol. 22, p. 182.
- ²⁶ Bewly, Aisha, *Glossary of Islamic Terms*, Ta-Ha Publisher, London, 1998. p. 123.
- ²⁷ Ibid, p. 124.

- ²⁸ Ibid., p. 129.
- ²⁹ al-Shawkānī, Muḥammad ibn ‘Alī, *Nayl al-Awtār: Sharḥ Muntaqā al-Akhbār min Ahādīth Sayyid al-Akhyār*, Maṭba‘ah al-‘Uthmaniyyah al-Miṣriyyah, Egypt, 1357 H., vol., 6, p. 73. See also Nāṣif, *al-Tāj*, p. 252.
- ³⁰ Taqiyyuddīn, *Kifāyah*, p. 239, al-Nawawī, *Minhāj*, p. 87, Sharbini, *al-Mughnī*, p. 25, al-Ramlī, *Nihāyah*, p. 28-29.
- ³¹ Ibn Qudāmah, Abd Allāh ibn Aḥmad al-Maqdīsī, *al-Mughnī*, Egypt, Maṭba‘ah al-Imām, n.d., vol. 6, p. 339.
- ³² al-Bahūti, Maṣṣūr ibn Yūnus, *Kashshāf al-Qinā‘ An Matn al-Iqnā‘ li Ibn Qudāmah*, Mecca, Maṭba‘ah al-Ḥukūmah, 1352 H, vol. 2, p.600.
- ³³ al-Dardīr, *Al-Sharḥ*, vol.4, p 486. See also Ibn Juzai, *Qawānīn al-Fiqhiyyah*, Morocco, Maṭba‘ah al-Nahḍah, n.d., p. 394.
- ³⁴ See Section 5 of Egyptian Succession Law 1943.
- ³⁵ See section 223 and 264 of Syrian Personal Code 1953.
- ³⁶ al-Ṭarābulsī, “al-Muḥadhdhab” p. 205.
- ³⁷ Bewly, *Glossary*, p. 124.
- ³⁸ al-Nawawī, *Minhāj al-Ṭālibīn*, Egypt, Muṣṭafā al-Bābī al-Ḥalabī Wa Aulāduh, 1338H, p.87. See also al-Ramlī, Muḥammad ibn Ḥamzah, *Nihāyah al-Muhtāj ilā Sharḥ al-Minhāj*, Beirut, Dār al-Kutub al-‘Ilmīyyah, 1993, pp. 27-28.
- ³⁹ Ibn Juzai, *al-Qawānīn*, p. 394.
- ⁴⁰ al-Bahūti, *Kashshāf*, vol. 2, p. 600.
- ⁴¹ Ibn ‘Ābidīn, Muḥammad Amīn bin ‘Umar, *Ḥāshiyah Rad al-Mukhtar ‘Ala al- Durr al-Mukhtār*, Egypt, Muṣṭafā al-Bābī al-Ḥalabī Wa Aulāduh, 1966, vol. 5, p. 797.
- ⁴² Bewly, *Glossary*, p. 37.
- ⁴³ Ibid.
- ⁴⁴ al-Ṭarābulsī, “al-Muḥadhdhab”, p.204

- ⁴⁵ al-Dijwī, Muḥammad, *al-Ahwāl al-Shakhṣiyyah lil Miṣriyyīn al-Muslimīn Fiqhan wa Qadāan*, Cairo, Majlis al-‘Alā lil Shu’ūn al-Islamiyyah, 1392 H, vol. 2, p. 340.
- ⁴⁶ al-Shawkānī, *Nayl al-Awṭār*, vol. 6, p. 74.
- ⁴⁷ al-Ṭarābulṣī, “al-Muhadhdhab”, p. 202.
- ⁴⁸ See section 6 of Egyptian Succession Law of 1943. See Section 263 of Syrian Law of Personal Status of 1953
- ⁴⁹ al-Zuḥaylī, *al-Fiqh*, pp. 335-336.
- ⁵⁰ Lane, E.W., *Arabic-English Lexicon*, London, 1863, Part 5, p. 2059.
- ⁵¹ Ibn Manẓūr, *Lisān al-‘Arab*, Beirut, Dār al-Fikr, 1956, Vol. 1, p. 605.
- ⁵² al-Zuḥaylī, *al-Fiqh*, p. 332.
- ⁵³ al-Zuḥaylī, *al-Fiqh*, pp. 332-340. See also Keller, Noah Ha Mim, *The Reliance of the Traveller; A Classic Manual of Islamic Sacred Law*, Modern Printing Press, Dubai, 1991, pp. 476-494.
- ⁵⁴ Ibid,
- ⁵⁵ Ibid.
- ⁵⁶ Ibid.
- ⁵⁷ Khan, *Islamic law of Inheritance*, pp. 74 – 75.
- ⁵⁸ Taqiyyuddīn, *Kifāyah*, p. 332.
- ⁵⁹ Fawzī, Ibrāhīm, *Aḥkām al-Uṣrah fī al-Jāhiliyyah wa al-Islām*, Beirut, Dār al-Kalimah, 1983, p. 200.
- ⁶⁰ al-Zuḥaylī, *al-Fiqh*, p 291.
- ⁶¹ Ibid., p. 292.
- ⁶² Comments in the bracket are from the researcher
- ⁶³ Taqīyyuddīn, *Kifāyah*, p. 335.
- ⁶⁴ As mentioned in Taqiyyuddīn, *Kifāyah*, p..336

⁶⁵ Ibid, p. 336.

⁶⁶ al-Ṣabūnī, Muḥammad 'Alī, *al-Mawārith fī al-Sharī'ah al-Islāmiyyah fī Ḍau' al-Kitāb wa al-Sunnah*, Beirut, 'Alam al-Kutub, 1985, p. 79.

⁶⁷ Ibid, p. 80.

⁶⁸ The subject of *dhawū al-Arḥām* however, has not been discussed by the author in the text probably because of his view that the *dhawū al-Arḥām* cannot inherit as it was the ruling of the early Shāfi'ī jurist. However, the later Shāfi'ī jurists ruled that the *dhawū al-Arḥām* would be called to inherit in the case of *al-Radd* if the *bait al-Māl* or state treasury was not been administered by a just leader. See al-Nawawī, *Minhāj*, p. 75.

⁶⁹ Wehr, *A Dictionary*, p. 332.

⁷⁰ al-Zuḥaylī, *al-Fiqh*, p. 381

⁷¹ al-Nawawī, *Minhāj*, p. 75

⁷² False grandparents are those who related to the deceased through one or more female links. See al-Zuḥaylī, *al-Fiqh*, pp. 381.

⁷³ Ibid.

⁷⁴ As mentioned in Taqiyyuddīn, *Kifāyah*, p. 338.

⁷⁵ al-Zuḥaylī, *al-Fiqh*, pp. 253-254.

⁷⁶ Ibid., p.253.

⁷⁷ al-Nawawī, *Minhāj*, p. 85.

⁷⁸ al-Shawkānī, *Nayl al-Awtār*, vol. 6, p. 62.

⁷⁹ Section 7 of Egyptian Succession Law 1943.

⁸⁰ Section 263 of the Syrian Law of Personal Status 1953.

⁸¹ al-Zuḥaylī, *al-Fiqh*, pp. 249-250.

⁸² Ibid., p. 270.

⁸³ Ibid., p. 250.

- ⁸⁴ Fawzī, *Aḥkām*, p. 200.
- ⁸⁵ Ibid., p.201 see also al-Zuḥaylī, *al-Fiqh*, p. 250.
- ⁸⁶ al-Zuḥaylī, *al-Fiqh*, p. 250.
- ⁸⁷ Fawzī, *Aḥkām*, p 201.
- ⁸⁸ Fawzī, *Aḥkām*, p. 201.
- ⁸⁹ Section 11 of Egyptian Succession Law 1943 and Section 116 of Syrian Law of Personal Status 1953.
- ⁹⁰ Ibn 'Ābidīn, *Ḥāshiyah*, vol. 5, p. 538. In the *Ḥanafī* school there is another type of *al-Walā'* known as *walā' al-Muwālah* or acknowledge kinsman. In other Sunnī School it was known as *al-Ḥalf wa al-Ta'āqud* that is succession based on oath and faithful agreement which means that each one of them would assist each other, in hardship or in prosperity, and if one of them dies, the other would inherit the property of the deceased. See also Sharbīnī, *al-Mughnī*, vol. 3 p. 4. See also Ibn Rusḥd, Muḥammad ibn Aḥmad al-Qurtubī, *Bidāyah al-Mujtahid wa al-Nihāyah al-Muqtaṣid*, Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī, Egypt, 1975, vol.2, p. 355.
- ⁹¹ Quran 4:11
- ⁹² Quran 4:12
- ⁹³ al-Ṭabari, Muḥammad Ibn Jarīr, *Jāmi' al-Bayān 'An Ta'wīl Ay al-Qur'ān*, Egypt, Dār al-Ma'ārif, vol. 3, p. 46.
- ⁹⁴ al-Nawawī, *Minhāj*, p. 5, Sharbīnī, *al-Mughnī*, p. 3. al-Zuḥaylī, *al-Fiqh*, p. 271.
- ⁹⁵ al-Zayla'ī, *al-Tabyīn*, vol.6, pp. 229-230.
- ⁹⁶ al-Dardīr, *al-Sharḥ*, vol. 4, p. 617.
- ⁹⁷ al-Bahūti, *Kashshāf*, vol. 2, p. 541.
- ⁹⁸ Section 71 of the Egyptian Succession Law 1943.

- ⁹⁹ Section 257 of the Syrian Law of Personal Status 1953.
- ¹⁰⁰ al-Nawawī, *Minhāj*, p. 75. See also al-Dardīr, *al-Sharh*, vol. 4, p. 467. See also al-Bahūti, *Kashshāf*, vol 2, p. 543.
- ¹⁰¹ al-Zuḥaylī, *al-Fiqh*, pp. 271-279.
- ¹⁰² Section 4, 8, 16, 30, 31, 39, 41 of the Egyptian Succession Law 1943 and Section 262, 265, 274, 278,279 of the Syrian Law of Personal Status 1953
- ¹⁰³ *Aṣabah al-Sababīyyah* is agnate by specific reason such as in case of al-Ḥalf wa al-Ta'āqud or oath and faithful agreement. This matter, however, has been omitted from the Syrian Law of Personal Status of 1953 probably because it no longer exists.
- ¹⁰⁴ al-Dijwī, *al-Aḥwāl al-Shakhṣiyyah*, p. 296.
- ¹⁰⁵ Ibid.
- ¹⁰⁶ Ibid.
- ¹⁰⁷ al-Shawkānī, *Nayl al-Awtār*, vol. 6, p. 55.
- ¹⁰⁸ See al-Zuḥaylī, *al-Fiqh*, pp. 281-283.
- ¹⁰⁹ Fawzī, *Aḥkām*, p. 197.
- ¹¹⁰ Khan, Muhammad Mustafa, *Islamic Law of Inheritance; A New Approach*, Kitab Bhavan, New Delhi, 1989. p.40.
- ¹¹¹ Smith, W. Robertson, *Kinship and Marriage in Early Arabia*, Cambridge, Cambridge University Press, 1885. Reprinted London, A. and C. Black, 1903.
- ¹¹² Coulson, N.J., *Succession in the Muslim Family Law*, Cambridge University press, Cambridge, 1971.
- ¹¹³ Schacht, J., "Mīrāth" in Bosworth, C. E. et. al (eds.), *The Encyclopaedia of Islam*, Leiden, E.J. Brill, 1993.
- ¹¹⁴ Powers, David, S., *Studies in Qur'an and Hadith: The Formation of the Islamic Law of Inheritance*, Berkely, University of California Press, 1986.
- ¹¹⁵ Cilardo, Agostino, *Studies on the Islamic Law of Inheritance*, Napoli, Istituto Universitario Orientale, 1990, vol. 50, suppl. 63, part 2.

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- ¹¹⁶ Ibn 'Ābidīn, Muḥammad Amīn ibn 'Umar, *Majmū' al-Rasā'il al-'Ābidiyyah*, Damascus, Maṭba'ah Bulāq, 1272 H, vol 2, pp.114-115.
- ¹¹⁷ Shalabī, Muḥammad Muṣṭafā, *al-Fiqh al-Islāmī*, Beirut, Dār al-Jamī'iyyah, 1982, p. 80.
- ¹¹⁸ Wehr, Hans, *A Dictionary of Modern Written Arabic*, London, Macdonald and Events Ltd., 1980, p. 231 –233
- ¹¹⁹ Sābiq al-Sayyid, *Fiqh al-Sunnah*, Egypt, Dār al-Kuttāb al-'Arabī, 1985, vol. 3, p. 659. See also al- Ṣabūnī, *al-Mawārīth*, p. 158. See also al-Zuḥaylī, *al-Fiqh*, vol. 8, p. 440. See also Zakariyya al-Bārī, *al-Wāsiṭ fī Aḥkām al-Tarikat wa al-Mawārīth*, Cairo, Dār al-Nahḍah al-'Arabiyyah, 1979, p. 289.
- ¹²⁰ al-Ramlī, *Nihāyah al-Muḥtāj*, p. 31, al-Dardīr, *al-Sharḥ al-Kabīr*, vol.3, p. 31.
- ¹²¹ Ibid.
- ¹²² See section 48 of Egyptian Succession Law of 1943.
- ¹²³ See section 304/31 of Syrian Law of Personal Status of 1953.
- ¹²⁴ Ibid.

CHAPTER THREE

Islam and Law of Succession in the State of Pahang: Historical Background

3.1 Introduction

This chapter will discuss the development of the law of succession among the Malay community in the Malay States generally and in Pahang in particular. Since the development of succession law is closely related to that of Islamic law, the chapter at first will look at the historical background of the State of Pahang as well as analysing how Islam gained its foothold in the region. It is hoped that a clear picture will emerge of the gradual assimilation of *farā'id* in Malay society, and of how it finally became the acknowledged law of distribution for the Muslim community, although Malay customary law was not completely superseded. The discussion in the following pages will focus on only two periods: i) the Malay Sultanates era and ii) the period of Western colonisation.

3.2 The State of Pahang: Historical Background

Pahang as a political entity has been in existence since many centuries before the establishment of the Kingdom of Malacca. The Majapahit dynasty used the name Pahang to indicate the Malay State.¹ Godinho De Eridia, a Portuguese official in Malacca, stated that Pan (Pahang) was the second Malay Kingdom in the Peninsula, replacing the

Kingdom of Patani on the east coast. Even before the establishment of the Malay Kingdom of Malacca, Pahang was already prosperous, being the transition port where traders plied their wares.²

In the 16th century, the southern border of Pahang reached from Sedili Besar in the south to Terengganu in the north. The western border extended to Rembau, Selangor and Perak. The present state of Pahang is bounded to the north and west by mountain ranges and to the east by the South China Sea.³

Even though Pahang was mentioned as a kingdom before the finding of the Kingdom of Malacca, it had in fact been a protectorate of other kingdoms in its earlier history being effectively ruled by the Srivijaya, Majapahit and Siam before becoming a protectorate of the Malacca Malay Kingdom in 1454/1456 AD. Za'aba stated that the fact that Pahang was once ruled by the Srivijaya Kingdom, was evidenced by the statement of a Chinese author, Choa Ju Kuo, in 1225 that the Srivijaya Kingdom had declared that the states of Kelantan, Terengganu, Pahang, Langkasuka and Ceylon were all under its rule.⁴

The rise of the Majapahit followed the downfall of the Srivijaya, and the Pahang Malay Kingdom came under the control of this huge Hindu kingdom. A Buddhist religious leader during the rule of the Majapahit, Prapancha, wrote a Javanese verse entitled "*Naghara Karet Agama*" in the year 1365 AD in which he mentioned that among several states under the rule of the Majapahit were Jambi, Palembang, Minangkabau, Pahang, Langkasuka, Temasik and others.⁵

The 14th century witnessed a dramatic change in the history of Pahang, when the Kingdom was attacked and conquered by Siam. Siam continued to rule Pahang until the late 14th century, the period that marked the rise of the Malacca Malay Kingdom, to become the most politically and economically powerful kingdom in the Malay Archipelago.⁶

This situation posed a challenge to the sovereignty of Siam, which was further escalated by the refusal of Sultan Muzaffar Shah (1445-1456) to acknowledge Siam's hegemony; as a result, in 1445 Siam attacked Malacca through Pahang but it was repulsed. In the final year of Muzaffar Shah's rule, Malacca was once again attacked by the Siamese but once again the attempt failed.⁷

In 1456, Sultan Mansur Shah (1456-1477) ascended the throne. It was during his reign that Malacca reached its zenith in terms of political, economic and military strength and his policy of expansion led Malacca to attack and conquer Pahang, which was thus delivered from Siamese rule.⁸ The way was now open for the spread of Islam in Pahang.

3.3 The Spread of Islam into the State

In discussing the spread of Islam in the Malay states including Pahang, it is necessary to consider the history of the Islamic expansion in neighbouring areas of the Malay Archipelago for as de Jong has pointed out “ *the coming of Islam to Malaya was part of a*

*vaster movement, the penetration of Islam into the world of South East Asia...Islam in Malaya has to be seen in connection with happenings in Sumatra and Java.*⁹

Three inter-related issues have attracted the concern of scholars investigating the coming of Islam to the area: the period of Islam's arrival, the origin of the earliest Muslim settlers and the indigenous peoples' motive for and medium of conversion, i.e. the questions of "when", "who" and "how" respectively.¹⁰

The exact date of the appearance of Islam in the area, nevertheless, still cannot be determined as there is a lack of consensus among historians on the matter. This lack of consensus is due to the fact that up to the present time no clear historical evidence has appeared that can answer this question conclusively.

The researcher, however, basing his opinion on the available historical sources, suggests that the end of the thirteenth century to the early fourteenth century was the period when Islam started to spread and gain its foothold among the Malay community.¹¹ There is the evidence of Marco Polo's description of Perlak in North Sumatra as a Muslim kingdom in 1292;¹² of the year 1297 or 1307 inscribed on the tombstone of Malik al-Salih, the first Muslim ruler of Samudra-Pasai;¹³ and of *batu bersurat* (stone inscription) of Terengganu bearing the date 1303 or 1386-87.¹⁴ Chinese sources also mention that two envoys sent by the ruler of Samudra to China in 1282 were known by the Muslim names of Hasan and Sulayman. This shown that Muslims were already playing a vital role in the state affairs of the Samudra-Pasai kingdom.¹⁵ Furthermore, it seems to corroborate the claim

of the *Hikayat Raja-Raja Pasai* (Pasai chronicles) that Pasai was the first country in the region to accept Islam.¹⁶ The chronicles tell how the missionary expedition to Samudra, led by Sheikh Ismail and Sultan Muhammad of Malabar, had on its way converted the indigenous people of Fansur, Lambri, Aru and Perlak.¹⁷

According to Alatas, the vigorous dissemination of Islam into the Malay Archipelago began in the thirteenth century and by the sixteenth century the whole area had been successfully penetrated by the Islamic expansion.¹⁸ Nevertheless, long before this immense achievement of peaceful conversion took place throughout the region, the Arab world had already forged strong links with the indigenous people through trade relationships and commercial activities. For example, during the flowering of Arabian civilisation in the fifth century the region was known a place where Arab traders would break their long journey to China. Among the stopping places most familiar to the Arab traders in the Malay Archipelago were Kalah (probably Kedah or Kelang), Panhang (Pahang), Tiyuman (Tioman), Mul Jawa (Java), Sribuza (Srivijaya), Balus, Fansur, Lamuri and Malayur.¹⁹

According to Di Meglio, the number of visits to Chinese ports by Arab traders increased, but in 879 A.D. the situation changed due to the Chinese rebellion against the T'ang emperor Hi-Tsung (878-889 A.D). In an attempt to control the rebellion, all the ports were closed to foreign vessels and their colonies at Canton were destroyed. This incident consequently led merchants and traders, who were mainly Arab and Persian Muslims to flee Canton and seek refuge in for example, Champa and Palembang but most of them

eventually settled in Kedah on the west coast of the Malay Peninsula. The large scale of this emigration seems to be an early sign of Islamic expansion into the region.²⁰

Rauf has argued that the Islamic expansion, which occurred in the area passed through two stages: an incubation stage, which was followed by mass conversion. The incubation stage was protracted, beginning with the inception of commercial activities between the Muslim traders and the Malay Archipelago. The process was slow at first, due to the presence of the Hindu-Buddhist Empire, which was still at the height of its power. The second stage, that of the mass conversion that took place between the thirteenth and sixteenth centuries, was the result of the great efforts and endeavours of various Muslim missionaries who took full advantage of the decline of the Hindu-Buddhist kingdom in the fifteenth century.²¹

The historian is confronted with the task of explaining the sudden intensification of missionary activity in the region from the thirteenth century onwards, even though relationships between Muslim traders and Malays had been established for at least four centuries.²² The Dutch scholar Van Leur emphasised the economic and political advantages that accrued to native rulers via alliances with Muslim merchants, describing the strategy of the Malacca kingdom as “*adopting Islam and using it as a political instrument against Indian trade*”.²³

The role of Muslims traders became important as they brought with them their faith, which was well-suited to the needs of the Malays. Islam possessed egalitarian and

democratic principles, which contrasted favourably with the rigid Hindu caste system, which is regarded by Al Attas as 'so incompatible with Malay culture'.²⁴ His opinion supported by Wertheim who also considers that Islam brought to an end the Hindu caste system of the Malays which existed prior to the coming of Islam, which had divided the people into different classes²⁵

As to the origins of these missionaries, a number of possible places have been suggested by scholars: Gujarat, Southern India, Bengal, Arabia, Persia and even China.²⁶ Marrison and Arnold refuted the theory, held by the Dutch orientalists, which ascribed a Gujarati provenance for Malay Islam. Instead they suggested coastal southern India, whose Muslims follow the same *Shāfi'ī* school of law as the Malays.²⁷

On the other hand, Al-Attas completely rejects an Indian provenance, arguing that “ *Any author described as 'Indian' or work as of 'Indian origin' by western scholars turned out to be actually Arab or Persian, and most of what has been described as Persian has in fact been Arabian, whether considered ethnically or culturally*”.²⁸

Al-Attas believed that the missionaries came from Arabia because the practice of Islam in the region has within it elements characteristic of the Middle East. The use of Arabic terms, the names of the days of the week, the *Jawi* writing system, the method of reciting the *al-Quran* without any distinctly Malay accent and the way '*aqidah* (Islamic belief) and *tassawuf* (Islamic spiritualism) are elaborated clearly show Arabic influence, therefore,

Al-Attas argues it was the Arabs, travelling via India, Persia and China, who brought Islam to the Malay Archipelago.²⁹

Apart from the various factors aiding the Islamisation process such as the activities of traders, marital alliances and political pressure, the rise of Sufi groups in the region constituted a missionary movement which also played a major role, especially between the thirteenth and sixteenth centuries when the most vigorous wave of conversion took place.

According to Johns, the Sufis started to have a significant influence in the Muslim world after the seizing of Baghdad by the Mongols in 1258 A.D. This defeat broke and scattered the Muslim world. It was at this time that the Sufi groups began to play an important role in the attempt to assure the unity and the future of that world by developing close relations with other Muslim groups and spreading the faith to new regions.³⁰

It can be argued that the success of the Sufis in the spreading of Islam into the Malay Archipelago was due to their peaceful character. They did not come to impose a harsh rule or as conquerors but simply disguised themselves as traders employing all their intelligence and civilisation only for the instruction and conversion of the local people. They conciliated the natives of the country by respecting their manners, acquiring their language and developing relationship with them without measuring their status in the

local *caste* system. They also practised intermarriage with the local women in order to become one with the people and to gain the trust of the host society.³¹

The most significant event leading to the spread of Islam in the State of Pahang as well as other Malay states was conversion of Malacca kingdom by the early 1400 A.D.³² On his conversion Parameswara, the founder of Malacca is said to have adopted the Muslim name Megat Iskandar Shah; however scholars such as Winstedt, Hall, Marrison, and Al-Attas differ as to whether Parameswara assumed the name upon his conversion, or whether the Megat Iskandar Shah who married the daughter of the King of Pasai³³ was in actual fact Parameswara's son. No evidence survives as to the precise motive of his conversion, which may have occurred because of political pressure or for the sake of economic convenience.

Malacca then extended the Islamisation process to other parts of the region, in particular those with which Malacca had a close trading relationship and those under its sovereignty such as Johore, Jambi, Kampar, Bengkalis, Bintang and the Carimon Islands.³⁴ As Islam became the religion of the royal family in Malacca it then helped the spread of the religion by intermarriage between the Malaccan royal with other ruling families of Kedah, Kelantan and Indragiri (Sumatra). In addition, as a new state conquered by the kingdom, the local rulers were replaced by Muslim princes of the Malaccan family.³⁵

In the case of Pahang, as we have seen, it was conquered by Malacca in 1456, a victory that removed the burden of Siamese rule and paved the way for the adoption of Islam.

More important in considering Islam in Pahang was the attitude of the rulers toward Islam. As describe in the Malay Annals, Sultan Shah as the first Malacca ruler converted had commanded the people of Malacca to become Muslims.³⁶ As the people at the grassroots level were always loyal to their Sultan perhaps the order was easily followed. Since Pahang also under the ruled of Malacca, presumably, the people of Pahang were also no exception to the command. In fact, some of the Sultans did make the attempted to govern their states in accordance with Islamic justice.³⁷

3.4 The Development of Succession Law in the Malay Society

3.4.1 Early Aboriginal Tribes

The aboriginal people who inhabited the interior and coastal jungles of the Malay Peninsula consisted of three main tribal groups: the Jakun or Proto-Malay, the Sakai and the Negritos. Of the three, the Proto-Malay or Jakun are regarded as having been the most developed. Each of these had their own law administered by the chief. The application of the law in this society was not harsh. The most serious crimes were those, which most hurt the tribal interest³⁸

The Proto-Malay or Jakun were headed by a chief called a *batin* who administered the law with the assistance of the tribal elders who were the guardians of their customs and laws. The penalty for most offence was a fine, which could be paid in the form of either money, or sixty Chinese saucers, which no Jakun was likely to possess. In certain instances, death was the penalty for incorrigible thieves and adulterers; execution was by

impaling, drowning or exposure to the sun. These types of penalty seem to indicate Hindu influence. Islam seems to have influenced the laws regarding property and succession, as in some smaller tribes among the Jakun, the distribution law embraced the principle that the male took double the female share.³⁹

The Sakai, did not recognise individual land. Among them land was communally owned and cultivated and the produce shared by all members. This tribe was headed by a chief, the *penghulu*, who determined the boundaries of every plot of land that a particular member could occupy.⁴⁰ With regard to the matter of other properties, the descendants of the deceased were given priority in the succession scheme, followed by the ascendant and collateral branches of the family. If there were no heirs, the house and clearing would be abandoned.⁴¹

As for the Negritoes, who appear to have been the least organised, their society was tribal and nomadic. Each tribe was headed by a chief called a *pelima*, who had absolute authority over his subjects. Laws were few as crime was scarce in such a primitive community. Any offence committed by a member of the tribe was punished by a fine prescribed by the chief. Inter-tribal disputes, including the disposition of inheritance, were settled by the chiefs assisted by the elders of the tribes concerned.⁴²

It can be seen that, as in other primitive societies, all these tribal laws were based on the principles of tribal interest and self-preservation. As in the division of the property, Islam

seemed to have some influenced where the male predominated the female in the distribution of the shares.

3.4.2 Malay Customary Law

Malay customary law, known as *adat*, has a range of meanings in the Malay context. It can refer to customary behaviour or proper behaviour and courtesy. However as far as this thesis is concerned, the terms *adat* or custom will be used to denote those Malay customs and traditions, which have legal consequences; that is, in the course of time acquired the character of law. Being living law formulated at a certain time in a certain place, customary law is adaptable to changing social needs. Wilkinson, analysing the concept of *adat* or custom in the Malay context, summarised the situation as follows.

“ ...of all branches of Malay research, the study of jurisprudence is the one that presents the greatest difficulties. Malay laws were never committed to writing.....varied in each state... they were often expressed in metaphors or proverbs that seem to baffle interpretation...”⁴³

The development of Malay customary laws owed much to the contributions made by the Malaccan rulers. By fourteenth century, Indian culture had already strong in the Malay states and Malacca in particular, introducing Indian religion, law and language. It also replaced native tribal organization with government by a *raja* (ruler) and perhaps have transmitted the Hindu custom, which were the main features of the *Adat Temenggung*.

When the kingdom of Malacca accepted Islam and established it as the official religion, effort has been made to islamise the Malay *adat* or custom.

The emigrants from Sumatra and Java (presently known as Indonesia) who crossed over to the Malay states as early as seventeenth century also have significant influenced on the customary law. It is understood that the search for new territory on which to settle due to the population pressure and land shortage.⁴⁴ They perceived Malay states as a more prosperous life and prospect of easily obtainable land. Although many migrants came from Java, but majority were of Sumatran origin or known as Minangkabaus⁴⁵ belonging to the Korinchi, Rawa, Mandiling and Batak sub-groups. These people were strict Muslims in their personal beliefs and also fully committed to their own customs and way of life, especially those customs relating to inheritance of land and property that is the *Adat Perpateh*.⁴⁶ To the Minangkabau, the *adat* appear to come first even though they often clash with the laws of Islam. With their strong attachment to *adat*, the consensus among Minangkabau is summarised by the following saying; *Biar mati anak, jangan mati adat* (Let the child die but not the *adat*).⁴⁷

As for the Javanese, they tended to move into Malay states in small family group to seek out areas where they could pursue their farming life style.⁴⁸ The system of land inheritance adopted by the Javanese tended more towards the system of *Adat Kampong* which much more towards the system of *Adat Temenggung*.

The Malay customary law was based upon two types of custom practised by two distinct groups within Malay society: the matrilineal, with its particular kinship structure, and the bilateral, based on territorial units. The former set of laws is commonly known as the *Adat Perpateh*, which is applied among the Minangkabau in the region now constituting Negeri Sembilan and certain parts of Malacca, especially in the area, called Naning. These matriarchal laws, or elements of them can be found in three Malay legal digests: a digest of customary law from Sungai Ujong, a Minangkabau legal digest from Perak and another from Kuala Pilah. The second group of laws is known as the *Adat Temenggung*, which prevailed in the remaining Malay states. Elements of these customary laws can be found in numerous Malay digests such as those dealing with Malacca law, Pahang law, Kedah law, the ninety-nine Laws of Perak, Selangor law and Johore law. Of these two customary laws, the *Adat Temenggung* has been far more thoroughly influenced by Islamic law than the *Adat Perpateh*.⁴⁹

i) *Adat Perpateh*

The term *Adat Perpateh* signifies a body of rules which is based on the existence of a set of unilineal descent groups organised on a matrilineal and matrilocal basis.⁵⁰ The *Adat Perpateh*'s fundamental principle was that the law was conceived to be the communal responsibility of the tribe or clan. Any offence would be judged according to the unwritten law contained in aphorism and maxim. The *Perpateh* tradition, which is based on exogamy, appear to have covered all aspects of law: the election of chiefs, marriage, divorce, the status of the husband in the wife's clan, and succession to property. The

range of jurisdiction was assigned to various functionaries, namely the *ibubapa* (head of a sub clan), the *lembaga* (chief of a matrilineal clan), the *undang* (territorial chief) and finally the *raja* (ruler) who as head of state was also regarded as the source of justice. The laws, which tolerated no interference, guaranteed the independence of every functionary.⁵¹

In the *Adat Perpateh*, the impositions of penalties were firmly established on the principles of restitution and compensation rather than retribution.⁵² Cases of wounding were exonerated and absolved by payment in kind or by conducting the reconciliation ceremony. In the case of homicide, awards of compensation were taken from the slayer's clan or payment of adequate blood money was made. Mutilation and the death penalty were not recognised as form of punishment. The death penalty was the prerogative of the *raja* alone, and was prescribed only for incorrigible offenders.

According to the *Adat Perpateh*, when an individual and his family had worked and acquired a piece of land, the land was to be kept within the tribe to which he belonged. Three categories of property were recognised: *harta pesaka* (ancestral property), *harta charian* (acquired property) or *harta pembawa* (accompanied property) and *harta sepencharian* (jointly acquired property).⁵³

Ancestral property included all land which had been inherited through the matrilineal line, and which was tied as inheritance descending through the female heir and could not be alienated by its present holder except for certain customary purposes. Substitution for

a predeceased mother would be permitted but inheritance was *per stirpes* not *per capita*.⁵⁴ Acquired and accompanied property generally included all land or property acquired by a person other than by inheritance. Acquired property refers to the wife's property acquired before marriage, while accompanied property refers to the husband's property similarly acquired. In the case of divorce it was retained by the original owner, while in the event of death the nearest female descendants of the deceased would inherit it.⁵⁵ As for jointly acquired property, that is property jointly acquired during the marriage by the husband and wife, upon divorce it would be divided equally. On the death of a spouse, the surviving spouse would take the property if there were no children but if there were succession to the property would follow the practice of the various states.⁵⁶

On the basis that the matriarchal tribe is the social unit, four cardinal principles governing the distribution of property can be deduced: i) all property is vested in the tribe, not in the individual; ii) acquired property, once inherited becomes ancestral; iii) all ancestral property is vested in the female members of the tribe; and iv) all ancestral property is strictly entailed in the female.⁵⁷

ii) *Adat Temenggung*

The organisation of *Temenggung* society is based on territorial units where the legal authority is vested not in the elected leaders and chief, as in the *Adat Perpatih*, but in a group composed of the *raja* (ruler), the *bendahara* (prime minister), the *temenggung* (chief of police), the *manteri* (minister), and the *mandulika* (governor).⁵⁸

The *Adat Temenggung* apparently came from the same source as the *Adat Perpateh* but changed its character under Hindu influence. Evidence suggesting that both *adat* were originally a single system can be found in the laws relating to property and succession to land; those in the *Temenggung* area are identical with those in the *Perpateh* area in Negeri Sembilan.⁵⁹

While *Adat Perpateh* has received much scholarly attention, no comprehensive study of *Adat Temenggung* has been written although a small amount of information has been provided by Taylor⁶⁰ and Maxwell⁶¹ regarding the inheritance of land in Perak, Pahang and Selangor. Ahmad Ibrahim has noted that other discussion of the *Adat Temenggung* tend to be rather vague, except in one area: the rights of widows and divorcees in the distribution of inheritance.⁶² Moreover, Hooker has pointed out that

*“ The term (Adat Temenggung) does not refer to a recognizable or certain body of law. Its lack of precise reference is not helped by various meanings which have been attributed to it over a long period and this will undoubtedly give some difficulty. ”*⁶³

Much of the *Adat Temenggung* does show Hindu influence, as Winstedt observed, ‘*it is mixed with relics of Hindu and overlaid with Muslim law*’.⁶⁴ Moubary on the other hand stated that the *Adat Temenggung* has assimilated itself almost entirely to Islamic law.⁶⁵ Hooker, however, rejects the suggestion made by Moubary as he argued that the above assertion is in no way valid for at least two reasons, both of which are connected with the

matter of inheritance. Firstly there are many transmissions, which involve women as trustees, and secondly it is extremely common to find land titles in the name of a man and woman in equal shares. This shows that there is no Islamic influence in the matter.⁶⁶ It seems that Hooker is unaware while making his statement that among the Malay villagers, the settlement of inheritance often being made by mutual agreement (see discussion on adat kampong below). This practice as a matter of fact, is totally in agreement with the principle of Islamic law and probably based on this ground Moulbary made his statement.

Maxwell, on the other hand, noted that the Malays in the *Temenggung* area used both form of distribution law, i.e. *farā'iḍ* and that based on consent or mutual agreement as applied in the *Adat Kampong*. According to Maxwell, *farā'iḍ* in general seemed to be widely used among traders while farmers tended to resort to the customary law.⁶⁷

In discussing the concept of *Adat Temenggung*, it also must be allowed that *Adat Kampong* or village custom cannot be wholly excluded from it, for the reason that most of the characteristics of the *Adat Kampong* are similar to those of the *Adat Temenggung*. In the State of Pahang, most villagers still practise both *adats* especially in regard with the distribution of land left by the deceased. Both *adats*, in the perception of the villagers, are identical because both profess the importance of patrilineal descent. However, one is not justified in assume that the *Adat Kampong* is a manifestation of *Adat Temenggung*, because the *Adat Kampong* only appeared on the rural scene after *Adat Temenggung* had become established. Therefore, it is enough to say that the *Adat*

Kampong resembles some aspects of the *Adat Temenggung*, especially as regards the distribution of property through patrilineal descendants. But perhaps the most striking feature of the *Adat Kampong* is its tendency to conform to the Islamic law of inheritance. The concept of distribution based on consent or pact among the heirs involved is also widely practised in settling cases of succession. Under this practice, there is a tendency for a woman, to receive more than she would under the rule of *farā'id*. The fact that Islamic law allows distribution of the deceased's property based on consent or pact among the heirs has enabled this method, which is in reality the application of *Adat Kampong* to pass as distribution according to Islamic law.⁶⁸

3.5 Law of Succession During the Malay Sultanates Era

During the sovereignty of the Malay Sultanates, the administration of justice was based on the Malay law-digests which embodied elements of Malay customary law as well as Hindu law, overlaid by Islamic law; i.e. the Malacca Law of 1523, the Pahang Law of 1536, the Kedah Law of 1650, the Ninety-Nine Laws of Perak of 1765 and the Johore Law of 1789. Of these various digests the Malacca law has contributed most toward the law in Pahang as it formed the basis for the establishment of the Pahang Law during the reign of Sultan Abdul Ghafur Muhaiyyuddin (1591-1614).⁶⁹ Originally, the Pahang Law consisted of 23 sections, which were increased to 67 after the acceptance of Islam and the inclusion of the Malacca Law. The Pahang Law can be divided into five areas, which are: i) the Law of Malay tradition and of the constitution as practised in the state of Pahang, ii) trade law including legislation concerning selling and buying (purchasing),

leasing and renting, pawning, lending, debt and repayment iii) criminal law incorporating fines, which includes legislation concerning theft, robbery, murder, threats, rape, adultery, drinking, gambling, bribery and interest, iv) law related to acts of worship and the fundamental obligations prescribed by Islam and v) family law, which includes legislation concerning marriage, the custody of adopted children and so on.⁷⁰

Like other Malay law digests, the Pahang Law did not include any regulations concerning the law of succession although there were provisions dealing with trade and property. This absence of provisions concerning the law of succession in the Pahang law as well as other Malay law digest shows that as far as the law relating to the ownership and devolution of property was concerned the Malay Rulers, although they were Muslim, still adhered to the old Malay customs; and it appears that their subjects tended to follow their example.⁷¹ Ahmad Ibrahim has pointed out that in the matter of succession the law showed hardly any Muslim influence; succession to titles and dignities followed the male line while the division of land was conducted according to matriarchal customary law (*Adat Perpateh*).⁷²

3.6 Law of Succession During the Period of Western Colonisation

The era of Western colonisation of the Malay States began in the early part of the sixteenth century, when the Portuguese defeated Malacca in 1511. Malacca then remained under Portuguese control for one hundred and thirty years until the appearance of the Dutch in the region. In 1641 the Dutch ousted the Portuguese to gain control of

Malacca, which they hold until displaced by the British in 1795. The Dutch however reoccupied it in 1801, and finally ceding it to the British in 1824 through the Anglo-Dutch Treaty.⁷³

Among these European colonisers, the British were the most influential power in the political and legal history of the country.⁷⁴ The involvement of the British in the region was driven by the desire to expand their trade and to check the Dutch monopoly schemes in the area. This rivalry led to the establishment of the first British settlement, which was established in 1786 in Penang. In 1819 a second settlement was set up in Singapore despite strong protest from the Dutch in Malacca. In 1824, through the Anglo-Dutch Treaty, the Dutch handed over Malacca to the British in exchange for Bengkulu in Sumatra.⁷⁵

Before the advent of Western colonisation, the administration of justice in the Malay States was based on the Islamic law and on Malay customary law that is the *Adat Perpatih* and the *Adat Temenggung*. Islamic law, which at first was adopted in respect of purely religious affairs, gradually began to influence family law. During the British rule, Islamic law was recognised as the law of the land; Judge Thorne in *Ramah v Laton*⁷⁶ stated that Islamic law is not foreign but local law and the law of the land, which the court must take judicial notice of and should propound. A similar decision is found in *The Official Administration of the Federated Malay States v Magari Mohitoi*,⁷⁷ where the judge stated that Islamic law is part of the law in force in the State of Pahang. In the case

of *Fatimah Bt Hanis v Haji Ismail B. Tamim* the court held that Islamic law is part of the law of Johore.⁷⁸

In practice however, the British administrators never took seriously the task of propounding the local law; instead, they established secular courts with which they were more familiar and which best suited them. In fact, the main concern of the British regarding Islamic law was to decide how much of that law was to be recognised and how to supervise its interpretation and implementation.⁷⁹ Therefore, they only acknowledged those aspects that concerned family law, succession and minor criminal offences. In addition, the role of the *sharī'ah* court was relegated to a subordinate position and provision was made that its decisions could be overridden by the High Court.⁸⁰ Ahmad Ibrahim has noted that

“ Until 1948, the court of kadhis and Assistant kadhis were part of the structure of the courts. In 1948, the courts ordinance established a judicial system for the Federation and omitted Shariah courts from being part of the Federal court system.”

The first regulation introduced by the British in the Malay States concerning the administration of inheritance was the Federated Malay State Probate and Administration Enactment, Chapter 8 of 1904. The act at first covered only the Federated Malay States, i.e. Pahang, Selangor, Perak and Negeri Sembilan. The purpose of this act was to coordinate as well as to upgrade matters regarding land ownership handled by the District

Land Office, one of whose new functions was to determine the heir to a landed property.⁸¹ In the Unfederated Malay States (Kelantan, Terengganu, Johor, Kedah and Perlis) the administration of Muslim estates were still under the purview of the Department of Islamic Affairs or the *shari'ah* court of the respective states.⁸²

In 1920, another enactment known as the Enactment of Public Trust 1920 was introduced, establishing the Department of Public Trust and Official Administration. The enactment provided that the department could handle inheritances valued at less than five thousand Malaysian ringgit and deal with ordinary trustees and any other property as instructed by the High Court.⁸³ This enactment however was later replaced by the Public Trust Act, 1950.⁸⁴

In 1955, the administration of inheritance in these Malay States was reorganised in order to centralise the administrative system. The administration of inheritance was put under the jurisdiction of two departments, the High Court and the Collector of Land Revenue.⁸⁵ The administration of inheritance under the jurisdiction of the High Court follows the procedures laid out in the Federated Malay State Probate and Administration Enactment, Chapter 8, mentioned above. This enactment was subsequently amended in 1959 and renamed as The Probate and Administration Act, 1959 (later PAA 1959).⁸⁶

Correspondingly, the administration of inheritance falling under the jurisdiction of the Collector of Land Revenue follows the procedure laid out in the Small Estate Distribution Act 1955 (later SEDA 1955) and its regulations as detailed in the Small Estate

(Distribution) Regulations 1955. SEDA 1955 named the District Officer as the Land Revenue Collector. However, due to the heavy responsibility shouldered by the Collector, in 1974 the Small Estate Unit was established under the Ministry of Lands and Mines, although the Act itself had been in existence since 1955. Following the establishment of the Small Estate Unit, the Small Estate Officer was officially appointed as the Assistant to the Collector of Land Revenue.⁸⁷

In settling cases of inheritance, whether testate or intestate, the distribution law applied is based on the personal law of the deceased which, in the case the Muslims cases, is *farā'iḍ* or *wasiyyah*. This can be seen in the case of *Sheikh Abdul Latif vs Sheikh Elias Bux*⁸⁸ where the court ruled that, according to the principle Islamic law of succession, a bequest is only valid within the restricted limitation of one third of the property and the remaining estate has to be divided according to the rule of *farā'iḍ*.⁸⁹

The Small Estate (Distribution) Act, 1955 however also allowed the heirs to distribute the deceased's property based on mutual agreement, as practised in the *Adat Kampong*.⁹⁰ For such cases to be properly settled the act provides that all heirs involved must have attained the age of majority; that is, eighteen years of age.⁹¹ However, if there is no agreement among the heir it is usual for the Small Estate Officer to order that the division be made according to the rules of *farā'iḍ* as it is the arbitrary law.⁹² This shows that *farā'iḍ* has been officially recognised as the law governing the distribution of Muslim inheritance, together with certain practices of Malay customary law such as distribution based on mutual agreement.

3.7 Conclusion

The application of the Islamic law of inheritance or *farā'id* in the State of Pahang is closely related to the development of Islamic law in the region. Before the coming of Islam, Pahang was under the rule of several foreign powers such as the Hindu kingdoms of Srivijaya and Majapahit and later of the Buddhist kingdom of Siam before being conquered by Malacca Sultanates in 1456. Before the spread of Islam the administration of justice was based on the Malay customary law. There are two main bodies of customary law in the Malay States, i.e. the *Adat Perpateh* and *Adat Temenggung*. Although originally both of these *adat* came from the same source, Sumatra, due to the influence of the Srivijaya and Majapahit kingdoms, *Adat Temenggung* marked by many Hindu practices and became a patrilineal system. The *Adat Perpateh*, however, remained unchanged and its the matrilineal system is still its main characteristic. But the *Adat Temenggung* has been practised more widely in the Malay States than the *Adat Perpateh*, as the Malacca Sultanate favoured the patrilineal system over the matrilineal one.

Considering the evidence cited by various Western and Malay historians, it is generally accepted that the Arab world first made contact with the region as early as the fifth century; but the process of Islamisation really began in the early thirteenth century and by the end of the sixteenth century the whole Malay archipelago had been successfully penetrated by Islam.

The conversion of the Malacca Sultanates had a major impact on the Malay states including Pahang as Malacca became the centre for the spread of Islam in the region. The conversion of Malacca to Islam may be linked to several factors such as intermarriage and political and economic pressure as well as the expansion of Sufi missionary activity.

The early history of Pahang does not suggest that the Islamic law of inheritance within the context of *farā'id* and *waṣiyyah* was fully implemented. This is evident from a study of the Pahang law developed during the reign of Sultan Abdul Ghafur Muhaiyyuddin (1591-1614). Like other Malay law digests, the Pahang Law did not include any provision concerning the distribution of inheritance, although there were regulations applying to property. It can therefore be concluded that, although the Malay rulers were Muslim, as far as the issue of succession was concerned they still followed the customary law.

In the State of Pahang the *Adat Temenggung* is the basis for the administration of law and justice, which in most respects conforms to the principles of Islamic law with the notable exception of the succession law, where it reveals its matriarchal origins. In the *Temenggung* area however, the body of custom known as *Adat Kampong* is also practised by villagers especially in the matter of succession where the distribution of property is based on mutual agreement.

The *arrival* of the Western colonialists, especially the British drastically changed the traditional setting of the legal system in the area. Under the British administration the jurisdiction of the *sharī'ah* court was curtailed and relegated to a subordinate position. However it was also during this period that *farā'id* was officially implemented, because the distribution law was based on the personal law of the deceased. Thus, in cases pertaining to the settling of Muslim estate, *farā'id* is the applicable law.

Notes to Chapter Three

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- ³ Linehan, W., "History of Pahang", p. 1.
- ⁴ Za'ba, *Sejarah ringkas Tanah Melayu*, Pustaka Melayu, Singapore, 1961, p. 31.
- ⁵ Ibid, p. 35.
- ⁶ Hashim, Muhamad Yusoff and Gopinath, Aruna, *Tradisi Persejarahan Pahang Darul Makmur 1860-1930* (Traditions in the History of Pahang Darul Makmur 1860-1930), Tempo Publishing, Selangor, 1992, p.273.
- ⁷ Morrison, G.E., "The Siamese Wars With Malacca During the Reign of Muzaffar Shah", *Journal of the Malayan Branch of the Royal Asiatic Society*, 1938, vol. 16, part III, pp. 62-63.
- ⁸ Linehan, W., "History of Pahang", p. 41.
- ⁹ As quoted in Fatimi, S.Q., *Islam Comes to Malaysia*, Singapore, Malaysian Sociological Research Institute, 1963, p. 3.
- ¹⁰ Coatalen, P., "The Coming of Islam to South East Asia: A Critical Review of Some Extant Theories", *The Islamic Quarterly*, 1981, vol. XXV, nos. 3-4, p. 3: 102. See also Hooker, M. B., *Islam in Southeast Asia*, Leiden, E. J. Brill, 1983, p. 1-22.
- ¹¹ Hussin Mutalib, *Islam and ethnicity in Malay Politics*, Singapore, Oxford University Press, 1990, p. 11.
- ¹² Fatimi, *Islam comes to Malaysia*, p. 8. See also Arnold, T.W., *The Preaching of Islam: A History of the Propagation of the Muslim Faith*, Lahore, Sh. Muhammad Ashraf, 1961; 371.
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- ¹⁴ Ibid., pp. 60-64. See also Paterson H.S., and Blagden, C.O., "An early Malay Inscription from Trengganu" in *Journal of the Malayan Branch of the Royal Asiatic Society*, 1924, vol. II, pp. 252-263. See also Rauf, M.A., *A Brief History of Islam with Special Reference to Malaya*, Oxford University Press, Kuala Lumpur 1964, p. 78.
- ¹⁵ Fatimi, *Islam comes to Malaysia*, pp 10-14.
- ¹⁶ Ibid., p. 37.
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- ¹⁸ Alatas, S.H., "On the Need for a Historical Study of Malaysia Islamization", *Journal of Southeast Asian History*, 1985, vol.4, no 3, p.62.
- ¹⁹ Tibbetts, G.R., "The Malay Peninsula as known to Arab Geographers" in *Malayan Journal of Tropical Geographer*, 1956, vol. 9, pp.21-24.
- ²⁰ Ra'uf, M.A., *A Brief History of Islam with Special Reference to Malaya*, Oxford University Press, Kuala Lumpur 1964, p.84.
- ²¹ Ibid.
- ²² Alatas, Syed Farid, "Notes on Various Theories Regarding the Islamization of the Malay Archipelago", *The Muslim World*, 1985, vol. LXXV, nos. 3-4, p 164. See also Coatalen, P., "The Coming of Islam to South East Asia", p. 109. See also Milner, A. C., "Islam and the Muslim State" in Hooker, M.B. (ed), *Islam in Southeast Asia*, p. 44.
- ²³ Van Leur, J.C., *Indonesian Trade and society: Essays in Asian Social and Economic History*, the Hague, 1955, p. 112. See also Alatas, S.F. "Notes on Various Theories Regarding the Islamization of the Malay Archipelago", pp. 167-168. See also Fatimi, *Islam Comes to Malaysia*, pp. 90-92. Se also Coatalen, P., "The Coming of Islam to South East Asia", p 106.
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- ²⁵ As quoted by Ismail Hamid, *The Malay Islamic Hikayat*, University Kebangsaan Malaysia, Bangi, 1983. p. 26. See also Cesar Adib Majul "Theories on the

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- ²⁷ Marrison G.E., “The Coming of Islam to the East Indies 1951. See also Arnold, *The Preaching of Islam*, p. 368.
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- ²⁹ Al-attas, S.M.N, *Islam Dalam sejarah dan Kebudayaan Melayu (Islam in the History and Malay Culture)*, University Kebangsaan Malaysia, Kuala Lumpur, 1972, p. 34.
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- ³³ Ibid. Pasai was located in the north Sumatra had been Islamised much earlier, probably in 1282 A.D.
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- ³⁵ Kennedy, J., *A history of Malaya- 1400-1959*, (London, 1962), p. 17. See also Buyong Adil, pp. 4-5.
- ³⁶ A.C. Milner, ‘Islam and Malay Kingship’, in *Reading of Islam in South East Asia* (Singapore, 1985), p. 27.
- ³⁷ Ibid.

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- ³⁸ Ibrahim, Ahmad and Joned Ahilemah, *The Malaysian Legal System*, Kuala Lumpur, Dewan Bahasa dan Pustaka, 1995, p. 10.
- ³⁹ Ibid p. 12.
- ⁴⁰ Ibid.
- ⁴¹ Ibid.
- ⁴² Ibid, pp.10-11.
- ⁴³ Wilkison, R.J., *Papers on Malay Subjects*, Kuala Lumpur, Government Printer, 1927, p. 12.
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- ⁸³ Section 5 (i) Enactment Public Trust 1920.
- ⁸⁴ This Act has been revised in 1981.
- ⁸⁵ Sharifah, *Penyelesaian Pusaka*, p. 2.
- ⁸⁶ *Ibid*, pp. 2-3.
- ⁸⁷ Yahya, Osman, *Pembahagian Pesaka Kecil: Suatu Pengalaman Dan Amalan (The Distribution of Small Estate; Experience and Practice)*, unpublished paper presented

at Meeting Towards the Development of Muslim Inheritance Act, in Mutiara Malacca Beach Resort from 2-4 September 1995.p.4.

⁸⁸ (1915) 1 F.M.S.L.R. 204.

⁸⁹ Ibid.

⁹⁰ See Section 15 (1) and (2) SEDA 1955.

⁹¹ Section 15 (1) of SEDA 1955 and section 2 of Majority Act 1971.

⁹² Interview with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh, Pahang.

CHAPTER FOUR

The Present Administration of Muslim Inheritance in the State of Pahang

4.1 Introduction

This chapter is divided into two parts. The first part provides a general introduction to the present system of administration of Muslim inheritance in the State of Pahang. The discussion begins with an examination of the various categories of inheritance as defined by the present system. The authoritative agencies and their jurisdiction in managing inheritance cases will then be considered, also the legal acts that govern the management of Muslim inheritance. The second part concerns the settlement process, its procedures and duration. The problems that may affect the smooth running of the process also will be examined.

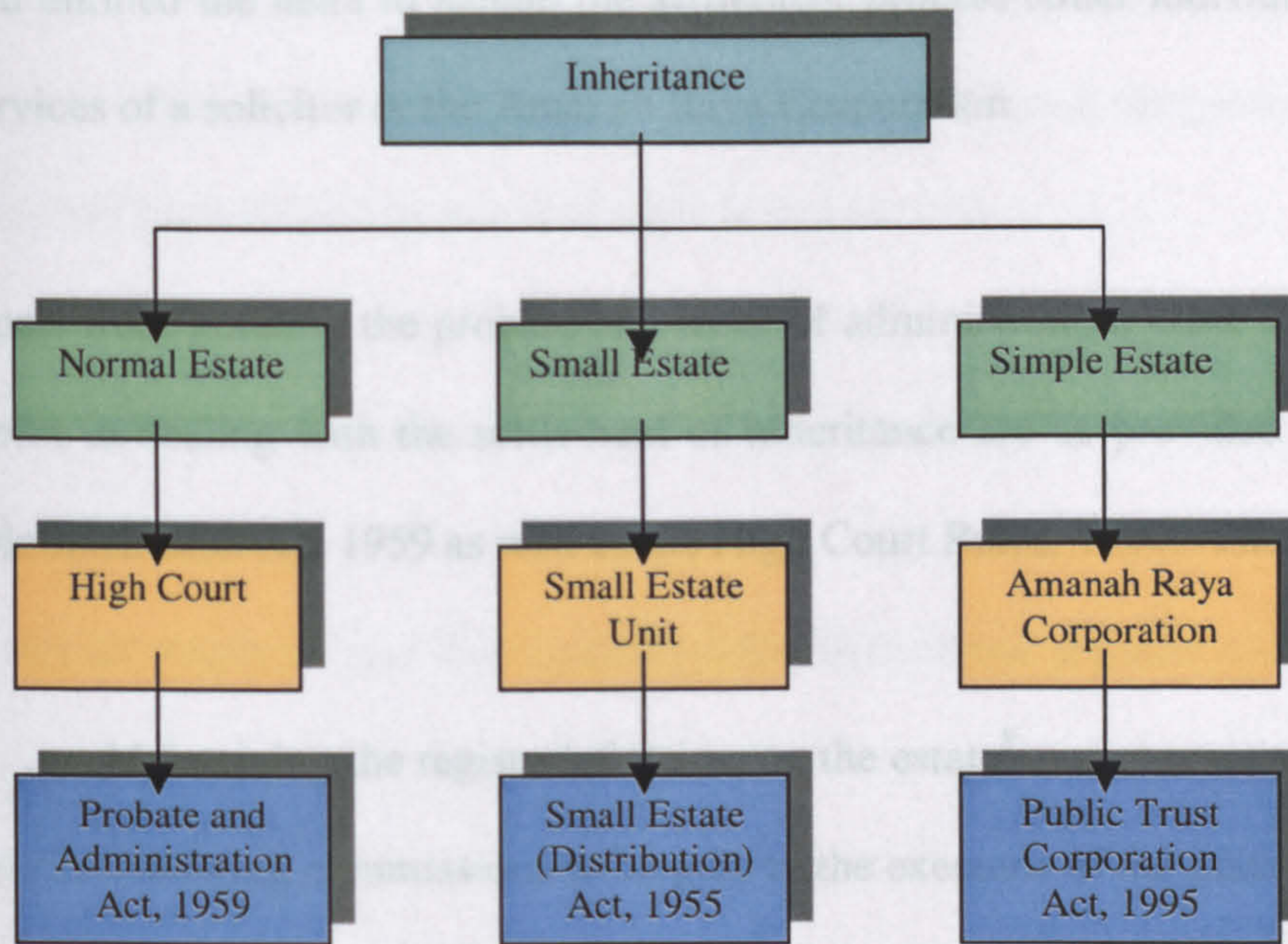
4.2 The Categories of Inheritance

The workings of the present administration in handling cases of Muslim inheritance are even *now* not free from British influence, especially in respect of legislation and administrative structure, although many changes have been made by the authorities.¹ As was the case before independence, the distribution of Muslim estates in Pahang is based on three main acts: the Small Estate (Distribution) Act, 1955 (later SEDA 1955); the

Probate and Administration Act, 1959 (later PAA 1959); and the Public Trust Act 1950, now known as the Public Trust Corporation Act, 1995 (later PTCA 1995). Under the present administrative system, the deceased's property is categorised as being one of three types: normal, small and simple estate.²

Although the present administration divides the deceased's property into three categories, with each type being administered by a separate agency, Ahmad Ibrahim, a prominent scholar of the administration of Islamic law in Malaysia, has noted that in real practice this administrative separation did very little to increase the level of efficiency of the agencies handling cases of inheritance, as the procedures of the settlement process remained more or less the same. He points out that on the contrary, the separation has sometimes led to confusion among claimants, who have difficulty in deciding which agency to consult to resolve their problem.³ The categories of inheritance and their links with the administrative agencies are shown in Flow Chart 4.1.

Flow Chart 4.1: The Categories of Inheritance and the Administrative Agencies



Source: Author based on Yusoff, Siti Maryam, *Penyelesaian Pusaka Pesaka Kecil Di Pahang; Masalah dan Penyelesaian*, unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 4

4.1 Normal Estates: Act and Settlement Agency

A normal estate is defined as an estate that consists of immovable property⁴ or movable property,⁵ or a mix of both, valued at more than RM 600,000.00.⁶ The administration of normal estates is based on the Probate and Administration Act 1959 under the jurisdiction of the High Court. The act provides the procedures necessary for an individual to acquire probate and a letter of administration before the estate can be distributed among the legal

heirs and other claimants. This letter is normally issued through the subordinate courts, and entitled the heirs to handle the settlement process either individually or through the services of a solicitor or the Amanah Raya Corporation.

Apart from granting the probate and letter of administration, other functions of the High Court in dealing with the settlement of inheritance are as provided by the Probate and Administration Act 1959 as well as the High Court Rules, 1980. They are as follows:⁷

- i) Maintaining the register of claims on the estate⁸
- ii) Allowing commissions to be paid to the executor of the estate⁹
- iii) Granting approval to use the estate to pay for expenses¹⁰
- iv) Validating the letter of administration¹¹
- v) Settling the issue of revoking the letter of administration.¹²
- vi) Settling third party claims to obtain the rights to administer the estate after the issuance of the letter of administration.¹³
- vii) Death determination¹⁴
- viii) Hearing appeal cases against the decisions of Small Estate Officers.¹⁵
- ix) Authorising the Amanah Raya Corporation to administer intestate property¹⁶
- x) Appointing a temporary executor of the estate¹⁷

It is clear from an examination of the foregoing that all matters relating to the settlement process of a Muslim deceased's property is under the jurisdiction of the High Court and not the *sharī'ah* court. The High Court's exclusive jurisdiction in settling cases of

Muslim inheritance has led to judicial conflict with the *sharī'ah* court and causes resentment through out Malaysia, where many believe that the High Court has usurped the role of the *sharī'ah* court. The matter of jurisdiction and the problem of the role of the *sharī'ah* court will be further discussed in section 4.6.

4.4 Simple Estates: Act and Settlement Agency

A simple estate is one that consists only of movable property such as bank savings, employee's provident funds (EPF), and shares with a value of not more than RM 600,000.00.¹⁸ The administration of simple estates is based on the Public Trust Corporation Act, which was introduced by the Federal Government in 1995, replacing the Public Trust Act of 1950.¹⁹ This new act was designed to organise the matter of public trustees and the administration of simple estates. By the enforcement of this act on 1st August 1995, a new private agency, wholly owned by the Federal Government, was established; known as the Amanah Raya Corporation, it replaced the Department of Public Trust and Official Administration.²⁰ Mr. Ali, the Small Estate Officer of Pahang's Middle Zone, commented that by corporatising the Department of the Public Trust and official Administration the government has neglected the Small Estate Unit, which needs more support and attention in order to improve its performance, dealing as it does with both movable and immovable property, whereas the Department of Public Trust and Official Administration only deal with the cases of movable property.²¹ As for the Amanah Raya Corporation, Sections 11 and 12 of the PTCA 1995 highlighted four main functions. They are: i) as executor of the estate ii) as trustee of the estate iii) preparing

the will and accepting the appointment as executor of the estate and iv) as trustee of share funds²²

4.5 The Small Estates: Act and Settlement Agency

A small estate is defined as the estate of a deceased person consisting wholly or partly of immovable property with a value of not more than RM 600,000.00.²³ The administration of the small estate is based on the SEDA 1955 and its regulations. The introduction of this act has reinforced the powers of the Collectors of Land Revenue and made their task easier, especially in solving acute land dilemmas.²⁴ The aim of the act is to simplify and speed up the resolution of the intricacies of land distribution, particularly the enormous problems created by competing claims to small plots of land, which constitute a widespread phenomenon in nearly all districts of Pahang especially in areas populated by Malays.²⁵ Apart from distributing land among the rightful heirs, the jurisdiction of the act also covers other forms of immovable property, such as money saved in local banks by villagers; pensions and shares; and also the employees provident fund (EPF).

The implementation of the act was carried out gradually beginning with the east coast state of Kelantan on 1st December 1955.²⁶ The act was introduced in Pahang on the 1st July 1957, approximately a month before the nation gained its independence.²⁷ The uniqueness of SEDA 1955 lies in the concern of its provision for the claimants' welfare. These include (i) all the relevant claim forms are free and easily obtainable from the district office or the Small Estate Unit; (ii) hearings can be carried out at the nearest

office to the claimant's address, whether at the Small Estate Unit or any other land office, in order to encourage all the heirs involved to attend the hearing; iii) transmission among the heirs after the hearings will not be charged stamp duty; (iv) most importantly, the services of a solicitor are rarely allowed. According to section 31, "*no advocate shall be entitled to appear on behalf of any party in any proceedings before the collector and assistant collector who may grant or withhold such permission in each case as he thinks fit*".²⁸ According to Mrs Rosnaha, a senior official of Pahang's Small Estate Unit, the aim of this section is to safeguard the financial welfare of the claimant; the solicitor's fee is usually so high as to be beyond the means of the claimant, especially if he or she is a villager.²⁹

However, apart from the question of religious law the act also allows the distribution to be based on customary law, i.e. on mutual agreement.³⁰ As previously mentioned in chapter 3, the distribution of the deceased's property based on mutual agreement was originally derived from the practice of *Adat Kampong*, which was widely applied by the villagers in the area of *Adat Temenggung* such as Pahang although distribution based on mutual agreement also occurs among people practising *Adat Perpateh* in Negeri Sembilan.³¹

The distribution of inheritance based on mutual agreement as practised in the State of Pahang shows some similarity with the principle of *al-Takhāruj* in *farā'iḍ*. as explained in chapter 2 (2.7).

So it is clear that the main principle connecting *al-Takhāruj* and the settlement by mutual agreement is that the process must be based on consent and voluntary basis among the heirs involved. The only difference between these two practices is that in the case of *al-Takhāruj* the agreement is reached among the heirs by freely negotiating the form of share received by them, while in the case of settlement by mutual agreement in the *Adat Kampong*, the agreement tend to concern the equal distribution of shares between the males and females.³² Therefore it could be suggested that the distribution of inheritance based on the mutual agreement as practised by Malay society is probably a manifestation of Islamic principle rather than Malay customary law.

The introduction of SEDA 1955 gave some prominence to the role of four equally important individuals on whom the smooth functioning of the settlement process depends. They are the Collector of Land Revenue and the Small Estate Officer (Assistant of Collector of Land Revenue), the *Penghulu* or village headman and the *qāḍī* or judge of the *sharī'ah* court.

4.5.1 Collector of Land Revenue

Before the establishment of the Small Estate Unit by the Director General of Land and Mines in July 1974, settlement process was handled by the Collector of Land Revenue (later collector) who was also the district officer. The powers of the collector in distributing the deceased's property are laid down in section 15(1) of SEDA 1955 which stipulates

*“...where the collector (district officer) is satisfied that all the beneficiaries of the estate being of full age and capacity have agreed between themselves as to the manner in which the estate should be distributed, the collector may after recording in the distribution order the terms of the agreement, and the assent of the parties thereto, distribute the estate in the manner provided for by the agreement unless it shall appear to the Collector to be unjust or inequitable so to do”.*³³

Although substantial powers are vested in the collector under the SEDA 1955, there are considerations to be taken into account before a particular piece of land can be distributed. These considerations are laid down in the first Schedule of Section 15 (5) which are as follows: (i) dividing land into several lots in several names may seriously diminish the value of the estate as a whole; (ii) the real value of a small estate, especially when represented by complicated fractions, is less than their proportionate values; (iii) it is not conducive to good cultivation or peace in a family for persons who may have conflicting interests to be undivided co-proprietors of land; iv) It is greatly to the advantage of an infant that his co-proprietors should be those most nearly related to him; and v) valuations are necessarily estimates and are only approximately correct; it is therefore unnecessary that the estimated value of a lot should be the precise amount of a beneficiary's mathematical share; it is sufficient if the estimated value of a lot substantially corresponds to the beneficiary's calculated share.³⁴

The nature of the collectors' work requires them to be familiar with a large number of laws. Habib in his working paper noted that there are at least twenty other relevant laws, of which the officer needs to be aware. They are i) Estate Duty Enactment, 1941; ii) Trustee Act 1949; iii) Oath and Affirmation Act 1949; iv) Powers of Attorney Ordinance, 1949; v) Contracts Act 1950; vi) Evidence Act, 1950; vii) Presumption of Survivorship Act, 1950; viii) Public Trustee Ordinance, 1950; ix) Adoption Ordinance 1952; x) Mental Disorders Ordinance, 1952; xi) Registration of Adoption Ordinance, 1952; xii) Limitation Ordinance, 1953; xiii) Civil Law Act, 1953; xiv) Wills Ordinance, 1959; xv) Partnership Act 1960; xvi) Legitimacy Act, 1961; xvii) Guardianship of Infants Act 1961; xviii) Age of Majority Act 1971; xix) Rules of High Court, 1980; xx) The National Land Code.³⁵ However, most collectors tend to rely on an experienced subordinate officer such as the senior clerk of the office, who has vast experience in these matters. These individuals are regarded as an asset to the Unit especially from the perspective of the newly appointed officer.³⁶

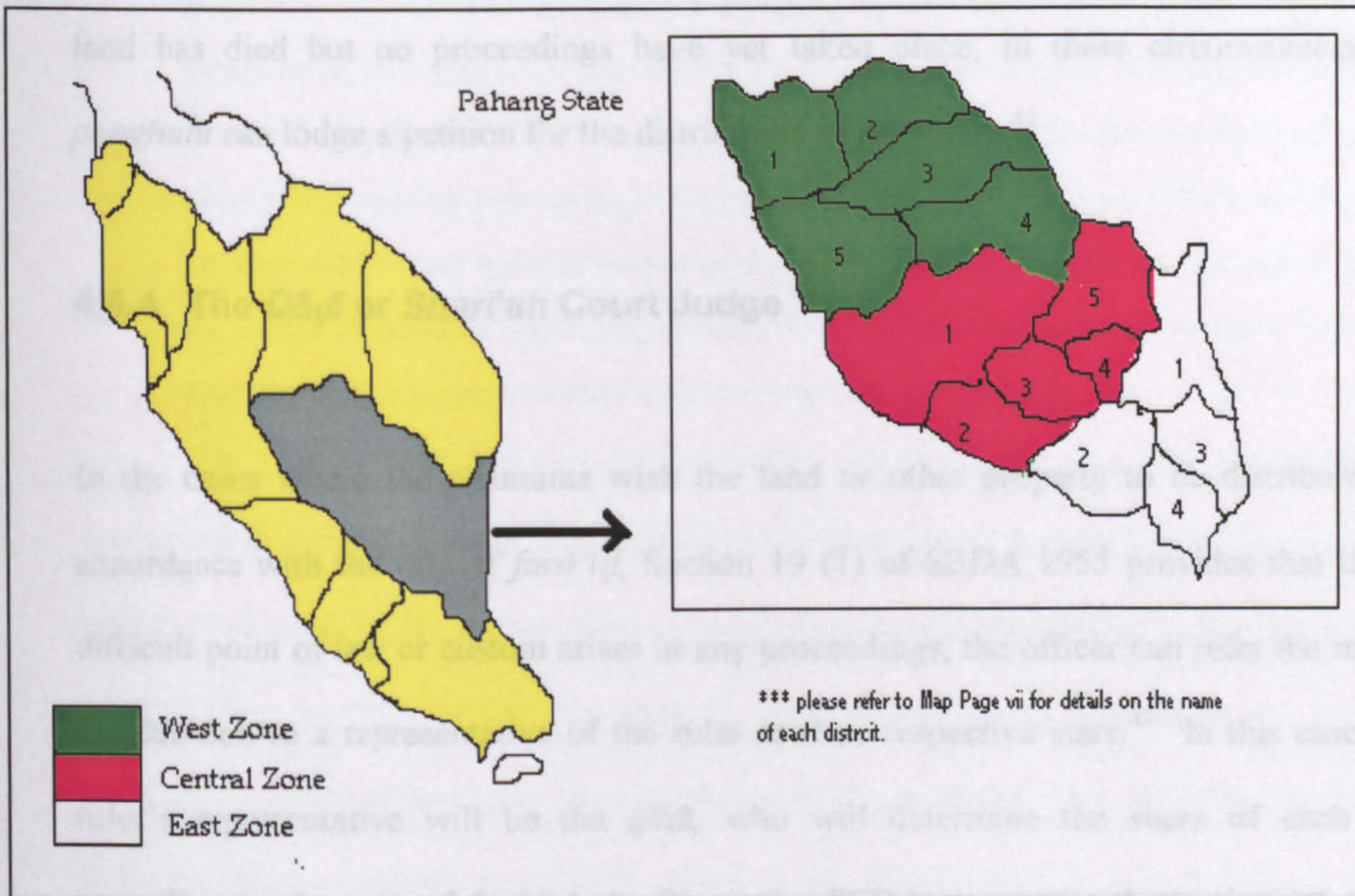
Since the collector deals with the distribution of land and other immovable property, his jurisdiction in most instances overlaps with the role of *qāḍī*. The collector however, has the advantage of being able to summon the *qāḍī* or *penghulu* (village headman) on matters pertaining to land.³⁷

5.4.2 The Small Estate Officer

In recognition of the great burden the collector had to shoulder, in 1974 the Small Estate Unit was established. The Small Estate Officers were appointed as Assistant Collectors of Land Revenue in order to settle the enormous backlog of small cases, which the lone figure of the collector had been unable to deal with. The Small Estate Officers have been provided with jurisdiction to deal with property of a value less than RM³⁸ 300,000.00; this figure was revised in 1989, enabling the Small Estate Unit to deal with property valued below RM 600,000.00.³⁹ The Small Estate Officers are also regarded as second-class magistrates for the purpose of taking oaths and affidavit as required by the Statutory Declaration Act, 1960.⁴⁰

There are three zones administered by the Small Estate Units in the State of Pahang, with each zone comprising at least three districts, as shown in map 4.1. These zones are: i) the East Zone, which covers the districts of Kuantan, Pekan and Rompin; ii) the Middle Zone, which is composed of the districts of Temerloh, Bera, Jerantut and Maran; iii) the West Zone, which covers the districts of Bentong, Raub and Kuala Lipis.⁴¹

Map 4.1: Administrative zones of the Small Estate Unit in the state of Pahang.



Source: Ali, Aziz, *Ke Arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, (Toward Better Administration of Inheritance in Pahang) unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 5.

4.5.3. The *Penghulu* or Village Headman

The duties of the *penghulu* are not excluded from SEDA 1955. He is assumed to be the person who knows what is happening locally and has a deep knowledge of the personal background of those involved as they have a close relationship. Thus the information supplied by the *penghulu* is vital to the smooth functioning of the hearing process and it can be said that the efficiency of the Small Estate Unit in settling such cases partly hinges

on the capability of a particular *penghulu*. Under Section 18 of SEDA 1955 a further duty of the *penghulu* is to report to the Office in cases where the proprietor of a piece of land has died but no proceedings have yet taken place; in these circumstances the *penghulu* can lodge a petition for the distribution of the estate.⁴²

4.5.4 The *Qāḍī* or *Sharī'ah* Court Judge

In the cases where the claimants wish the land or other property to be distributed in accordance with the rule of *farā'iḍ*, Section 19 (1) of SEDA 1955 provides that if any difficult point of law or custom arises in any proceedings, the officer can refer the matter for decision to a representative of the ruler in their respective state.⁴³ In this case, the ruler's representative will be the *qāḍī*, who will determine the share of each heir according to the rule of *farā'iḍ*. As far as the SEDA is concerned, Section 19 (1) is possibly the most vital indication made by the act albeit indirectly, in regard to the function of the *qāḍī* and the *sharī'ah* court.

Although the *qāḍī* and the *sharī'ah* court play an important part in Malay society, under the present administration of inheritance, their role in dealing with the matter of Muslim inheritance is very limited. As provided by Pahang's Administration of Islamic law Enactment 1991, the function of the *qāḍī* or the *sharī'ah* court is only to certify share distribution based on the rule of *farā'iḍ* whenever there is a request from an interested party, as is clearly stated in the Section 51 of the said enactment:

“ If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Shariah Courts, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the Shariah Courts may, on the request by such court or authority, or on the application of any person claiming to be a beneficiary or his representative and upon 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 the shares to which they are respectively entitled.”

According to Ahmad Ibrahim, the restriction imposed on the jurisdiction of the *qāḍī* and the *sharī'ah* court in the matter of Muslim inheritance is probably due to the Federal law having been applied beyond its scope.⁴⁴ For instance, in the matter of Muslim succession, testate or intestate, account should be taken of the PAA 1959 and the SEDA 1955 despite the fact that it is clearly stated in the Ninth Schedule List II (State List) of the Federal Constitution that the matter of Muslim succession testate or intestate is under the jurisdiction of state court which means to be under the jurisdiction of the *sharī'ah* court. The Ninth Schedule List II of the Federal Constitution read as follows;

“ Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, 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; Malay Custom; Zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosque or any Islamic public place of worship; creation and punishment of offences by persons professing in the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Shariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.”

The problems faced by the *qāḍī* and *sharī'ah* court are certainly not new; they have been reported since the Malay state came under the rule of Western colonialism. Wilkinson, as quoted by Ahmad Ibrahim stated that “ *there can be no doubt the Muslim Law would have ended by becoming the law of Malaya had not British law stepped in to check it*”⁴⁵.

4.6 The *Sharī'ah* Court Under the Administration of Islamic law Enactments and Its Problems

Prior to the establishment of Western colonialism in the Malay States, Islamic law played an important role in the administration of justice through the *sharī'ah* courts and the final appeal was heard before the Sultans, who were the ultimate religious authority in their respective states.⁴⁶

The arrival of the British drastically changed this situation since they were concerned to set up secular courts, which were more suited to their purpose without considering the need to re-establish the Islamic legal system.⁴⁷ Under British rule, the *sharī'ah* court jurisdiction was restricted to deal mainly with family matters, succession and minor criminal offences. As the result the role of the *sharī'ah* court was greatly diminished and the court was relegated to a subordinate position.⁴⁸

Nevertheless, during the period of British rule there were cases which show that the opinion of the *qāḍī* was taken into consideration, but even so the final decision was made by a non-*sharī'ah* court or civil court. This can be observed in the case of *Ramah v Laton*⁴⁹ in 1941, which involved a Malay widow who sued the second widow of her late husband for certain lands and property because she claimed that all the land and property was a jointly acquired property between her and the deceased and therefore half of the property was hers. After the local *qāḍī* had given the evidence, the final decision was made by Chief Justice of the Civil Court. Thorne concluded that the *adat* principle of jointly acquired property is part of Islamic law and ruled that the plaintiff was entitled to half of the immovable property left by her late husband. As a judge of the Court of Appeal, Justice Thorne held that in the Federated Malay States, Islamic law is not foreign law but the local law and the law of the land.⁵⁰

Concerning the above case, it can be said that although in principle the issue was about Islamic law and should therefore have been settled in accordance with the principles of Islamic law on the advice of the *qāḍī*, unfortunately the final decision was made by a

civil judge and not by the *qāḍī* presiding in the *sharī'ah* court. Similarly, it can be said that although Judge Thorne conceded that Islamic law is not foreign but local law, the fact remains that the *sharī'ah* court's role was usurped by the Civil Court. It can be assumed then that the advice of the *qāḍī* was only needed as far as the division of the land was concerned and was not part of the final decision making process.

There were also those who were sceptical about the integrity and capability of some *qāḍī* and *sharī'ah* courts to conduct cases involving inherited property. For example, Taylor, who recorded a series of cases pertaining to the distribution of property, came to the conclusion that on many occasions *qāḍīs* were confused between *adat* rules and Islamic law when they were consulted.⁵¹ Although there may be some truth in his opinion it would be unrealistic to conclude that no *sharī'ah* court presided over by a *qāḍī* should be allowed to make the final decision for this reason alone. Moreover, it can be argued that Taylor's view was preconceived since he failed to appreciate that in most cases the opinion of the *qāḍī* was perfectly correct. Mackeen gives an example of this, citing the proceedings of *Lebar v Niat*⁵² where a confrontation occurred between the *qāḍī* and the secular court, which showed itself totally unfamiliar with the Islamic jurisprudence.⁵³ Mackeen's view is supported by Banks and Salleh Buang who argue that in general the attitude of British administrators towards Islamic law was not encouraging.⁵⁴ They perceived it as a threat to efficient rule and thus opposed the influence of Islamic legal settlements concerning property.⁵⁵ This was partly because, in their opinion, British property and succession laws were fairer, and they seem to have feared that the principles

of *farā'id*, which appear to be biased towards male inheritance, would create a concentration of wealth in rural areas.⁵⁶

The doubts that surrounded the efficiency and usefulness of the *sharī'ah* courts were further enhanced by the question of legal codes. Islamic legal codes, although easily accessible, were seldom consulted or analysed. Stamford Raffles concluded that in most states, including Pahang, what he called “*the civil code of the holy Quran*” was almost unknown.⁵⁷

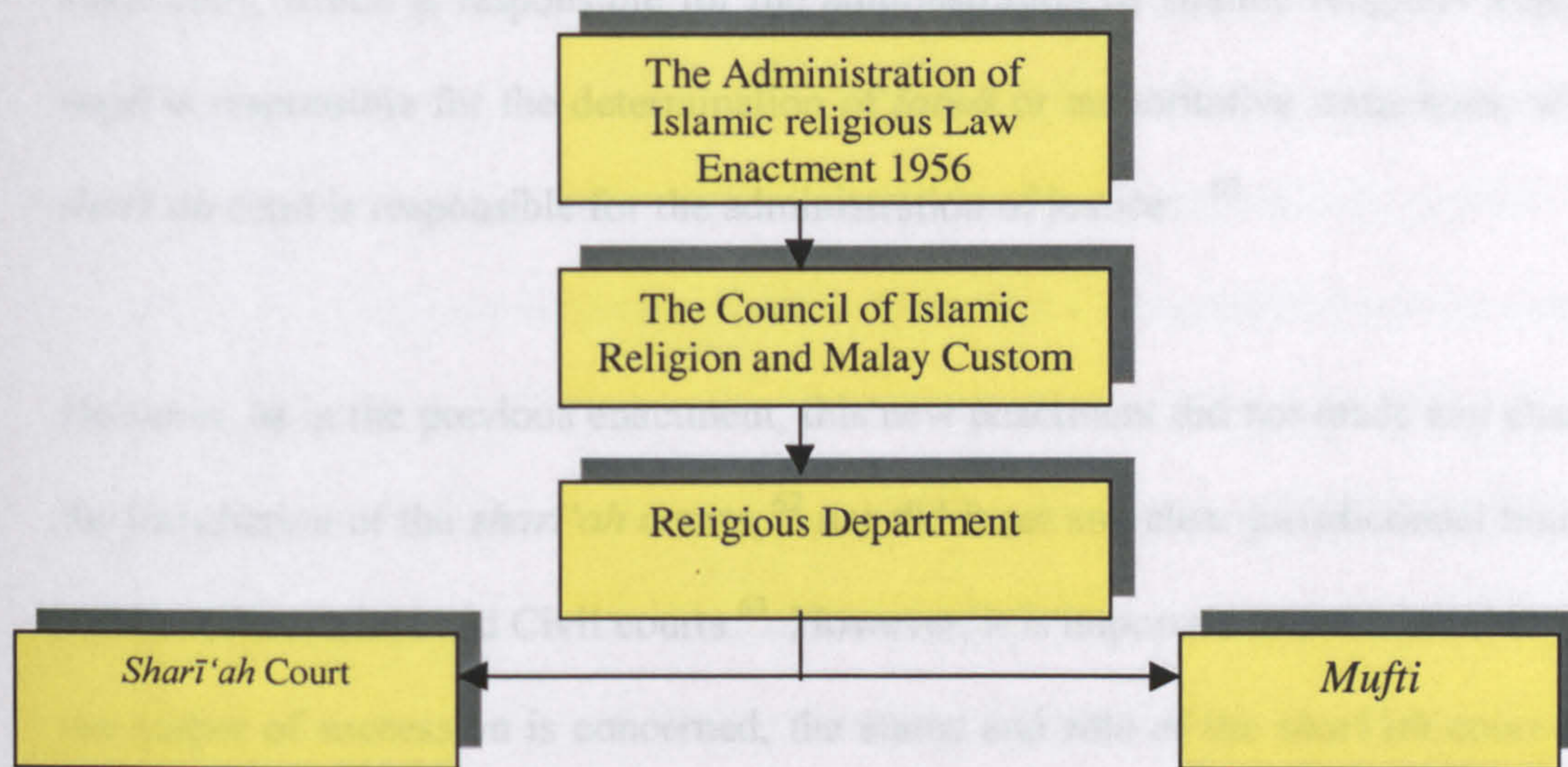
Before 1948 the *sharī'ah* courts were part of the judicial structure, but even so they failed to meet the expectation that they would help to revive the Islamic legal system. After 1948, the Shariah courts were excluded from the national judicial structure.⁵⁸ State governments were given the power to set up their own *sharī'ah* court, thus relieving the British of any responsibilities.

Despite these setbacks to the status of Islamic law, some credit should be given to the British for the adoption by the Pahang Administration of the Muslim Enactment of 1956. Among other things, the enactment provided the necessary procedures and regulations to set up *sharī'ah* courts officially, if possible in every district in the state. The enactment was the first constructive initiative towards adopting Islamic public law in the state. The enactment was intended to provide the administrative and judicial apparatus to maintain Islamic authority in the State of Pahang and to support the administration of Islamic

religious affairs and law. It defines the relation of Islam to the states and it also attempts to specify the substance of Islamic law for the Muslims in the state.⁵⁹

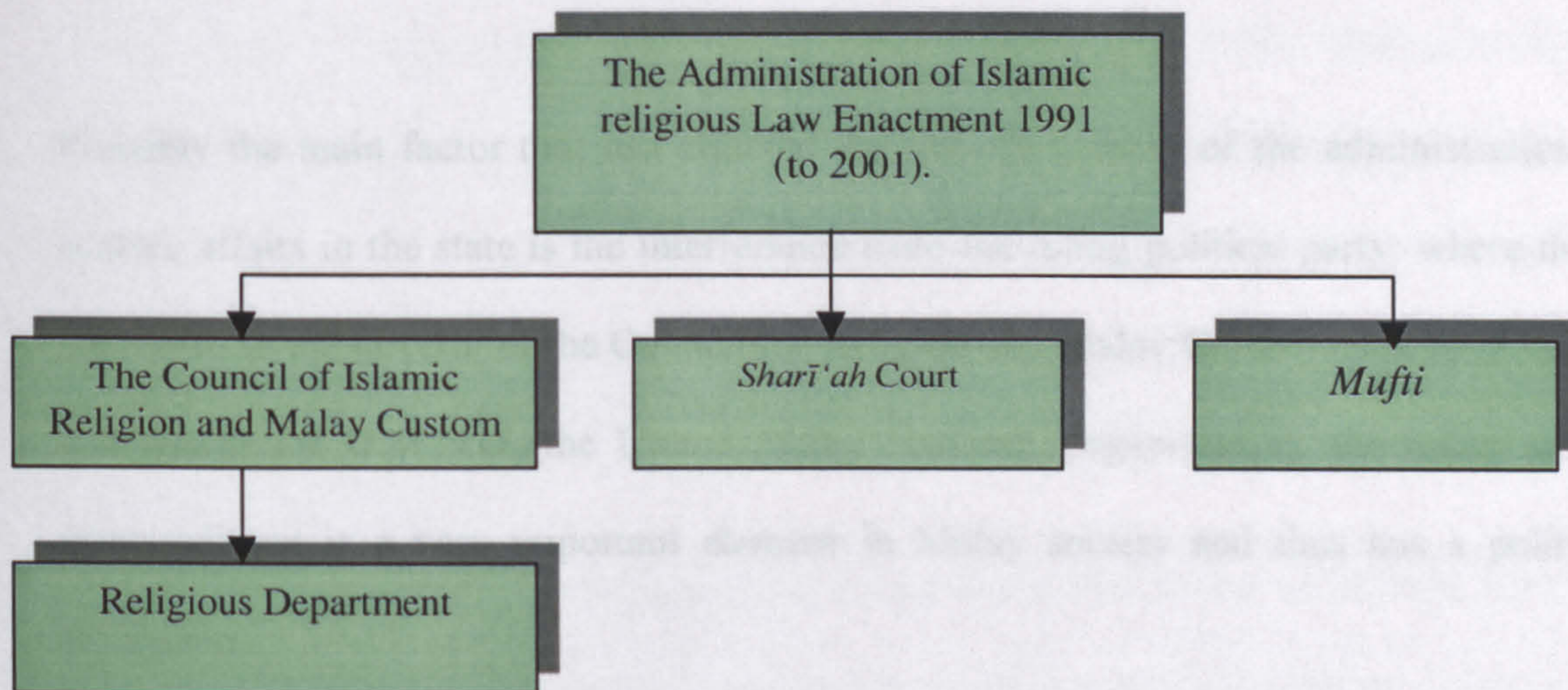
After the nation gained its independence in 1957, few significant changes were made in regard to the function of the *sharī'ah* courts in the Malay states and Pahang in particular. However, due to the increase of Islamic awareness in Malay society and the consequent demand for more efficient ways of dealing with matters related to Islam, in 1991 the Pahang State Legislative Assembly passed a new enactment for the administration of Islamic law. The aim is to reorganise the administration of Muslim affairs in the state. Unlike the previous enactment which concentrated power in the Council of Islamic Religion and Malay Custom, the new enactment provides three independent functionaries: i) the Council of Islamic Religion and Malay Custom; ii) the Mufti; iii) and finally the *Shariah* Court.⁶⁰ The administrative structure of each, as determined by the previous and new enactments, is illustrated in the following flow charts.

Flow chart 4.2: The Management of Islamic Affairs Under the Administration of the Islamic Religious Law Enactment, 1956.



Source: The Administration of Islamic Religious Law Enactment 1956

Flow chart 4.3: The Management of Islamic Affairs under the Administration of the Islamic Law Enactment, 1991 (to 2001).



Source: The Administration of Islamic Law Enactment 1991

Under the new enactment, the Council for Islamic Religion and Malay Custom is the main body, which is responsible for the administration of Islamic religious affairs. The *mufti* is responsible for the determination of *fatwā* or authoritative statements, while the *sharī'ah* court is responsible for the administration of justice.⁶¹

However, as in the previous enactment, this new enactment did not made any changes to the jurisdiction of the *sharī'ah* courts,⁶² nor did it set any clear jurisdictional boundaries between the Islamic and Civil courts.⁶³ However, it is important to point out that as far as the matter of succession is concerned, the status and role of the *sharī'ah* court remains the same as before; that is, to certify the share distribution based on *farā'id* if the heir requests it to do so.⁶⁴ So it is obvious that even the new enactment does not give sufficient power to the *sharī'ah* court in managing the settlement of Muslim inheritance, which is under the jurisdiction of the High Court, as previously mentioned in section 4.3.

Probably the main factor that has affected the smooth running of the administration of Islamic affairs in the state is the interference from the ruling political party: where those appointed as the director of the Council for Religion and Malay Custom must have strong sympathies for U.M.N.O (the United Malay National Organisation), the ruling party, since religion is a very important element in Malay society and thus has a political dimension.

From the researcher point of view, the role of the *mufti* has also become increasingly difficult especially in the late 90's. This is because the *mufti* has to balance the interest of

important political figures and the needs of Malay society, which is becoming more sensitive to the interaction of religion with their day-to-day lives. As members of the legal committees appointed under the enactment, the *muftī* have become targets for criticism, as they seldom argue with or go against the opinion of their superior. This is especially so if the issue is controversial or detrimental to vested interests on a particular point of Islamic law. In most cases, they keep their counsel and refuse to commit themselves, and because of this those who are conversant with Islamic law tend to perceive them as puppets of the state government. This, it can be argued, has contributed to a grave weakening in the adoption and reform of Islamic law in the State of Pahang.

4.7 The Amendment of Article 121 of the Federal Constitution and its Effect on the Role of the *Sharī'ah* Court.

In 1988 an important amendment was made to Article 121⁶⁵ of the Malaysian Federal Constitution by inserting a new sub article, 121(1) (A) which reads as follows:

“The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts.”

The intention of this new sub article was to take away the powers of judicial review of the High Court over the *sharī'ah* court and to avoid any conflict between these courts. Immediately after the amendment was passed, the High Court appears to have been reluctant to accept that its jurisdiction had been taken away in cases which now come

under the jurisdiction of the *sharī'ah* court. This can be observed in the case of *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Jumus*,⁶⁶ where the presiding judge remarked that section 4 of the Judicature Act, 1964, which provides for the jurisdiction of the High Court, had not been affected by article 121(1) (A) of the Federal Constitution. For this reason, the High court held that they still had the right to review the cases of the *sharī'ah* court, unless the amendment were made retrospective. This judgement was however overruled by the Supreme Court in the case of *Mohd Habibullah v Faridah*⁶⁷ where it was pronounced that Article 121 (1) (A) gave the *sharī'ah* court exclusive jurisdiction over matters related to Islamic law. Hence the High Court is precluded from having any jurisdiction over such matters.

But even though the amendment of Article 121 (1) (A) has theoretically ended the conflict of legal jurisdiction between the two courts, in real practice the amendment is still not sufficient to allow the *sharī'ah* court to handle all the cases of Muslim inheritance without involving the High Court. There appear to be two main reasons for this. Firstly, each of the agencies that is involved in the administration of Muslim inheritance is bound by its respective act. For example, the Small Estate Unit is bound by SEDA 1955, and the Amanah Raya Corporation is bound by PCTA 1995. Under these Acts and PAA 1959 in particular, the power of granting the probate and letter of administration remains under the jurisdiction of the High Court and as yet no amendment has been made to these acts in order to transfer the matter to the jurisdiction of the *sharī'ah* court. Therefore the amendment appears to have made no difference to the role of the *sharī'ah* court in settling cases of Muslim inheritance.

Secondly the *sharī'ah* court was still not included in the definition of a court provided by the Federal Constitution although it did include written law, common law and custom and usages.⁶⁸ As a result, the Registrar of the High Court cannot take orders from the *sharī'ah* court even if its jurisdiction is level with the jurisdiction of the High Court.⁶⁹

4.8 The Settlement Process

In discussing the settlement process used to settle Muslim inheritance cases as administered by present administration, the focus will be on two main issues: Firstly, the procedures and their duration, in order to highlight the differences that exists between the settlement by *farā'iḍ* and mutual agreement and secondly, the problems associated with the process.

Emphasis will be given to the settlement process as it occurs in cases handled by the Small Estate Unit and the Amanah Raya Corporation. The problems faced by the agencies in settling these cases will also be explored. It is hoped that the personal observations of the researcher during the fieldwork survey will also throw some light on the realities of the settlement process. Relevant comments by the officers involved in the process will be used to support the argument.

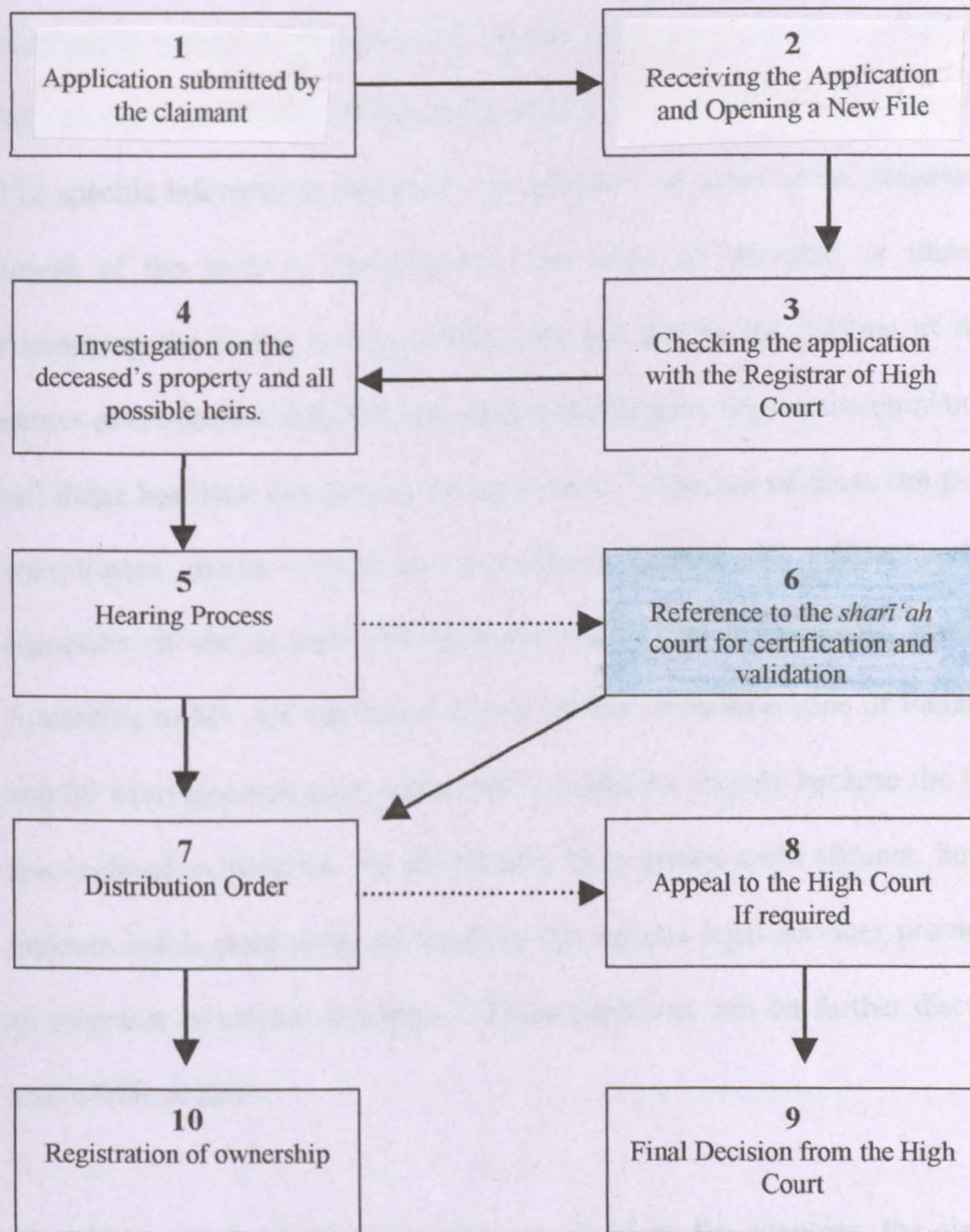
As mentioned earlier in the chapter, under the present administrative system there are three agencies responsible for settling cases involving Muslim inheritance. They are the High Court, the Amanah Raya Corporation and the Small Estate Unit. The

following discussion, however, will concentrate on only two of these: the Small Estate Unit and the Amanah Raya Corporation. The High Court is excluded from the discussion because it is not directly involved with the settlement process since it is not an administrative agency. The settlement process with respect to normal estates, though falling under the jurisdiction of the High Court, is handled by the holder of the letter of administration issued by the High Court. The administrator or the holder of the letter of administration is normally granted a period of one year to settle the distribution of the deceased's property.⁷⁰ In addition, most cases of Muslim inheritance in the State of Pahang involve properties valued at less than RM 600,000.00,⁷¹ and these are dealt with either by the Small Estate Unit or the Amanah Raya Corporation.

4.8.1 The Procedure of the Settlement and its Duration

The study found that the settlement process at both agencies is more or less similar. Altogether there are ten procedures involved in the settlement by *farā'iḍ* and nine by mutual agreement. According to the guidelines provided by the Small Estate Unit, the duration for the settlement of non *farā'iḍ* cases is approximately four months,⁷² while the duration taken by the Amanah Raya Corporation in settling non *farā'iḍ* cases, according to Mr. Kam is approximately two months.⁷³ However, for *farā'iḍ* cases its duration is expected to be longer since it depends on how soon the *sharī'ah* court can produce the *farā'iḍ* certificate. A summary of these procedures is presented in flow chart 4.3. Each of these procedures will be discussed separately.

Flow chart 4.4: The Administrative Procedure Involved in the Settlement Process.



□ Settlement procedure for *faraid* and mutual agreement

■ Settlement procedure for *faraid* only.

Source: Information gathered from fieldwork Survey

1. Submitting an Application Form

In claiming a share of the deceased's estate, the heirs must first submit various items of information through a special form (Form A), which is freely available from the agencies. The specific information required is as follows: the name of the deceased, the status and names of the heirs or beneficiaries, the types of movable or immovable property comprising the estate, a list of debts incurred during the lifetime of the deceased, the names of creditors and finally any other beneficiaries who in the opinion of the *penghulu* or village headman can qualify as legal heirs.⁷⁴ The last of these can prove to be a very complicated matter which has sometimes caused the officer serious difficulties, especially if the property in question will bring considerable profits to the heirs. According to Mr. Ali, the Small Estate Officer of middle zone of Pahang, in the 1970's and 80's this question gave rise to fewer problems, largely because the Malays were then less inclined to litigation. As the Malays have grown more affluent, however, they have become much more ready to resort to the various legal services provided either by the government or private solicitors.⁷⁵ These problems will be further discussed in the later part of this section.

In addition to the above information required by the agencies, the claimants must also submit a copy of the death certificate and a letter of affidavit from two witnesses who have attended the funeral. In cases involving those killed during the Japanese occupation or the tragic racial riot of 1969, or Javanese and Bugis who had once lived in Pahang but left the country and died in Indonesia, a letter of presumption of death issued by the High

Court must be produced. However, in the State of Pahang few cases involving the first two types of deaths are heard. There are on the other hand a considerable number which concern Javanese and Bugis who left the state and died in Indonesia. This is because historically very many Javanese and Bugis have opened up or owned land throughout Pahang.⁷⁶

Finally, the claimants must also submit copies of documents concerning movable or immovable property including the land certificate, share certificates, savings book and the income statements of the employees' provident fund (EPF). As will be seen later, the EPF documents are particularly important because they provide names of the heirs who are eligible to make the claim.

It must be said that not every member of the deceased's family can make a claim to a particular property. In order to avoid undesirable complications and minimise unreasonable interference from distant relatives, most officers will always consider the interest of the immediate heirs. Of course this does not mean that the right of those who can claim under the Islamic law of inheritance are completely disregarded, since in carrying out his duty the officer will solicit the advice and guidance of the district *qāḍī*. But in most cases involving a small piece of land of one to three acres, distant relatives will abandon their interest and very few will choose to pursue their claim further.⁷⁷

Moreover, to avoid land fragmentation, the officer in practically all cases will use his power of persuasion to ensure that the land remains intact, since if subdivision does

occur, it is inevitable that the land will be uneconomical to exploit⁷⁸ Thus it can be said that the officers are more concerned with land viability than satisfying the personal interest of the heirs. But having said this, it is not necessarily the case that advice given by the officer will be accepted. In most straightforward cases, where the heirs are able to decide rationally, the problem is minimal, but there are a number of cases where a stubborn heir refuses to budge. These negative aspects will be discussed further in section 4.8.2 (ii).

2. Opening a new file

Once the application form has been received, a new file will be opened. The clerk in charge will transfer the information to Form B. Acknowledgement that the application form has been submitted will be sent immediately to the heir concerned. This procedure usually takes three days.⁷⁹

3. Checking the Application with the Registrar of the High Court

Under section 8 (2) of SEDA 1955, the officer, after receiving all the necessary information, will submit the application to the Registrar of the High Court before further investigation can undertaken, in order to check whether there has been any previous application to settle the case in question by another party. This procedure is necessary in order to prevent any deception on the claimant's part. If there has been a previous application, the officer will be notified by the Registrar's office through Form C. It is the

duty of the officer therefore to inform all heirs concerned about the decision of the Registrar and he is empowered to suspend any further investigation or transactions concerning that particular case.⁸⁰ If no application has been forwarded previously, then under section 8(9) of SEDA 1955 the officer can proceed with further procedure.⁸¹ This procedure generally takes more than a month to complete, which is not unusual when dealing with a legal institution like the High Court.⁸²

4. Investigation of the deceased's property and all possible heirs.

The fourth procedure involves the investigation of the deceased's property such as the land title and is usually conducted by the settlement officer from the district office where the land is located. At the same time, the *penghulu* is ordered to investigate the background of the heirs involved in the case. This is to make sure that all legitimate heirs are included in the application. Theoretically, this procedure should take approximately three weeks to complete but in reality, the process can take longer.⁸³

5. Hearing process

If while waiting for the reports from the *penghulu* and the settlement officer, the Registrar of the High court sanctions the officer to proceed, he will then arrange the date of the hearing. Form D will be dispatched not only to all the heirs involved but also to the creditors of the deceased person. Copies of the notices will also be exhibited in public places such as the community hall.⁸⁴

It is *important to stress that no solicitor is allowed to be present during the hearing process for any particular interest, except with the consent of the officer presiding.*⁸⁵ Even if this consent is given, the solicitor is prohibited from charging legal fees if the value of the property in question is less than RM 3000.00 as stated in Section 31 (2) of SEDA 1955.

During the hearing all statements recorded must be taken under oath. If collateral disputes arise during the hearing, in the interest of justice the officer may defer the making of any distribution order in respect of the estate. Under section 14 (2) of SEDA 1955 and its regulations, a collateral dispute means a dispute as to whether (i) any property movable or immovable or any right or interest in any such property forms part of the estate of the deceased; (ii) any person is entitled beneficially to any property movable or immovable or any right or interest in any such property which the deceased at the time of his death held or was entitled to hold as a trustee and not beneficially; (iii) any debt or liquidated sum in money is payable to any person claiming the same out of the assets of the deceased or any debt or liquidated sum in money is due or payable to any person by the estate of the deceased; and (iv) any share or any right or interest in any share of a beneficiary in the estate of the deceased has been assigned to or vested in any other person whether a beneficiary or not.⁸⁶

6. Reference to the *sharī'ah* court

As indicated in the flow chart 4.4 this particular procedure is only involved with *farā'iḍ* cases. It is during the hearing process that the heirs will be asked to state their preferred distribution method either *farā'iḍ* or mutual agreement. Where there is no possibility of co-operation among the heirs the officer under section 12 (7) of SEDA 1955 may order the distribution of the property base on *farā'iḍ*, which is the personal law of the Muslim deceased.⁸⁷

If the case is to be settled by *farā'iḍ*, the officer in charge will submit an application for the *farā'iḍ* certificate to the *sharī'ah* court. It usually takes more than two months for the *sharī'ah* court to produce such certificate.⁸⁸

7. Distribution Order

If the case is to be settled by mutual agreement the officer will issue the distribution order after the completion of the hearing. The order will be lodged at the agency and the heirs are granted fourteen days' notice of appeal. The order will remain with the officer until the appeal has been decided or withdrawn.⁸⁹

8. *Appeal to the High Court*

Section 29 of SEDA 1955 provides that any person aggrieved by any order or decision made by the officer can appeal to the High Court within fourteen days.⁹⁰

9. *Waiting Final Decision from the High Court*

The decision of the High Court upon any such appeal shall not be subjected to any further appeal.⁹¹

10. *Registration of Ownership*

Finally, the process ends with the registration of the title of the property into the registration book of the land office for the cases that involve the immovable property.

4.8.2 Problems Associated with the Settlement Process

From the preceding description of the settlement process, it can be seen that the time taken to decide such cases can be influenced by many factors. Therefore, the following section will discuss more comprehensively the problems faced by the agencies that may prolong the settlement process. These problems can be categorised under two aspects: the administrative and the social.

i) Administrative Aspects

As stated earlier, in the State of Pahang there are only three small estate officers who have the responsibility of covering all eleven districts.⁹² This means that each officer is responsible for three to four districts; for example, the Small Estate officer of the middle zone explained that he has to shuttle between four districts: Temerloh, Maran, Bera and Jerantut in order to handle the hearing process.⁹³ This lack of balance between the heavy workload and the number of staff has created huge difficulties in settling cases within the targeted period of time.⁹⁴ It is likely that this factor is the cause to many cases having to be postponed for a long period before they can be submitted to the hearing process. It is important to emphasise that administrative overload has also resulted in too little time being available to provide the consultation and guidance needed by claimants to resolve their case in a proper manner.⁹⁵

Due to the backlog of Muslim cases in nearly all districts, requests have been made to the Federal Government for additional staff. The Federal Government however, stressed that the state government should be able to provide additional staff recruited through its Public Commission.⁹⁶ In other words the federal Government has attempted to shift its responsibilities on the state government, and its negative attitude in reacting to the officers' requests has made the situation no easier. The officers have further voiced their resentment about the lack of sufficient clerical staff for output and efficiency to reach a satisfactory level in the Small Estate Units. Thus the problem of staff shortage involves

not only senior officers but also the lower ranks of the administration such as clerks, typists and notice couriers.⁹⁷

As for the Amanah Raya Corporation, although it handles only movable property, the main problem is that this agency has only one branch, which is situated in Kuantan the capital city of Pahang, to cover all eleven districts of the State of Pahang. This has certainly created many difficulties for claimants, especially those who live far from the branch office. Indeed the number of cases settled by this agency seems to be similar to the number settled by one small estate zone covering only three or four districts. Therefore the small amount of cases handled by this agency probably indicates that there are many heirs who cannot afford to come to the branch to settle their case officially and who as a result might attempt to resolve the matter by themselves or by asking persons who they know have some knowledge of the subject. Indeed, this has been confirmed by the researcher's own experience: there are many heirs, especially villagers, who have approached the researcher, asking him to arrange the distribution of the deceased's property since they cannot afford to go to the agency due to its distance; they complain that it is extremely inconvenient to take all the heirs involved to the agency perhaps several times, before their case can be settled. In other words, there are many heirs who prefer to settle their case without resorting to the authoritative agencies, especially when their case involves only movable property.

Another important factor that retards the settlement process is the procedures themselves.

The ways the acts and regulations are structured make both agencies very dependent on

other administrative bodies. For example, obtaining confirmation from the Registrar of the High Court entails receiving confirmation of the value of the property from the valuation department (immoveable property), the *farā'iḍ* certificate from the *sharī'ah* court and the investigation reports from both the settlement officer and the *penghulu*.

From the procedures explained above it can be seen that if cases need to be settled according to *farā'iḍ*, the process will be prolonged as the heirs will have to wait for the *farā'iḍ* certificate from the *sharī'ah* court, which usually takes more than two months.⁹⁸

Commenting on the situation, the Mr. Justice Abdul Rahman Yunus, judge of Pahang's *Sharī'ah* High Court, during an interview conducted by the researcher, stressed that the long delay inherent in *farā'iḍ* certification results mainly from the fact that no specific officer has been appointed by the court with the duty of calculating the share of each heir. Therefore, the responsibility has to be shouldered by the *qāḍīs* who are already overburdened due to the enormous number of cases that need to be settled.⁹⁹ It is important to note that from the researcher's own observations the *qāḍī* also has other social duties to perform which are not part of his traditional role. This is inevitable, as religion in Malaysia is becoming more and more politicised at the grassroots level. For instance, there are social activities where the presence of the *qāḍī* is compulsory, such as the opening of a new school by a local politician, community gatherings and youth activities. These various social duties combine to prevent the *qāḍī* from devoting sufficient time to the cases submitted to him from the agencies.

Ahmad Ibrahim pointed out that among other causes of weakness to the present administrative system is due to the uncodification of *farā'iḍ* as well as the settlement officers are incompetent in the matter of *farā'iḍ*. Therefore they have to wait the *sharī'ah* court to produce the *farā'iḍ* certificate on their behalf. He then added that this is in fact is a waste of time because they are not supposed to become too dependant on the *sharī'ah* court.¹⁰⁰

When the Director of the Small Estate Unit was asked why his officers lack expertise in *farā'iḍ* he replied “ *Actually we do encourage every officer to understand farā'iḍ as much as possible but according to SEDA the farā'iḍ certification must come from the sharī'ah court.... that is probably why the officers haven't bothered to learn*”.¹⁰¹ He also added that the long time needed to settle *farā'iḍ* cases is due to the weaknesses of the *sharī'ah* court and not to those of the Small Estate Unit.¹⁰²

It seems both parties tend to blame each other. In fact, Section 19 (1) of SEDA 1955 provides that reference can be made to the *sharī'ah* court if difficulties arise in cases involving Muslim law. This means that in ordinary circumstances distribution based on *farā'iḍ* is supposed to be settled by the officers in charge. However, it is observed that in practice the calculations of the shares according to *farā'iḍ* are forwarded to the *sharī'ah* court because the officers in charge are not experts in this area. Their passive and nonchalant attitude may be the result of, among other factors, (1) a lack of proper training by the authorities and (2) the perception that they would have to cope with an increasing workload if they became expert in *farā'iḍ*.

ii) Social Aspects

The smooth running of the settlement process in these cases can also be considered to be partly dependent upon the attitude of the heirs and their understanding or knowledge of the matter. One of the most common problems faced by the agencies is the negative attitude shown by the heirs to attempts to make an early application to settle their case.¹⁰³

This attitude has sometimes led to a situation where the number of heirs involved accumulates as one death follows another,¹⁰⁴ making it very difficult for the agencies to trace the real beneficiaries. The delay in application can also cause many important documents, such as the death certificate or the savings book to be lost without trace. This can then lead to the claim being made without sufficient documentation, and therefore being unacceptable.¹⁰⁵ According to Mr. Ali, sometimes the heirs appeared not to care whether their case was settled quickly, the reason being that there was no dispute among the beneficiaries of that particular property. However, the moment disputes arose numerous applications would be filed to settle the case.¹⁰⁶

The disputes that divide the heirs also cause problems with the settlement process. This is because some heirs are very stubborn and refuse to co-operate with the other claimants. In many instances, they try to influence the other heirs to boycott the hearing process.¹⁰⁷

The *heirs'* lack of understanding of the subject may also cause difficulties. For example there are heirs who insist that the parcel of land no matter how small must be divided according to *farā'iq*,¹⁰⁸

The other problem confronted by almost all the officers is to get the notices served to the heirs in time. Only too often, the heirs will move from one place to another without notification. The situation will be still more complicated if the heirs move not only outside the district but also to another state.¹⁰⁹

In addition, some heirs are reluctant to settle their case for fear that they will be prosecuted for neglecting to pay the annual land tax, sometimes for several years.¹¹⁰

Quite a number of these heirs are under the impression that by not disclosing the land title they will be able to have full use of the produce of the land without any interference from the district office. In the State of Pahang this situation is quite common, especially if the land is planted with orchard trees such as mango, durian and rambutan. These seasonal fruits can bring high financial rewards, particularly if the heir is engaged in secret mortgaging with another party.

Political attitudes among the heirs toward the establishment constitute another problem, which has repercussions on the smooth functioning of the settlement process. There are some heirs perceive government officials as puppets of the ruling party (U.M.N.O.) who act only in its interests. Some of the more zealous even see the officers in charge and

*qāḍīs as infidels and maintain that whatever the qāḍī does is not in the interest of Islam but merely fulfilling the wishes of the UMNO government.*¹¹¹

With regard to the problems discussed above, it would be unjust to lay the blame entirely on the claimants because no specific programme has been conducted by the government or the agencies in particular to increase public awareness concerning the matter. This has been admitted by both the Small Estate Unit and the Amanah Raya Corporation officers.¹¹²

4.9 Conclusion

Basically, the present administration of inheritance is based on the system established by the British before the country gained its independence. Under the present administration, inheritance is divided into three categories: normal estate, small estate and simple estate. The normal estate is administered by the holder of a letter of administration, who is appointed by the High Court; the small estate is administered by the Small Estate Unit, while the simple estate is administered by the Amanah Raya Corporation.

Although a few changes have been made to improve the administration and the settlement process of Muslim inheritance, the role of the *sharī'ah* court is still very limited, restricted to certifying the shares of the legal heirs according to the rules of *farā'iḍ*. Under the present administration the High Court retains absolute jurisdiction to grant the probate and letter of administration for the administrator, whether the claim is

made *individually* by the heir as in the case of a normal estate or through authoritative agencies such as the Small Estate Unit (small estate) or the Amanah Raya Corporation (simple estate). Although an amendment has been made to the Federal Constitution to prevent the High Court from interfering with matters that properly come under the jurisdiction of the *sharī'ah* court, it has had minimal impact on the matter of succession, as the power to grant the probate and letter of administration is still within the jurisdiction of the High Court. Therefore, the role of the *sharī'ah* court under the present administration of Muslim inheritance remains the same as before the amendment.

We have seen that both agencies implement similar settlement procedures, although each agency deals with a different type of inheritance: the Small Estate Unit deals with small estates that consist of both immovable and movable property, while the Amanah Raya Corporation deals with simple estates that consist of movable property only.

As regards the procedural aspect, the settlement process based on mutual agreement is faster than that based on *farā'iḍ*. The delay, it was discovered is due to the considerable time it takes for *farā'iḍ* certificate to arrive from the *sharī'ah* courts.

The study revealed that the smooth functioning of the whole settlement process depends on two main aspects: the administrative and the social. As to the first the main problems encountered are: i) the heavy work load that has to be shouldered especially by the Small Estate Unit due to the large administrative areas that have to be covered; ii) the regulations set up by the present administrative system which

make the agencies dependent on other officials and departments in order to settle cases, such as the Registry of the High Court and the settlement officer and the *penghulu*, the valuation department, the financial institutions and the *shari'ah* courts. In addition, social problems are often caused by the unco-operative or non-chalant attitude of the heirs, whose lack of awareness of the settlement process and its regulations contributes to the perpetuation of this negative attitude.

Notes to Chapter 4

- ¹ See chapter 3 for the historical background on the development of the succession law in the Malay State.
- ² Ridzuan Awang (ed), *Undang-Undang Mengenai Pentadbiran dan Pengurusan Harta Pusaka Orang Islam Di Malaysia*, (Law Concerning the Administration of Muslim Estate in Malaysia) Rahmaniah, Malaysia, pp.8-9.
- ³ Interview with Professor Tan Sri Ahmad Ibrahim, Dean of Law Faculty, of International Islamic University on 8 January 1998 at his office in Kuala Lumpur (Question 1).
- ⁴ Immovable property is defined as a land that has legal title of ownership and all those on land such as buildings, houses, garden, orchards etc.
- ⁵ Movable property is any possession left by a deceased other than land such as saving, cash, vehicle, jewellery, debt, clothing, reared animals and etc.
- ⁶ Awang, Rizduan, *Undang-Undang pentadbiran Harta Pusaka Orang Islam Di Malaysia*, Kuala Lumpur , Al-rahmaniah, 1988, pp. 8-9. See also Habib, Kamrulzaman, *Sistem pembahagian dan Pengurusan Pesaka di Semenanjung Malaysia*, unpublished working paper, June 1983, Kuala Lumpur, p. 3.
- ⁷ Sections 2,3 and 4 of PAA 1959 See also High Court Rules, Order no 71 and 72.
- ⁸ As provided by Probate and Administration Act (1959), the High Court is responsible for the maintenance of the registrations on all claims made on the estate regardless of its category and the issuance of the Letter of Administration. The records are kept in order to avoid duplication of claims made against the estates. The Central Registrar Office located in Kuala Lumpur, is responsible for keeping and maintaining the records for the whole of the Peninsula. See also High Court Rules, 1980, order 71, rule 2.
- ⁹ If a trustee or a board of trustees maintains the estate of the deceased, the court may use its discretion in allowing commissions of not more than 5% of the total value of the estate to be paid to them. However, no commission is to be paid to any Malaysian Estate Administration Officer. See Probate and Administration Act, Sect. 43 (1) and sect. 46.

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- ¹⁰ The High Court has the authority to grant the approval to use the estate to pay for expenses related to the funeral, executing the will and other matters that the court deems fit. See Probate and Administration Act, sect. 44.
- ¹¹ The High Court has the authority to revalidate any Letters of Administration issued by the Probate Court in the Commonwealth, which are deposited to them. The Letter is thus accorded the same status as the one issued by the High Court itself. However, the High Court has the authority to request for further information regarding the deceased domicile status before it revalidates the Letter. The executor of the estate or their agents too have to provide a guarantee as provided in Form 171 signed by them and the guarantor and validated by a Commissioner of Oath. See Probate and Administration Act, sect. 55.
- ¹² It is the duty of the High Court to settle disputes arising from the issuance of Letter of Administration. The disputes might arise from a request made by the third parties to nullify the Letter of Administration. The request of nullifying the Letter of Administration is included in the term 'Probate Action'. A Probate Action must be initiated with the issuance of writ by the Registrar Office. The issuance of the writ requires a sworn statement on the interest of the plaintiff or the defendant with regards to the estate of the deceased. The writ could only be issued until a citation under rule 7 (High Court Rules order 72) is issued or the Letter of Administration is forwarded to the Registrar Office. The citation must be issued by the Registrar Office and must be finalised by the High Court. Before the citation is issued, the claimant must supply sworn affidavit to support the citation. In certain circumstances, lawyers may furnish sworn statements on behalf of the claimant. The citation must be stamped with the seal of the Registrar Office and must be delivered directly to the person it is intended for. Only then will the High Court issue a writ for action on nullifying the said Letter of Administration. See High Court Rules, 1980, order 72.
- ¹³ When an individual believes that he or she has sufficient grounds to be involved in administering the estate of the deceased, s/he may apply to the High Court for the right to administer the estate by initiating a probate action in the High Court. The applicant must supply sworn affidavit concerning his/her interest in the estate of the deceased. The applicant may not be permitted to hear the case unless the claim is also filed with the Registrar Office. The citation will then be issued against the person who has conflicting interest with the applicant, notifying him that if the citation is not included in the action, the court order may be taken against him without any further notice. The citation must be issued by the Registrar Office and must first be finalised by the High Court. After the citation is issued and stamped with the Registrar Seal, the High Court could then issue a writ to enable the initiation of a probate action. See High Court Rules, 1980, Order 72.

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- ¹⁴ If Amanah Raya Corporation or Small Estate Settlement Officers face a problem in obtaining the evidence of the death of the deceased due to incomplete statement presented by the claimants, then the High Court has the authority to determine that the death has occurred by ruling it as an 'assumed dead'. See Director of Federal land and Mines, *Pekeliling (Circular)*, no 29/1977.
- ¹⁵ The High Court may present their views or instructions to the claimants who appeal to them with regards to the decision made by the Small Estate Officers. However it is restricted to those that do not involve Islamic Laws or Malay Traditions or the Tribal Laws of the Native of Sabah and Sarawak. See Small Estate (Distribution) Act, 1955, sect., 19 and 29.
- ¹⁶ The High Court has the authority to appoint Amanah Raya Corporation to administer the deceased intestate estate before the issuance of the Letter of Administration to the party that the High Court deems fit. See Probate and Administration act, 1959, sect. 39(1).
- ¹⁷ The High Court may appoint a temporary executor of the estate before a permanent one is appointed. This is done when there is a complaint by Amanah Raya or any interested third party that the estate is in danger of being squandered. See Probate and Administration act, 1959, sect. 45.
- ¹⁸ Awang, Rizduan, *Undang-Undang pentadbiran Harta Pusaka Orang Islam Di Malaysia*, Kuala Lumpur , Al-rahmaniah, 1988, pp. 8-9. See also Habib, Kamrulzaman, *Sistem pembahagian dan Pengurusan Pesaka di Semenanjung Malaysia*, unpublished working paper, June 1983, Kuala Lumpur, p. 3.
- ¹⁹ Awang, Mohd Alias, *Permohonan Dan Pentadbiran Harta Pusaka: Peranan Dan Fungsi Amanah Raya Berhad*, unpublished working paper presented in Seminar of Inheritance at Malaysian Institute of Islamic Understanding, 24 November 1997, p. 2.
- ²⁰ Ibid.
- ²¹ Ali, Aziz, *Ke Arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, (Toward Better Administration of inheritance in Pahang) unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 7.
- ²² Public Trust Corporation Act, 1995.
- ²³ Section 3 (2) SEDA 1955.
- ²⁴ Ali , Abdul Aziz, *Ke Arah Mempertingkatkan Pentadbiran Pusaka diPahang*, p. 3.
- ²⁵ Ibid, p. 6.

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- ²⁶ Habib, Kamarul Zaman, "Sistem pengurusan Dan pembahagian Pusaka Khususnya Pembahagian Harta Pusaka Kecil" in Awang, Rizduan, (ed.) *Undang-undang dan Pentadbiran Harta Pusaka Orang Islam Di Malaysia*, Kuala Lumpur, Al-Rahmaniah, 1988, p. 120.
- ²⁷ Ibid.
- ²⁸ Ibid, p. 121.
- ²⁹ Interview with Mrs Rosnaha, the supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh.
- ³⁰ Section 15 (1) of SEDA 1955.
- ³¹ Ali , Abdul Aziz, *Ke arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, p.5.
- ³² Ibid.
- ³³ Small Estate (Distribution) Act 1955 (Act 98) and Regulations (as at 20th October 1997), Kuala Lumpur International Law book Services, p. 13.
- ³⁴ See first Schedule of Section 15 (5), SEDA 1955.
- ³⁵ Habib, Kamarul Zaman, "Sistem pengurusan Dan pembahagian Pusaka Khususnya Pembahagian Harta Pusaka Kecil," pp. 124-125.
- ³⁶ Ali , Abdul Aziz, *Ke arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, p.5.
- ³⁷ Ibid., p.4.
- ³⁸ RM means Malaysian Ringgit. Ringgit is the name for Malaysian currency.
- ³⁹ Ali , Abdul Aziz, *Ke arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, p.7.
- ⁴⁰ Yahya, Osman, *Pembahagian Pusaka Kecil: Suatu Pengalaman dan Amalan (The Distribution of Small Estate; Experience and Practice*, paper presented at meeting toward enacting the Muslim inheritance law in Mutiara Malacca Beach Resort, Malacca, from 2-4 September, 1995, p. 4.
- ⁴¹ Ali, Aziz, *Ke Arah Memantapkan Pentadbiran Pusaka di Pahang*, (Toward Better Administration of inheritance in Pahang) unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 5.

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- ⁴² See section 18 of SEDA 1955.
- ⁴³ Section 19 (1) SEDA 1955, p. 17.
- ⁴⁴ Ibrahim Ahmad, *The Malaysian Legal System*, Kuala Lumpur, Dewan Bahasa dan Pustaka, 1996, p. 48.
- ⁴⁵ Ibid., p. 45.
- ⁴⁶ Ibrahim, Ahmad, "Legislation in the Malay State" in Buang, Salleh, *Malaysian Legal History; Cases and Materials*, Kuala Lumpur, Dewan Bahasa dan Pustaka, 1993, p. 191.
- ⁴⁷ Ibrahim, Ahmad, *Recent Developments in the Syariah Law in Malaysia*, Paper presented at the International Seminar on The Administration of Islamic Laws, July, 1996 at the Institute of Islamic Understanding Malaysia, Malaysia, pp.3-4.
- ⁴⁸ Ibrahim, Ahmad, *Malaysian legal System*, p. 46. See also Ibrahim, Ahmad, *Recent Developments in the Syariah Law in Malaysia*, pp. 3-4.
- ⁴⁹ (1927) 6 FMSLR, 128.
- ⁵⁰ Ibid.
- ⁵¹ Mackeen, Abdul Majeed, "The Shariah Law Courts in Malaya" in Ibrahim Ahmad, Siddique Sharon and Hussain Yasmin (eds.), *Reading on Islam in South East Asia*, Singapore, Institute of Southeast Asia, 1985, p. 229.
- ⁵² (1937) 15, 1, JMBRAS, 488.
- ⁵³ Ibid.
- ⁵⁴ Banks, David, "Islam and Inheritance in Malaya", *American Ethnologist*, 1976, vol. 3, p. 582.
- ⁵⁵ Ibid.
- ⁵⁶ Taylor, E. N., "Malay Family Law", *Journal of the Malayan Branch of the Royal Asiatic Society*, may 1937, p. 13.
- ⁵⁷ As quoted by Hooker, M.B., *Islam in South East Asia*, Leiden, 1983, p. 27.

⁵⁸ Yaacob, Abdul Munir, *Shariah Court in Malaysia: Past, Present and Future*, Paper presented at the International Seminar on The Administration of Islamic Laws, July, 1996 at the Institute of Islamic Understanding Malaysia, Malaysia, p. 11.

⁵⁹ *The Administration of Islamic Law Enactment 1991*, p. 75.

⁶⁰ See the Administration of Islamic Law Enactment 1991 of Pahang, pp. 96-122. This new enactment is divided into eleven parts as follows;

- i) Part I Preliminary
- ii) Part II The Religious Council and Malay Custom
- iii) Part III Shariah Court
- iv) Part IV Prosecution and Representation
- v) Part V Finance
- vi) Part VI Mosque
- vii) Part VII Conversion To Islam
- viii) Part IX General

⁶¹ Ibrahim, Ahmad, *The Malaysian Legal System*, p.61.

⁶² For the jurisdiction of the shariah court, section 47 (2) (b) of the said enactment stated that "A Shariah court Shall in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to

- i) Betrothal, marriage, divorce, dissolution of marriage or judicial separation.
- ii) Any disposition of or claim to property arising out of any of the matters set out in subparagraph above.
- iii) The maintenance of dependants, legitimacy or guardianship or custody of infants.
- iv) The division of or claims to jointly acquired property
- v) Wills or death-bed gifts of a deceased Muslim
- vi) Gift inter vivos, or settlement made without adequate consideration in money or money's worth, by a Muslim
- vii) Wakaf and nazar
- viii) Division and inheritance of will or non-will property of a Muslim.
- ix) Other matters in respect of which jurisdiction are conferred by any codified law."

⁶³ Hooker, M. B., *Personal Law of Malaysia*, London, Oxford University Press, 1976, p. 47.

⁶⁴ See section 51 of the Administration of Islamic Law Enactment 1991 of Pahang, p. 97.

⁶⁵ Article 121 (1) of the Federal Constitution reads as follows;

"There shall be two courts of co-ordinate jurisdiction and status, namely

- a) one in the states of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
- b) (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang Di-Pertuan Agong may determine.
- And such inferior courts as may be provided by federal law; and the High court and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.”

⁶⁶ (1991) 3MLJ 327

⁶⁷ (1992) 2 MLJ 793

⁶⁸ See Article 160 (2) of Malaysian Constitution which read as follows; “Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.” See also Ibrahim, Ahmad, *Recent Developments in the Syariah Law in Malaysia*, Paper presented at the International Seminar on The Administration of Islamic Laws, July, 1996 at the Institute of Islamic Understanding Malaysia, Malaysia, p. 4.

⁶⁹ Ibrahim, Ahmad, *Recent Developments in the Syariah Law in Malaysia*, Paper presented at the International Seminar on The Administration of Islamic Laws, July, 1996 at the Institute of Islamic Understanding Malaysia, Malaysia, p. 4.

⁷⁰ See Section 77 of PAA 1959.

⁷¹ Interview conducted with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh. (in response to question no. 1).

⁷² The Ministry of Land and Mines and Co-operative Development, *Buku Panduan Permohonan Tuntutan Harta Pusaka Kecil (Guide for Claim the Settlement of Small Estate)*, Nasional Malaysia printer Ltd., Kuala Lumpur, 1997, p. 3.

⁷³ Interview conducted by the researcher with Mr. Kam Ian Hai, Manager of the Amanah Raya Corporation for the State of Pahang on 19 December 1997 at his office in Kuantan. (In response to question no. 4).

⁷⁴ Small Estate Unit, *Buku Panduan permohonan Pembahagian Harta Pusaka Kecil*, Ministry of Land and Development of Co-operation, n.d., p. 6.

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- ⁷⁵ Ali, Aziz, *Ke Arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, (Toward Better Administration of inheritance in Pahang) unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 14.
- ⁷⁶ Ibid. p. 24.
- ⁷⁷ Yussoff, Siti Maryam, *Penyelesaian Pusaka Pesaka Kecil Di Pahang; Masalah dan Penyelesaian*, unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 15.
- ⁷⁸ Section 15 (4) of SEDA 1955.
- ⁷⁹ Yussoff, Siti Maryam, *Penyelesaian Pusaka Pesaka Kecil di Pahang; Masalah dan Penyelesaian*, p. 11.
- ⁸⁰ Ibid. p. 12.
- ⁸¹ See Section 8(9) of SEDA 1955.
- ⁸² Yussoff, Siti Maryam, *Penyelesaian Pusaka Pesaka Kecil di Pahang; Masalah dan Penyelesaian*, p. 11.
- ⁸³ Ibid.
- ⁸⁴ Ibid.
- ⁸⁵ Interview with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh. (in response to question no. 17) See also Section 31 (2) of SEDA 1955.
- ⁸⁶ See Section 14 (1) SEDA 1955.
- ⁸⁷ Interview conducted with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh. (in response to question no. 20).
- ⁸⁸ Interview conducted with Mr. Kam Ian Hai, Branch Manager of Amanah Raya Corporation for State of Pahang on 19 December 1997 at his office in Kuantan. (in response to question no. 4: How long does it take to settle each case?).
- ⁸⁹ Section 16 (1) SEDA 1955.
- ⁹⁰ See Section 29 of SEDA 1955.
- ⁹¹ See Section 29 (4) of SEDA 1955.

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- ⁹² These districts are Kuantan Pekan and Rompin (East Zone), Temerloh, Bera, Jerantut and Maran (Middle Zone). Bentong, Raub, Kuala Lipis and Cameron Highlands. (West Zone)
- ⁹³ Interview conducted with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh. (in response to question no. 9).
- ⁹⁴ Ibid. (In response to question no. 8 and 12).
- ⁹⁵ Ibid. (In response to question no. 17).
- ⁹⁶ Ali, Aziz, *Ke Arah Memantapkan Pentadbiran Pusaka di Pahang*, p. 22.
- ⁹⁷ Ibid.
- ⁹⁸ Interview conducted with Mr. Kam Ian Hai, Branch Manager of Amanah Raya Corporation for State of Pahang on 19 December 1997 at his office in Kuantan. (in response to question no. 4: How long does it takes to settle each case?).
- ⁹⁹ Interview with Mr. Abdul Rahman Yunus, *Sharī'ah* High Court Judge of Pahang State on 12 January 1998 at his office in Kuantan. (in response to question no. 4, 5 and 6).
- ¹⁰⁰ Interview with Professor Tan Sri Ahmad Ibrahim, Dean of Law Faculty, of International Islamic University on 8 January 1998 at his office in Kuala Lumpur. (In response to question no. 2)
- ¹⁰¹ Interview with Mr. Muhammad bin Abdullah, Head Director of the Small Estate Unit on 10 December 1997 at his office in Kuala Lumpur. (in response to question no. 4).
- ¹⁰² Ibid., (in response to question no.. 5).
- ¹⁰³ Interview with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh. (in response to question no. 23). See also Interview conducted with Mr. Kam Ian Hai, Branch Manager of Amanah Raya Corporation for State of Pahang on 19 December 1997 at his office in Kuantan. (in response to question no. 6). See also Interview conducted with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh. (in response to question no. 16).
- ¹⁰⁴ Interview with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh. (in response to question no. 23).

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- ¹⁰⁵ Ibid. See also Interview conducted with Mr. Kam Ian Hai, Branch Manager of Amanah Raya Corporation for State of Pahang on 19 December 1997 at his office in Kuantan. (in response to question no. 6 and 7).
- ¹⁰⁶ Ali, Aziz, *Kearah Mempertingkatkan Pentadbiran Pusaka di Pahang*, p. 20.
- ¹⁰⁷ Interview with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh. (in response to question no. 23).
- ¹⁰⁸ Ibid.
- ¹⁰⁹ Ibid (in response to question no 5).
- ¹¹⁰ Ibid (in response to question no 23).
- ¹¹¹ Ibid.
- ¹¹² Interview conducted with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh. (in response to question no. 16 and 17).

CHAPTER FIVE

Settlement by *Farā'iḍ* and Mutual Agreement: Analytical Survey of Claimants' Preferences

5.1 Introduction

As Muslim claimants have two choices of settlement methods approved by the present administration i.e. settlement by *farā'iḍ* or by mutual agreement, this chapter therefore aims to analyse the respondents' preferences and to investigate the factors that influence claimants in their use of these methods to settle their cases. The perceptions of the claimants toward these settlement methods, especially *farā'iḍ* will also be discussed.

The following discussion is mainly based on the data and information gathered from the second fieldwork survey conducted in the state of Pahang (from March 1999 to September 1999). This is because up to the present, no study has investigated the subject, especially in the state of Pahang and therefore secondary data is both scarce and limited. Before going much further in discussing the main issues of this chapter, it is essential at first to briefly describe the methodological approach adopted in this chapter.

5.2 Methodological Approach

To serve the purpose of this study, an empirical survey was undertaken in the State of Pahang. The survey was conducted in two stages. The first stage consists of obtaining and organising the data concerning the use of *farā'īd* and mutual agreement among the Muslim claimants from the records of both agencies, the Small Estate Unit (East, Middle and West Zones) and the Amanah Raya Corporation. The second stage took the form of a survey of the claimants' perceptions regarding the influential reasons or factors that had led them to choose one of these distribution methods. The research instrument, an open-ended questionnaire, was used to obtain information from claimants directly involved with the settlement process.

5.2.1 Design of the Questionnaire

It should be noted that an objective of the survey was to secure the participation of as many claimants as possible. Most of the techniques suggested by the literature for improving the rate of response to the questionnaire were considered.¹ After considering the various options concerning the content, wording, form, sequencing and objectives of the questions, during the final stage of preparation of the questionnaire, particular attention was given to its general appearance. As to the questions ultimately selected for the questionnaire, their design was based on the researcher's observation during the survey.

Once the questionnaire was ready an initial package was prepared, consisting of: (i) a covering letter to explain the research purpose and assure the confidentiality of all the

information; (ii) a complete questionnaire with instructions and explanation; and (iii) a pre-paid reply envelope for those who preferred to fill in the questionnaire at home.²

5.2.2 Distribution of the Questionnaire

Altogether, 400 questionnaires were distributed, 100 copies to each office: the Small Estate Units of the East Zone, the West Zone and the Middle Zone and also to the Amanah Raya Corporation.

In order to obtain the greatest possible participation of the heirs or claimants, the researcher also sought the help of a few staff at the agencies, who agreed to try to persuade the claimants who came to the office to take part in the survey. An intensive effort was made to distribute the questionnaires and to persuade the claimants to complete them. The respondents were given the choice whether to complete the questionnaire at the office of the agencies then and there or to take it home and post it later in the stamped envelope provided. Of the 400 respondents approached, 263 filled in the questionnaire at the agency's office while 137 preferred to take it home.³

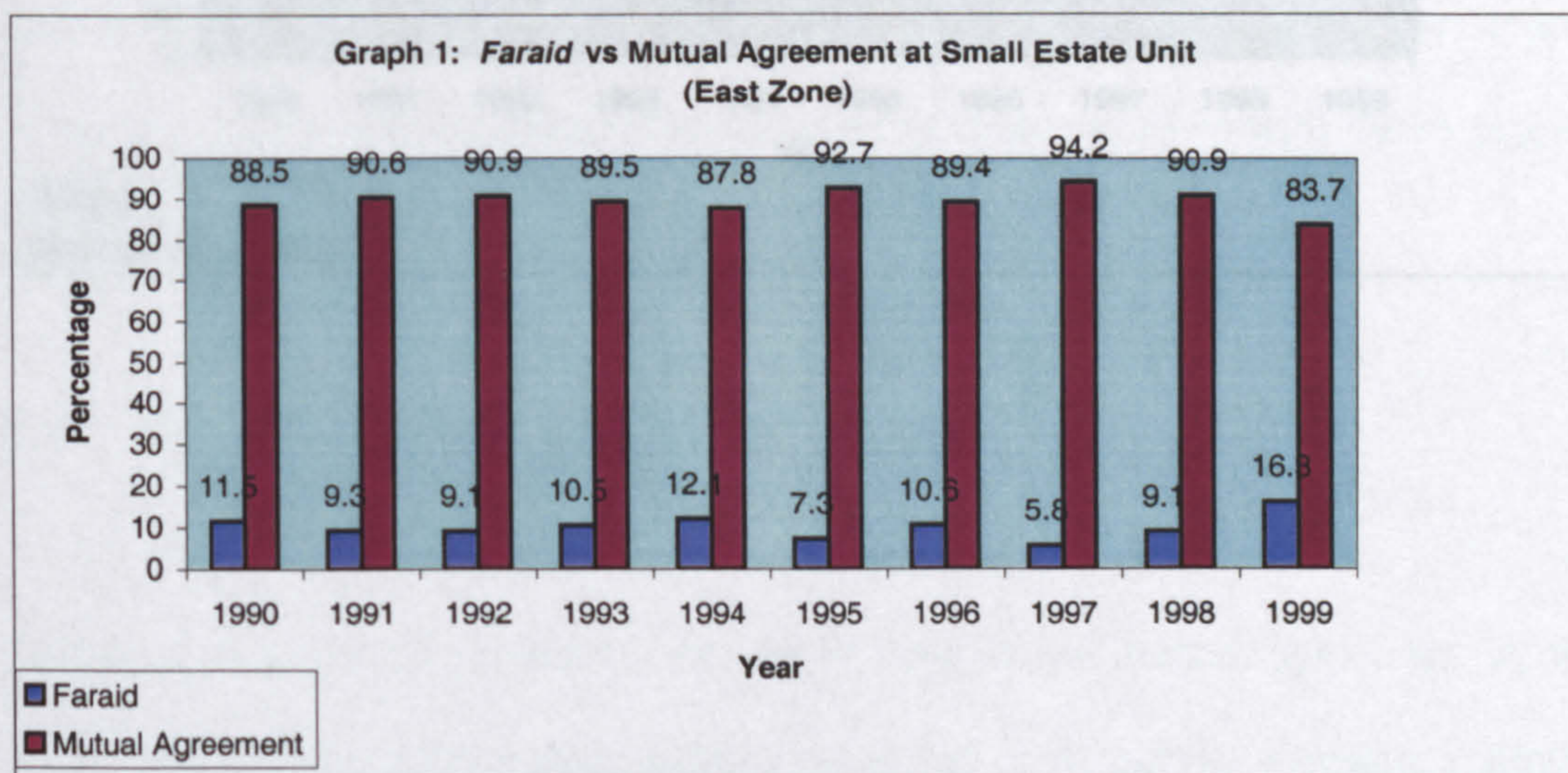
Of the 400 questionnaires, 274 or 68.2 per cent were returned. However, nine of the questionnaires had to be eliminated because four of the respondents returned only part of the questionnaire, while another five chose not to answer most of the questions, especially numbers 8 and 9, which are considered to be the most important in the questionnaire.

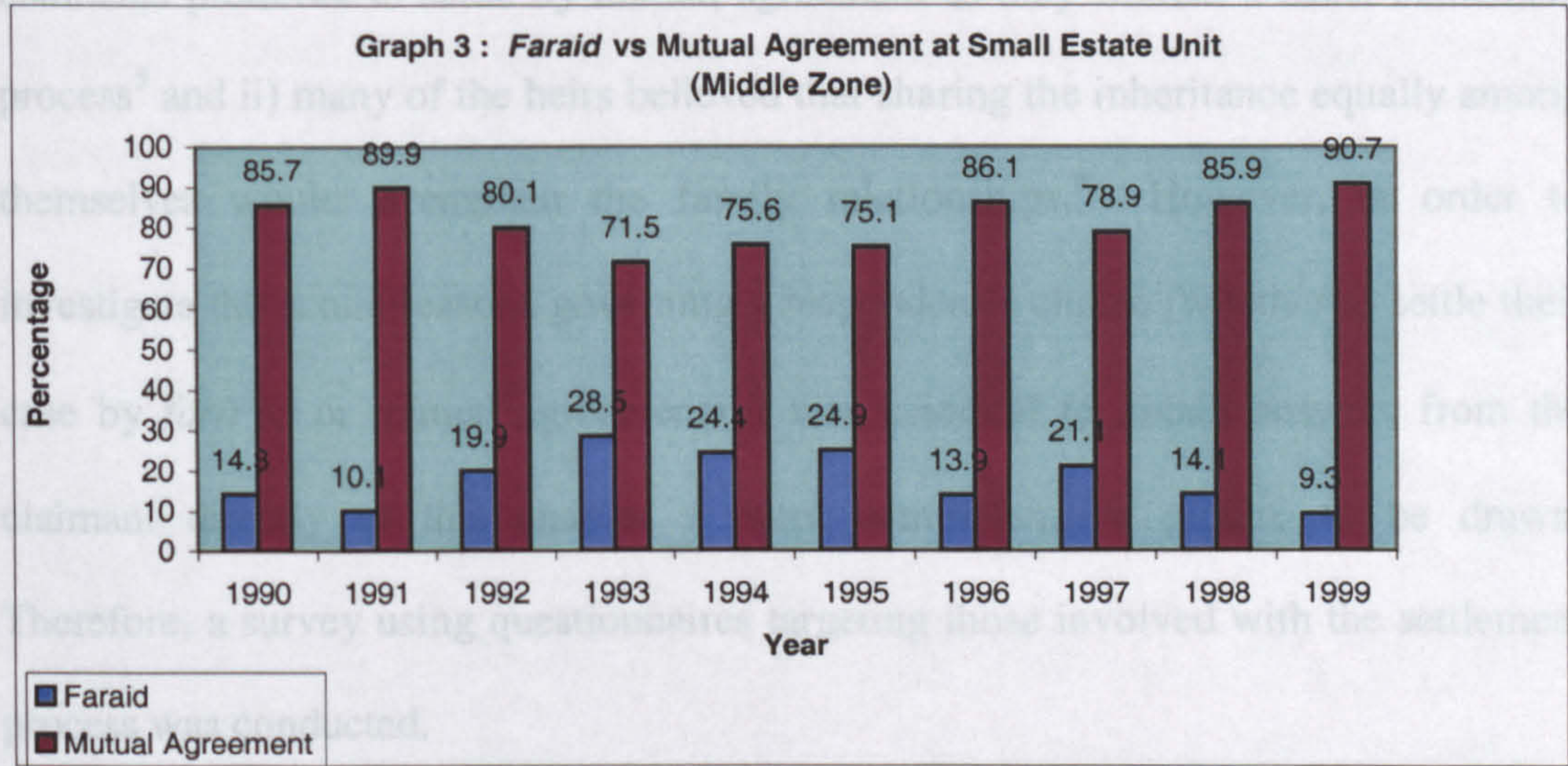
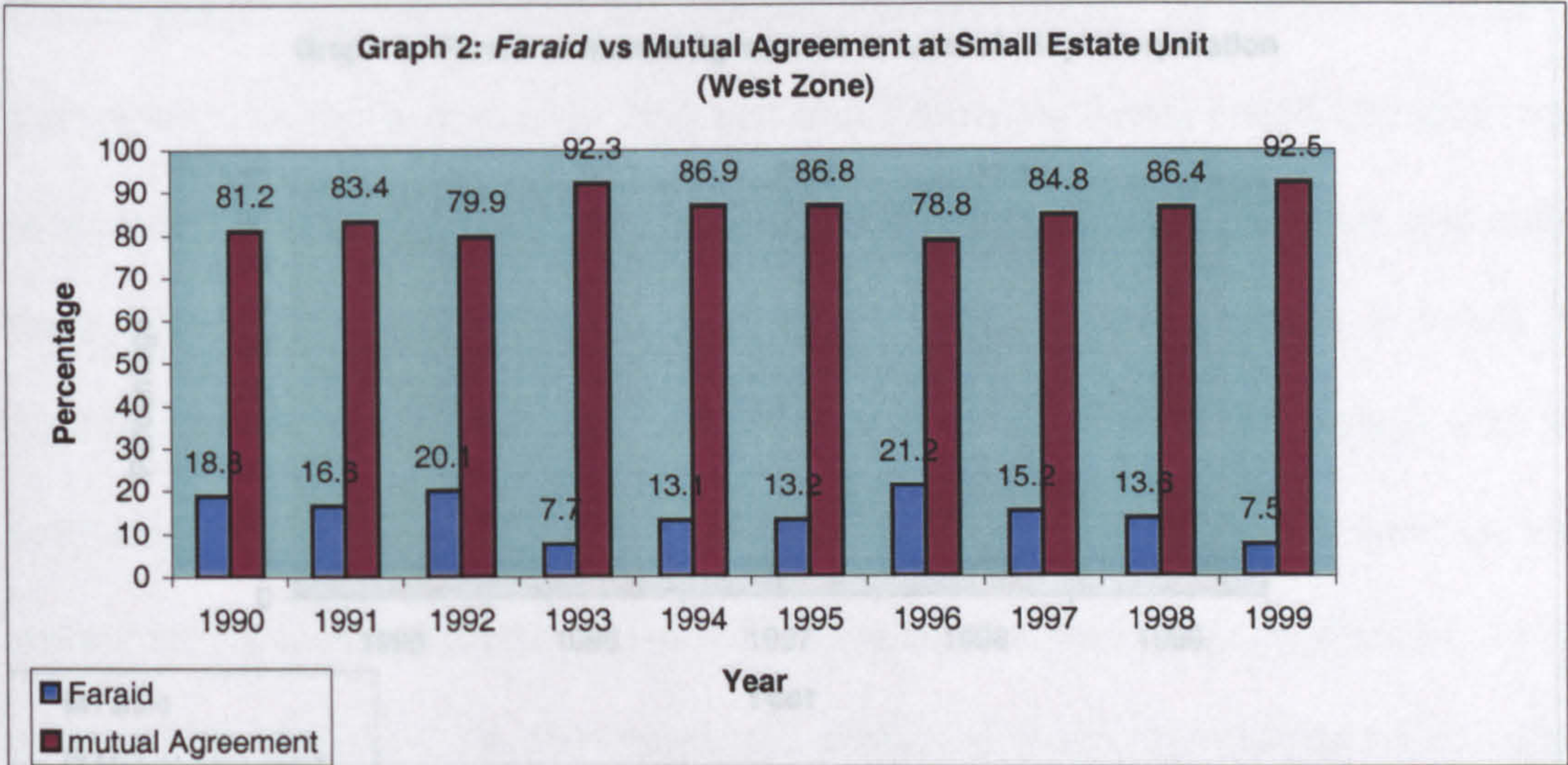
Thus, the researcher was left with 265 useable questionnaires. This represents a useable response rate of 66.2 per cent of the entire sample, which was encouraging and more than the researcher had originally anticipated. This rate is probably due to three main factors: (i) the questionnaires were distributed at the right location, i.e. the settlement agencies where the claimants have to attend to settle their cases; (ii) the questionnaires were mainly distributed by the researcher himself; thus the claimants were assured of the confidentiality of the information they provided and for that reason may have felt more inclined to participate in the survey; (iii) the agency staff encouraged the respondents to participate in the survey. It is important to note that this response rate is sufficient as it is generally accepted that research should only be considered weak when the response rate is less than ten percent.⁴ This study is therefore confidently presented as regards the degree of representativeness of the sample. In the next section, we will first look at the data concerning the use of *farā'iq* and mutual agreement as compiled from the agencies' records.

5.3 *Farā'iq* vs Mutual Agreement: Data Compiled from the Agencies' Records

The data compiled by the researcher on the number of claimants using *farā'iq* and mutual agreement were gathered from the general records of both agencies: 1990-1999 for all the Small Estate Units (East, West and Middle Zones) and 1995-1999 for the Amanah Raya Corporation. This task was a challenging one because the data was not stored on computer files but written by hand in the general record books.

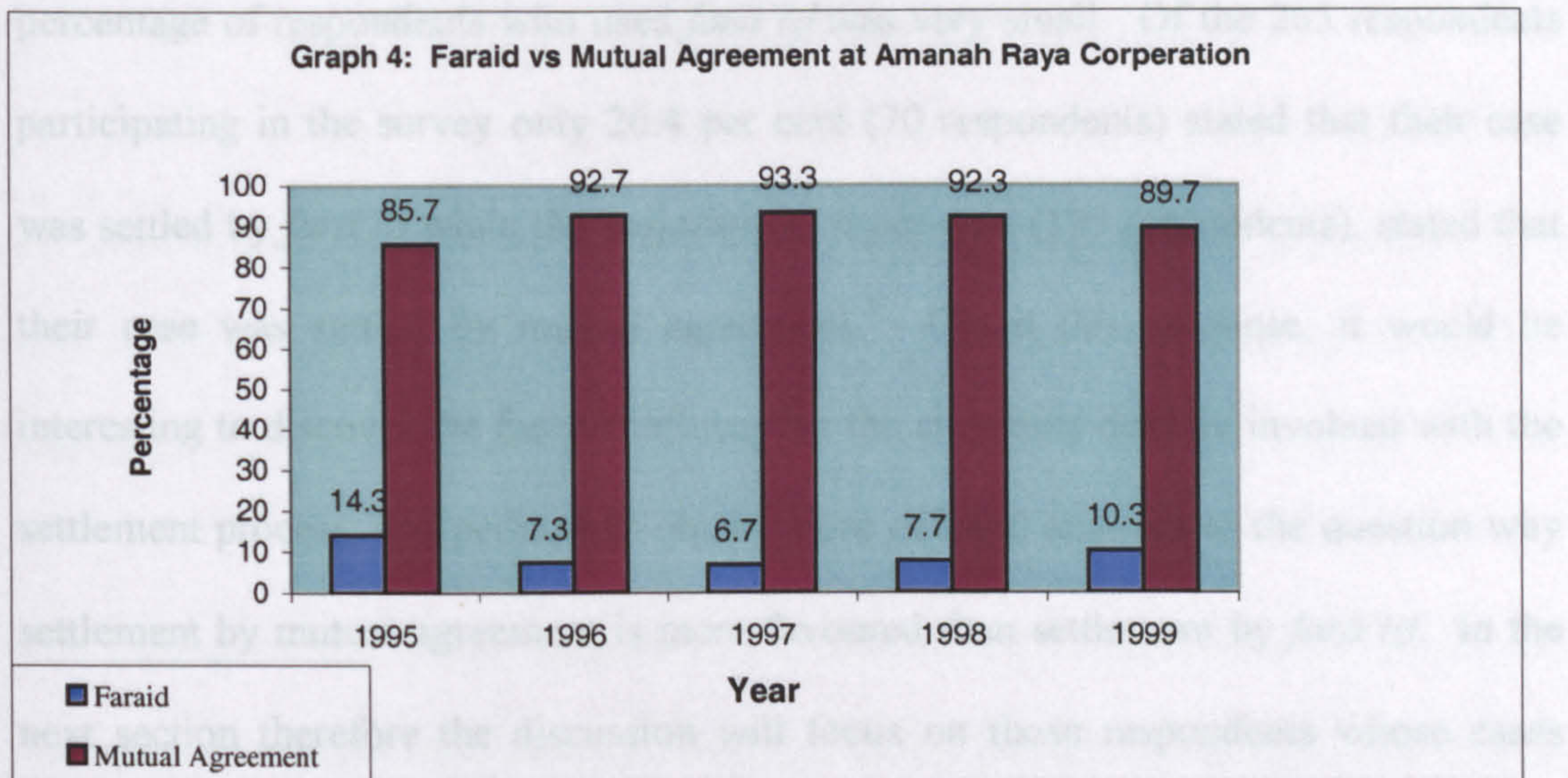
The percentages of claimants using *farā'id* and mutual agreement were calculated based on the data collected from the agencies' records (attached in appendices A-1, A-2, A-3 and A-4). The overall percentage of Muslim claimants using *farā'id* in the State of Pahang was found to be much smaller than that of those resorting to mutual agreement (see appendices A-1, A-2, A-3 and A-4 and graphs 1,2,3 4 below), regardless of the type of inheritance involved, whether simple or small estates. This is evidenced by the fact that there was little significant difference in the percentages regarding the use of *farā'id* and mutual agreement between the Small Estate Units and the Amanah Raya Corporation. The results show that the highest percentage in respect of *farā'id* was only 28.5 per cent in 1993 (the Middle Zone) and the lowest percentage, 5.8 per cent, occurred in 1997 in the East Zone. These results indicate that *farā'id* was not a favoured settlement method among the Muslim claimants in Pahang.





5.4 Findings of the Questionnaire Survey

Table 5.1 displays the results on the use of *farā'id* and mutual agreement by the respondents gathered from each location surveyed. The survey revealed a similar trend to that evident from the data compiled from the agencies' records: the



In the agencies view, there were a few factors, which were important here; i) many claimants preferred to settle by mutual agreement as they wanted a faster settlement process⁵ and ii) many of the heirs believed that sharing the inheritance equally among themselves would strengthen the family relationships.⁶ However, in order to investigate the actual reasons governing a respondent's choice (whether to settle their case by *farā'id* or mutual agreement) it was essential to obtain answers from the claimant directly as this enables a more comprehensive picture to be drawn. Therefore, a survey using questionnaires targeting those involved with the settlement process was conducted.

5.4 Findings of the Questionnaire Survey

Table 5.1 displays the results on the use of *farā'id* and mutual agreement by the respondents gathered from each location surveyed. The survey revealed a similar trend to that evident from the data compiled from the agencies' records: the

percentage of respondents who used *farā'iq* was very small. Of the 265 respondents participating in the survey only 26.4 per cent (70 respondents) stated that their case was settled by *farā'iq* while the majority, 73.6 per cent (195 respondents), stated that their case was settled by mutual agreement.⁷ Given this response, it would be interesting to discover the factors influencing the claimants directly involved with the settlement process, and perhaps to obtain more detailed answers to the question why settlement by mutual agreement is more favoured than settlement by *farā'iq*. In the next section therefore the discussion will focus on those respondents whose cases were settled by *farā'iq* and the influential factors that led them to choose this particular method.

Table 5.1: Data on the use of *farā'iq* and mutual agreement gathered from the questionnaires.

Location	No. of useable questionnaires	<i>Farā'iq</i>		Mutual agreement	
		Freq.	%	Freq.	%
SEU East Zone	67	17	25.4	50	74.6
SEU West Zone	51	12	23.5	39	76.5
SEU Middle Zone	69	22	31.9	47	68.1
ARC	78	19	24.4	59	75.6
Total	265	70	26.4	195	73.6

Source: Responses to question 8: What type of distribution method has been used in settling your case?

5.4.1 Settlement by *Farā'id* and its Influential Factors.

In order to discover the type of settlement method used and the reasons for that choice, part 2 of the questionnaire was designed (especially question 9) so that respondents could give in some detail the actual reason behind their decision.

The findings of the survey suggested that there were four main reasons on why the claimants had settled their cases by *farā'id*. These reasons are ranked according to their importance as shown in Table 5.2 and will be discussed separately.

Table 5.2: Reasons Influencing Claimants to Settle their Case by *farā'id*

Reasons	Male		Female	
	Freq.	%	Freq.	%
1. because of disagreement among the heirs	30	69.8	17	63.0
2. because the majority of the heirs preferred <i>farā'id</i>	8	18.6	4	14.8
3. to uphold the religious law	4	9.3	2	7.4
4. to implement the deceased's will	1	2.3	4	14.8
Total: 70	43	100 %	27	100 %

Source: Responses to question 9: What is your reason for choosing this method?

i) Disagreement among the heirs

In settling the distribution of the deceased's property, there is no doubt that full cooperation or understanding among the heirs is vital to a smooth settlement process.

However, some heirs find it hard to cooperate and therefore in this type of case, under

the present administrative system the officer will order the case to be settled in accordance with *farā'iḍ*. Nevertheless, as has been stressed before, settlement by *farā'iḍ* can be a crucial factor in prolonging the duration of the settlement process of such cases.

With regard to this factor (disagreement among the heirs), the survey revealed that of the seventy respondents who used *farā'iḍ* in their settlement process, forty-seven (30 male, 17 female) or 67.1 per cent stated that it was the reason why they had chosen to settle by this method. The following examples illustrate the general character of the responses. Respondent 202 stated "*Considering the dispute among the heirs and the bad intention of a few to take all the property, the best way to settle our case is by farā'iḍ.*" Respondent 237 commented "*No choice other than farā'iḍ was possible because all the heirs failed to compromise.*" Respondent 242 wrote "*One family member claimed, without providing strong evidence, that the deceased gave all the property to him*".

These and other similar responses suggest that these respondents would probably prefer their case to be settled by mutual agreement, but due to family disagreements they feel they have no choice but to settle by *farā'iḍ*.

Although not all of the respondents specifically described the type of dispute they faced, according to Mr Ali, the Small Estate Officer for the Middle Zone, his experience indicated that many factors are involved. For example, these are claim without proof, such as when heirs claim that a particular property was given to them by the deceased but fail to provide the necessary evidence. There were also some

heirs who may be said to have a 'hidden agenda' to prevent other heirs from taking their share of the inheritance and who hide important documents concerning the deceased's property. Usually when the other heirs discover the plan a rancorous dispute ensues. The dispute may also be a continuation of a dispute already existing among the heirs and so when they come to settle the estate they refuse to cooperate, sometimes going so far as to boycott the hearing process.⁸ Such disagreements are symptomatic of the social problems confronted by the agencies. As the officers admitted, they can damage the whole settlement process. However, little effort has been made by either agency to improve the situation, either to increase public awareness or at least to publicly highlight their role as settlement agencies so that those who are experiencing problems are encouraged to consult them.

Concerning this issue, even though the survey found that more than ninety per cent of the respondents stated that they were satisfied with the services provided by the agencies, the study found that in reality much remains to be done by the agencies in terms of informing the public of their role as an important department in the handling of Muslim inheritances. The survey showed that most of the respondents indicated that they had been referred to the agencies by other departments such as the religious department, land office or *penghulu's* (village headman) office. Many of them had also been informed by a second party such as friends or relatives who had previously gone through the settlement process. This situation is partly the result of the lack of any awareness programme, a failure of the agencies as briefly highlighted in chapter 4.

All the above indicate that the public were not aware of the function of these agencies, whose failure in this regard can be related to their heavy workloads, especially that of the Small Estate Unit (see chapter 4), as was admitted by the officers during the interviews.⁹ For this reasons the agencies had little time to provide proper consultation or an effective public awareness programme. An additional factor mentioned by the officers was the limited budget allocated by the government, especially to the SEU, to cover the social aspects.¹⁰

ii) Following the Decision Made by the Majority of the Heirs

Following the decision made by the majority of heirs is another influential factor leading claimants to settle their cases by *farā'id*, as stated by twelve (8 male, 4 female), or 17.1 per cent, of the respondents. Two of the respondents stated that they were over forty and the others were aged thirty and below, but there was no evidence to indicate whether they could be categorised as younger members of their family.

In the researcher's experience, in Malay society, when a family has to deal with important issues such as settling the distribution of the deceased's property, the family members, especially the younger ones, usually follow the decision made by the elderly in order to show their respect for them even though they might have their own preference. This kind of attitude is clearly prevalent in the society and is reflected in the statements given by some of the respondents. Respondent 251 for example stated; "*My elder brother and other siblings chose this method. I just went along with their decision*". A similar reply was given by respondent 246: "*Most of the older family members decided to settle the case by *farā'id*, and I just followed them*". These

responses indicate that the younger members of the family will normally follow the decision made by the majority of the heirs, which in most instances entails being influenced by the elderly member of the family. Furthermore, by following the majority the family relationships are also maintained and at the same time any disagreement among the heirs is avoided.

iii) To Uphold the Religious Law

The third factor that influenced the respondents to settle their cases by *farā'iḍ* was because of commitment to uphold the religious law. The study found that of the seventy respondents who settled by *farā'iḍ*, six (4 male, 2 female) of them or 8.6 per cent stated that they chose this method out of a desire to uphold the religious law. Respondent 189 for example wrote “ *I chose farā'iḍ in order to uphold the religious law; there must be a certain wisdom behind the religious law*”. And respondent 194 stated “*Religious law must be given a greater priority than customary law.*”

According to the survey data, all six respondents who gave this reason had had a formal religious education, i.e. at an Islamic college or university. Five of them indicated that they held an important position in society such as religious teacher, or official in the Department of Religious Affairs. In Malay society, those who have a strong religious background usually play an important role, as they are regarded as role models and are highly respected by many who have not received such an intensive religious education. Therefore, this group's priority was to uphold the religious law is not surprising. They probably wished to set an example, encouraging

others to follow the religious law, especially as at present many more people tend to prefer settlement by mutual agreement over that by *farā'iḍ*

iv) To Fulfil the Deceased's will

The last factor influencing the decision to use *farā'iḍ* revealed by the survey is due to execute the deceased's will. The survey revealed that five respondents or 7.1 per cent, stated this reason. For instance respondent 231 noted "*Before he died our late father ordered us to follow farā'iḍ in distributing his property. So we are just executing his will*". Respondent 244 commented "*The case was settled according to farā'iḍ because it was the will of the deceased.*"

Although only a small group of people gave this reason, it does however indicate that the owner of the property has the right to determine how his or her property should be distributed before his or her death. As far as Malay culture is concerned, to fulfil the deceased's will is a responsibility that the nearest heirs usually feel is as much important as other religious obligations even though it only concerns the distribution method preferred by the deceased. Although the respondents participating in the survey did not specifically mention the exact reason why the deceased preferred settlement by *farā'iḍ* it can be assumed (and is attested by researcher's own experience) that when a person instructs others to follow the religious law he or she usually has a strong commitment to that religion.

5.4.2 Settlement by Mutual Agreement and its Influential Factors

According to the survey, five main reasons (as shown in Table 5.3) were identified as the influential factors which led the respondents to settle their cases by mutual agreement. The five reasons will be discussed separately in accordance with their degree of importance. The perceptions of this group of respondents regarding *farā'iḍ* will also be examined.

Table 5.3: Reasons Influencing the Claimants to Settle their Cases by Mutual Agreement

Reasons	Male		Female	
	Freq.	%	Freq.	%
1.to obtain a faster settlement (as advised by the other heirs and agency's officer)	35	32.7	30	34.0
2.to strengthen family ties	32	29.9	21	23.9
3.to follow the majority of the heirs	19	17.8	18	20.4
4.because the size of the piece of land is small	19	17.8	11	12.5
5.to implement the deceased's will	2	1.8	8	9.1
Total: 195	107	100	88	100

Source. Response to question 9: What is your reason for choosing that method?

i) To Obtain a Faster Settlement Process (as advised by the agency's officer)

The advice given by the officer in charge has a strong influence on the respondents' decision to settle their case by mutual agreement. This can be seen from the results of the survey, which revealed that of the 195 respondents who used mutual agreement, sixty five (35 male, 30 female), or 33.3 per cent, stated that they had chosen this

method in order to obtain a faster settlement as advised by the officers. This can be seen in the answers given by three of the respondents. Respondent 63 for instance stated, “*The mutual agreement method is fast. The officer has already explained that if we use farā'iq it will be time consuming*”. Respondent 64 wrote, “*If we use farā'iq the process will be slowed, and so the officer advised us to use mutual agreement*”. Respondent 93 noted “*All the heirs want the easy way. According to the officer in charge settlement by mutual agreement is faster and easier.*”

In this regard, however, most of the officers involved in the settlement process denied that they had any influence on claimants. An officer of the Amanah Raya Corporation commented “*What we normally do is to advise the claimant or the heir that if they want a faster settlement, mutual agreement is the best method. But that is only our view ...whether they want to accept it or not is entirely up to them.*”¹¹ An officer from the Small Estate Unit also denied during his interview that any attempt was made to influence the heirs; he stressed that “*The choice of settlement method applied in such cases is totally up to the heirs themselves. Our duty in the Small Estate Unit is simply to keep them informed of the options they have.*”¹² However, these denials were contradicted by the Director of the Small Estate Unit, who bluntly admitted that the Small Estate Officers encourage heirs to settle by mutual agreement: “*As for those who want a faster settlement, we encourage them to use mutual agreement as the settlement method.*”¹³

These comments show that these officers are caught in a dilemma between the urgent need to speed up the settlement process in order to reduce the back log of cases which have yet to be brought to the hearing process and their duty to give the claimants full

freedom to make their decision. It seems however, that these officers have decided that it is necessary to encourage claimants to settle by mutual agreement because the process is much easier and faster.

As stated previously, under the present administration settlement by mutual agreement has proven to be much faster than by *farā'iḍ* (see chapter 4). This is simply because it is common practice for cases of *farā'iḍ* to be forwarded to the *shariah* courts in order that the share of each heir according to the rules of *farā'iḍ* can be calculated. This process, however, always takes longer than the expected time. This is because in some cases the court has to call the heirs involved in order to clarify the situation or to give further necessary information before the *farā'iḍ* certificate can be issued. Mr. Kam, an officer of the Amanah Raya Corporation, noted that “*to obtain the farā'iḍ certificate from the sharī'ah court normally it takes more than two months*”.¹⁴ According to Mrs Rosnaha, for settlement by *farā'iḍ* its duration normally will be longer because it has to be referred to the *sharī'ah* court.¹⁵ Obviously, this procedure will prolong the settlement process, which most of the claimants who prefer a faster settlement try to avoid.¹⁶ However it is not fair to put the blame totally on the *shariah* court, since it also has other responsibilities which need to be given urgent priority. As might have been expected, the *sharī'ah* court's officers refused to be blamed for such delays. In the view of the *shariah* court, since the present administration has assumed responsibility for handling the settlement of Muslim inheritance cases, both settlement agencies are expected to be capable of handling cases of *farā'iḍ* independently.

ii) To Strengthen Family Ties

It is common sense that cooperation, whether between heirs or friends, can strengthen any relationship. The results of the questionnaire survey show that to strengthen the family ties was the second most often cited reason given by the respondents to explain why they had settled their case by mutual agreement. Of the 195 respondents who had settled their case by this method, fifty three (32 male, 21 female) or 27.2 per cent gave this particular reason. For instance, respondent 1 commented "*Settlement by mutual agreement can strengthen the relationship between the heirs since mutual agreement is based on discussion and agreement between those involved.*" Respondent 2 stated "*I used mutual agreement in order to divide the estate equally among the heirs. In that way the relationship between the heirs can be strengthened.*" Respondent 7 asserted that "*Mutual agreement can strengthen the relationship between the heirs and the family.*" Respondent 21 argued that "*Settlement by mutual agreement can strengthen family relationships because if everybody gets an equal shareeverybody will be satisfied.*"

It seems that in the context of Malay custom, men tend to compromise by voluntarily declining to settle their case by *farā'iḍ*, although under *farā'iḍ* their share would be double that of their female counterparts. As for the female sharers, the tolerance and generosity shown by their male counterparts is greatly appreciated.

The reasons of this generosity and tolerance in this regard may be explained by the nature of gender relationships in Malay culture, which have been influenced by the fact that more and more women are engaged in outside work and contribute income to

the family. Studies of Malay society have often shown that egalitarian relations are permitted between the genders.¹⁷ Gender relations in Malaysia and South-East Asia, Karim argues, exemplify bilateralism as a concept and a value, in that there is the need to maintain social relationships through the use of complementarity and similarity rather than hierarchy and opposition, the need to reduce imbalance in power through mutual responsibility and cooperation rather than oppression and force.¹⁸ This view of gender relations in Malay society may provide an explanation for the increasing acceptance of equal distribution between male and female in the settlement process. The existence of the concept of jointly acquired property is another example of this egalitarianism. (See detail in chapter 6)

iii) **Following the Decision of the Majority of the Heirs**

The third most often cited factor influencing the respondents to settle their cases by mutual agreement was of following the majority of the heirs. This was mentioned by thirty seven (19 male, 18 female) or 19.0 per cent of the respondents. As previously explained, the great advantage of following the majority of the heirs was that it prevented disagreement among the heirs, which in turn helped to strengthen relationships within the family at a stressful time. Thus, these reasons seem to be strongly interrelated. This can be observed in the statements given by the respondents. For instance, respondent 131 wrote, "*After the discussion between us, all the heirs agreed to use this method and I just followed whatever was considered best for all.*" Respondent 146 stated simply "*The majority of the family agreed to use mutual agreement*".

iv) The Small Size of the Piece of Land

The small size of the piece of land left by the deceased was also among the factors contributing to the choice of settlement by mutual agreement: thirty, or 15.4 per cent, (19 male, 11 female) of the respondents gave this as a reason. For example, respondent 174 stated “*We have no choice because the land is small*” and respondent 169 admitted that “*The officer advised us to settle our case by mutual agreement due to the small size of the land.*”

Section 15 (4) of SEDA 1955 provides that it is the responsibility of the officer in charge to avoid the fragmentation of small plots of land because fragmentation will inevitably devalue them.¹⁹ Therefore, if the piece of land is small and the case involves a large number of heirs, the officer will normally suggest that they should settle their case by mutual agreement. This section, however, does not mean that SEDA 1955 prohibits the implementation of *farā'iq*, as some heirs might understand. In fact, *farā'iq* can still be applied as long as it does not lead to the fragmentation of the land. For example if the heirs insist on settling by *farā'iq*, they have no choice other than to sell the land, after which each of them will take their share in monetary form. These cases also demonstrate that the present administration has not provided to the claimants with sufficient information on this matter. However, it should be noted that under the present administration, the settlement of this type of case normally involves the imposition of interest (see details in chapter 6).

v) To Fulfil the Deceased's Will

Similarly to settlement by *farā'id*, to fulfil the deceased's will was the reason given by the fewest respondents to explain why they settled their case by mutual agreement. The survey revealed that only ten (2 male, 8 female), or 5.1 per cent, of the respondents stated this reason. This can be clearly seen in the statements given by the respondents. Respondent 187 for example wrote "*The deceased made a will asking that the property should be distributed by mutual agreement and I am just fulfilling his request*".

As the survey revealed, it is common practice among the Malays that a person makes a last will verbally to the family (see chapter 6). Directing the heirs to cooperate with each other by means of mutual agreement in distributing the deceased's estate ensures that both female and male heirs will get an equal share.²⁰ This is certainly one of the most important actions the owner of the property can take to prevent family disputes.²¹

5.4.3 Analysis on the Respondents' Perception Toward the Settlement Methods

Since the survey has proved that the percentage of settlement by *farā'id* is much smaller than that of mutual agreements, this section will explore the perceptions of the respondents in regard to the settlement methods, especially *farā'id*.

Regarding the general perceptions of *farā'iḍ* by the respondents who settled their cases by mutual agreement, the survey revealed that most of them (83.1 per cent) seemed to acknowledge the existence of the *farā'iḍ* as a religious law.²² However, a smaller percentage, consisting of four female respondents, or 2.1 % and five male respondents, or 2.6 per cent commented that *farā'iḍ* is no longer suitable to the present-day society. The results revealed that all five of the female respondents stated that they believed that the distribution of shares in accordance with *farā'iḍ* was not fair. Respondent 181 for instance stated “*Farā'iḍ is outdated and unfair in regard to the distribution of share between male and female heirs.*” Respondent 185 stated that “*(farā'iḍ) is no longer suitable for present day.*” Respondent 144 noted that “*(farā'iḍ) is not suitable.*” Respondent 145 also wrote that “*(farā'iḍ) is no longer suitable to be applied in the present day.*”

From the male respondents however, mixed comments were received. Three of them stated that settlement by *farā'iḍ* is no longer suitable because it is time-consuming compared to mutual agreement, and the other two agreed but added that *farā'iḍ* is not fair in its share distribution.²³ Respondent 98 for instance stated “*At the moment farā'iḍ is not suitable, most people in society nowadays prefer faster settlements in all matters.*” Respondent 112 wrote that “*(farā'iḍ is) not good because its settlement is very slow.*” Respondent 83 commented “*farā'iḍ is not so good because it is not fair.*” Respondent 96 stated “*(farā'iḍ is) not suitable because its settlement process is very slow.*” Respondent 97 remark that “*(farā'iḍ is) not suitable because settlement by mutual agreement is much faster.*”

As under *farā'id* the male's share is twice that of the female, it is not surprising that the survey showed that the female respondents were much more concerned than the male respondents about 'fair distribution' among the heirs. However, when these respondents' religious educational background was examined, it was found that they did not consider their religious knowledge to be very strong. All of them indicated that they had an informal knowledge through personal reading, or from education in secondary school or through occasionally attending religious talks in the mosque.

From the Islamic law point of view, the statements given by these respondents are highly controversial and anyone by making such kind of statement might be regarded as apostate because *farā'id* is the law revealed in the Quran. Disagreement on the concept of *farā'id* voiced by some of the respondents can probably be linked to the failure of the authorities (the agencies and the government as whole) to educate them about the matter as well as to improve the settlement process to make it as easy and quick as settlement by mutual agreement.

Prof Ahmad Ibrahim the most prominent scholar in Islamic family law in the country, when asked to comment on the issue of the suitability of *farā'id* to present-day society, tried to deal with these misunderstandings regarding the concept of faraid that at present exist in Muslim society. He stressed that *"Even though mutual agreement may seem fairer to all the heirs, but in Islam the men are ordered to take the responsibility of supporting the family....and not the women. Women on the other hand have other types of responsibility at home ...and women are supposed to be under the protection of the men. It is based on that foundation that under faraid men get a larger share than women"*²⁴

His view was also supported by Mr Justice Abdul Rahman Yunus, the Shariah High Court judge, who commented on the issue during his interview *“There are those who do not understand the concept of farā'iḍ. Farā'iḍ is the law established by Allah and should not be questioned. However, not even one Muslim scholar has ever stated that it is compulsory to follow farā'iḍ. We can use mutual agreement and it is not against god's law.”*²⁵

As for those respondents who used *farā'iḍ* in the settlement process, their perceptions towards *farā'iḍ* were also mixed. This is because the majority from this group were not genuinely choosing *farā'iḍ* on their own free will but rather based on many other factors such as because of disagreement among the heirs, following the majority of the heirs or implementing the deceased's will (see details in section 5.4.2). Since forty-seven, or 67.0 per cent of the respondents from this group opted for *farā'iḍ* primarily because of family disagreements, this majority evidently perceived *farā'iḍ* to be the method to follow if the case is difficult to settle by mutual agreement. In other words *farā'iḍ* is turned to as a last resort when it seems to be the only solution to their problem.

The Survey found that those who chose *farā'iḍ* to uphold the religious law had either been educated in religious secondary schools or Islamic teaching colleges, had minored in Islamic studies at university or graduated in Islamic religious studies. Thus, it is not surprising that they insisted on settling their cases by *farā'iḍ* even though they were aware that this method would take longer than settlement by mutual agreement. As regards their perception of mutual agreement, all of them stated that

this method despite being derived from Malay custom, is incompatible with the principles of Islamic law; but as a Muslims they felt that precedence should be given to the religious law.

Regarding the perceptions toward mutual agreement on the part of those who settled their cases by this method.²⁶ The survey found that only 47 of the 195 respondents, or 24 per cent are aware of the fact that settlement by mutual agreement is approved by Islamic law. Most of them commented that mutual agreement is a good method because of its simplicity and the rapidity of its procedures. Again, this opinion is probably due to the lack of provision of an awareness programme by the agencies and government as discussed previously.

5.5 Conclusion

The data collected from the agencies: Small Estate Units (East, West and Middle zones from 1990-1999) and the Amanah Raya Cooperation (1995-1999) proved that the number of Muslim claimants using *farā'iḍ* in the settlement process was much smaller than those choosing mutual agreement. The results showed that the highest percentage of the use of *farā'iḍ* was only 28.5 per cent in 1993; the lowest percentage, 5.8 per cent was observed in 1997. It is obvious that *farā'iḍ* was not a popular settlement method among Muslim claimants in Pahang

A survey using questionnaires and targeting those involved with the settlement process was also conducted to investigate attitudes toward *farā'iḍ*. The questions

were designed with the intention of thoroughly exploring their reasons for choosing a particular method and their perceptions of that method.

Similarly with the data collected from the agencies, the results of the questionnaire survey revealed that *farā'id* is less favoured by Muslim claimants than settlement by mutual agreement. This was evidenced by the fact that of the 265 respondents participating in the survey only 26.4 per cent (70 respondents) stated that their cases were settled by *farā'id* while the other 73.6 per cent (195 respondents) stated that their cases were settled by mutual agreement.

The study discovered that there were four reasons why claimants chose to use *farā'id* in their settlement process: i) because of disagreement among the heirs, ii) because majority of heirs preferred *farā'id*, iii) to uphold religious law and iv) to implement the deceased's will. But of the four groups of respondents who had settled their case by *farā'id* only one was found to have freely and willingly chosen this method: those who concern was to uphold the religious law. As for the other three groups, *farā'id*, seems to be the only effective option open to them, and their comments were that if they had had the choice, settlement by mutual agreement would have been their preferred method.

According to the survey, all the respondents who willingly chose *farā'id* were found to have experienced formal religious education in Islamic colleges or universities, and many of them indicated that they held important positions in society such as religious teachers, or officials working in the religious department. Thus, it can be argued that those who freely choose *farā'id* tend to have a strong religious background and

usually play an important role in the society, which entails their being regarded as respected role models.

With regard to the factors that influenced the respondents to settle their cases by mutual agreement, the study found there were five main reasons; i) to obtain a faster settlement (as advised by the other heirs and agency's officer), ii) to strengthen family ties, iii) to follow the majority of the heirs, iv) because the size of the land involved was small, and v) to implement the deceased's will. The survey discovered that the advice given by the officers that settlement by mutual agreement is faster and easier was the reason most often given although the officers strongly denied that they had ever given such advice.

Even though the majority of the respondents (256 out of 265) preferred settlement by mutual agreement, they stated that this did not mean that they rejected the use of *farā'iḍ* on principle. The survey found that most of them acknowledged that *farā'iḍ* is the religious law and therefore suitable to be applied at any period. However, out of the 265 respondents surveyed, nine bravely commented that *farā'iḍ* is no longer suitable to be applied due to the unfair distribution of shares between male and female.

Notes to Chapter Five

- ¹ Denscombe, Martyn, *The Good Research Guide for Small-scale Social Research Projects*, Open University Press, Buckingham, 1998, pp. 19-25.
- ² See Appendix B for copy of questionnaire.
- ³ Only 11 of them returned the questionnaire.
- ⁴ Kanuk, L and Berenson, C, "Mail Surveys and Response Rates: A Literature Review", *Journal of Marketing Research*, 1975, part 12, p. 440-453.
- ⁵ Interview conducted by the researcher with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh (In Response to question no. 8). See also Interview conducted by the researcher with Mr. Kam Ian Hai, Manager of the Amanah Raya Corporation for the State of Pahang on 19 December 1997 at his office in Kuantan. (In response to question no. 12 and 13).
- ⁶ Interview conducted with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh. (In Response to question no. 19)
- ⁷ Respondents' response to Q. 8 : What type of distribution method has been used in settling your case?
- ⁸ Ali, Aziz, *Ke Arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, (Toward Better Administration of inheritance in Pahang) unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 6.
- ⁹ Interview conducted with Mr Aziz (In Response to question no. Q 17). See also Interview with Mr. Muhammad bin Abdullah, Head Director of the Small Estate Unit on 10 December 1997 at his office in Kuala Lumpur (in response to question no. 16). See also Interview conducted with Mr. Kam Ian Hai. (in response to question no.16).

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- ¹⁰ Interview with Mr. Muhammad bin Abdullah (in response to question no. 16).
- ¹¹ Interview conducted with Mr. Kam Ian Hai. (in response to question no.4).
- ¹² Interview conducted with Mr Aziz Bin Ali (in response to question no. 18).
- ¹³ Interview with Mr. Muhammad bin Abdullah (in response to question no. 11).
- ¹⁴ Interview conducted with Mr. Kam Ian Hai, (in response to question no. 2).
- ¹⁵ Interview conducted with Mrs Rosnaha (in response to questions no. 6).
- ¹⁶ Interview conducted with Mr. Kam Ian Hai, (in response to question no.4). See also Interview conducted with Mr Aziz (in response to question no. 5).
- ¹⁷ Karim Wazir Jahan, "Introduction: Genderising Anthropology in Southeast Asia" in Karim, Wazir Jahan (ed), in *Male and Female in Developing Southeast Asia*, Oxford, Berg Publisher, 1995, pp. 11-34.
- ¹⁸ Ibid.
- ¹⁹ Section 15 (4), SEDA 1955.
- ²⁰ See also Interview conducted with Mr Aziz (in response to question no. 19)
- ²¹ Ali, *Ke Arah*, p. 11.
- ²² Respondents' response to Q:11: what is your view on applying *farā'iq* to settle such case ?
- ²³ Respondents' response to Q: 12: what is your opinion on the suitability of *farā'iq* in the present day?

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- ²⁴ Interview with Professor Tan Sri Ahmad Ibrahim, Dean of Law Faculty, of International Islamic University on 8 January 1998 at his office in Kuala Lumpur. (In response to question no. 7)
- ²⁵ Interview with Mr. Abdul Rahman Yunus, *Sharī'ah* High Court Judge of Pahang State on 12 January 1998 at his office in Kuantan. (in responded to question no. 15).
- ²⁶ Question no. 10: what is your view on applying *farā'iq* to settle such case ?

CHAPTER SIX

Analysis of Cases of Muslim Inheritance

6.1 Introduction

This chapter concern with an analysis of cases of Muslim inheritance settled in the State of Pahang by the Small Estate Unit. The discussion aims to explore two main issues: firstly, the compatibility of the decisions made by the officers in settling such cases with the rule of *farā'iḍ* and Islamic law in general; secondly, to what extent the Islamic law of succession especially *farā'iḍ* as applied in the State of Pahang has been reformed.

The discussion begins with a description of the methodological approach adopted during the fieldwork survey, which has been conducted in order to obtain and study the cases settled by the agency. Problems encountered by the researcher in completing this task will also be briefly discussed. This will be followed by an examination of the form of the Muslim cases settled by the agency and finally the cases themselves will be analysed.

6.2 Methodological Approach

In order to study and analyse the cases settled in the State of Pahang, a fieldwork survey has been adopted as the main approach, which has been essential as accounts of the cases

settled by the agency are not available in published law journals, i.e. the Malay Law Journal for cases brought to the civil court, and *Jurnal Hukum* for cases brought to the *sharī'ah* court. This is because the agency's policy treats the cases as confidential.¹

This tight procedure has prevented the public, especially future claimants from benefiting from the experience of previous claimants; it is one of the obvious weaknesses of the present administrative system. To share the experience of others is vital because the matter of distributing the deceased's property is a universal issue that will be faced by every member of Malay society. But because of the strict regulations, the subject of *farā'id* and the settlement procedures have become a 'grey area' to the society.

Even though as mentioned in chapter 4, two agencies are involved in handling cases of Muslim inheritance (the Small Estate Unit and the Amanah Raya Corporation), access to case records was permitted only by the Small Estate Unit, as the Amanah Raya Corporation regulations prohibited study of the cases under its jurisdiction.²

Owing to time constraints, the survey covers only those cases settled between 1990 and 1999; it was conducted in two stages because of the large number of cases. The first stage of the fieldwork was carried out over two months from November 1996 to January 1997 (3 months). During this period, the survey focused on the cases settled from 1990 to 1995. As for those settled from 1996 to 1999, a second fieldwork survey took place over six months from March to September 1999. This second survey period was much longer

because, besides examining the cases from 1996 to 1999, the questionnaire was also administered as has been discussed in chapter 5.

Studying the cases settled by the agency proved difficult due to the uncomputerised data system (see also chapter 5). The researcher therefore had to rely on the general records of the agency whose files yielded only basic information, such as the application date, the issue or problem considered, the settlement and distribution method applied. Therefore, in order to identify the types of cases settled by the Small Estate Unit, the following procedure was adopted: first, to examine the general record books of the agency for the period 1990-1999; second, to select the required files by taking their reference number; finally to obtain the file. However due to the strict procedure of the agency only its staff members are allowed to enter the filing room and retrieve the file. The survey therefore was very dependent on the staff, who were continuously busy with their own work schedules. This situation caused unavoidable delays.

6.3 The Form of Cases Settled by the Settlement Agency

A study of the general records of the agency suggested that most of the cases settled within the last ten years (1990-1999) involved more or less the same issues, although the disputes or problems arising among the relatives might differ considerably from one case to another.

However this chapter is not concerned with discussing these disputes and problems as its main focus is on the compatibility of the decisions made by the officers in settling the cases with the rule of *farā'id* and with Islamic law in general. The study revealed that there are four types of cases whose settlement as decided by the agency or its acts are in stark contradiction to the rule of *farā'id* and to Islamic law. These cases are: (i) those involving the issue of interest; (ii) those concerning group settlement area land; (iii) those involving Malay Reservation Land, and (iv) cases of nomination. All four mentioned are settled directly by the Small Estate Unit officer in charge.

In order to determine to what extent *farā'id* or the Islamic law of succession has been reformed in the State of Pahang, it is necessary to examine the cases referred to the *Sharī'ah* Court. The study revealed that there are four types of these cases: related to (i) cases of *farā'id*; (ii) cases involving *waṣīyyah* or bequest; (iii) cases involving *hibah* or gift, and (iv) cases involving jointly acquired property. All these cases must be referred to the *sharī'ah* court before the "distribution order" can be issued by the officer in charge. The above cases are referred to the *sharī'ah* court in order to obtain a *farā'id* certificate (for those that need to be settled in accordance with *farā'id* or to check their validity in cases of *waṣīyyah* or *hibah*). In cases of jointly acquired property it is the responsibility of the *sharī'ah* court to determine the share of the surviving spouse.

6.4 Cases which are Incompatible with *Farā'id* and Islamic Law

6.4.1 Cases Involving Interest

The study found that most of the cases involved with interest are related to immovable property, especially land and houses. It is the responsibility of the officer in charge to make sure that the land is not being divided into small fragments which will lead to a successive ownership that will devalue the land.³ Therefore, in settling this type of case, the officer normally will suggest that the case be settled by mutual agreement such as the land being given to one of them but they will share the whatever benefits are produced by the land peacefully. However, there are many instances where the heirs agreed that the land be sold to one of the heirs and the buyer will pay the share of other heirs in accordance with their consensus or by following the shares fixed by the rule of *farā'id*. However, if the payment was made by instalment, the buyer will be charged with an interest not less than five percent per annum.⁴

To give an example: in the case of Samiah bt Mamat⁵ (see appendix C 1), in order to prevent the land left by the deceased being divided into small fractions due to the large number of heirs, the heirs involved agreed to follow the officer's order to sell the land to one of the heirs at the current market value, who then will reimburse other heirs as agreed among them. However, due to the payment was made by instalment within three years, the buyer then has being charged by the officer with interest at four per cent per annum.⁶ The officer noted in his judgement that his decision was based on section 15 (4) of SEDA, 1955 in order to avoid the land being broken up into small parcels.

In this case, the decision made by the officer in charge was in explicit contradiction to the principles of Islamic law due to the imposition of interest. In fact, a thorough analysis of the decision shows that the officer did not state specifically which subsection his decision was based on, as section 15 (4) contains five subsections, i.e. (a), (b), (bb), (c) and (d).⁷ Each of these subsections gives the officer an option on how to settle the case. Clauses (c) and (d), for example, provide that the officer in charge may order the land or any part of it to be sold in the prescribed manner, or may order the land or any part of it to be sold among the heirs by tender without prescribing any imposition of interest upon the buyer as in clause (a) and (b). Therefore, the decision made in this case suggests that the officer in charge may not have been fully aware of the options provided by section 15 (4) and its subsections.

Another interesting point concerning the matter arises from an examination of subsection (6) of section 15 which states that if the claimant involved is a native, subsections 3, 4 and 5 are not applicable.⁸ As defined by SEDA 1955, 'native' means a native of Sabah or Sarawak (states of East Malaysia).⁹ This means that SEDA 1955 acknowledges the principles of native custom but not the principle of Islamic law, since it permits the matter of interest being imposed upon them.

In the case of Umar bin Kadir¹⁰ (See appendix C 2) a similar decision was made by the officer in charge. The deceased left one acre of land with a house where the deceased

lived before he passed away, which was valued at ten thousand Malaysian Ringgit. The heirs consisted of his widow, three daughters, two brothers and one sister. In this case, the deceased's daughters could not agree on the settlement, while the other heirs preferred a settlement based on a mutual agreement. The daughters insisted that the land should be registered in all their names. However, due to the small size of the piece of land the officer rejected this request. When he ordered that the land be sold among them, each of the daughters laid claim to it. The officer finally decided to select the buyer randomly with the result that the youngest daughter obtained the land, and she was ordered to pay the other heirs the value of their share as fixed by the law of *farā'id*. However, as the payment was to be made in instalments, she was charged interest at four per cent per year.

According to Islamic law all interest is regarded as *ribā* or usury. Although the word *ribā* itself means an addition over and above the principal sum lent it also applies to any usurious transaction whether the rate be high or low and whether the interest is or is not added to the principal after a fixed period. The prohibition of *ribā* or interest is intended to prevent injustice and to promote sympathetic feelings towards those in need or distress. It is clearly prescribed in the Quran although the ban appears to grow in force with the accumulation of relevant verses.¹¹

The first reference to usury occurs in Q. 30:39¹². While this verse does not expressly prohibit usury, it suggests that lending at interest is an injustice because it is done at the

expense of borrowers. The principle, therefore, is that any profit we seek should be through our own activities and at our own expense, not through exploiting other people or at their expense. Furthermore Q. 4:161¹³ warns Muslims indirectly not to transgress God's law and charge interest as did some of the Jews despite their own prohibition. In this verse, the use of the strong word *akhdh* (taking) instead of *ataytum* (lay out) which was used in Q. 30:39¹⁴ indicates the gradual prohibition of usury.

Its absolute prohibition is confirmed by the later stipulation in Q. 3:130.¹⁵ This verse clearly forbids Muslims to take interest, and states that real prosperity cannot be obtained through the taking of it. The final references to the banning of usury appear in Q. 2: 275–276¹⁶ and 278-279.¹⁷ In these verses, usury is condemned and prohibited in the strongest possible terms.

6.4.2 Cases Pertaining to Group Settlement Area Land

Group Settlement Area (G.S.A) lands are those falling under the provision of the Land Act (Group Settlement Area) 1960. They are provided by the federal government through agencies like the Federal Land Development Authority (FELDA), which was established in 1956 for specific purposes such as the establishment of palm oil or rubber estates in order to help raise the economic status of those living in rural areas.¹⁸

Those who join the FELDA Scheme are provided with planted rubber trees or palms as well as with accommodation (one house per family). Before the ownership is transferred

to them, they must agree to pay a certain amount, known as the consolidated annual charge, to the FELDA authority within a specific period. Payment usually starts after the sixth year and continues for the next fifteen years. Ownership is confirmed by the District Land Office only after the full payment is completed.¹⁹

The problem in regard to this type of land arises when the original holder of the land dies. This is because section 16 of the Land Act (Group Settlement Area) 1960 states that the land cannot be transferred to more than one holder, in order to avoid the fragmentation of the land. Section 16 reads as follows:

“Where, but for the provision of section 15 the land comprised in any rural holding would on the death of the holder or otherwise be liable to transmission by way of subdivision or in undivided shares, the persons entitled to interests in the holding may assign their interests to a single holder and in default of such assignment, the holding shall be disposed of on the order of the Collector and the proceeds of sale of the holding or any interests therein shall be dealt with according to law.”

Section 16 confers on the officer in charge the responsibility of appointing a new holder to the land. Normally, on the death of the holder, his widow if she chooses to remain on FELDA land will be given first claim to the land, but if she is not capable the officer will designate the most appropriate person among the heirs to be appointed as the new holder. This is usually done by asking the other heirs to jointly suggest who is to be the new

holder; however, if the heirs can not agree, the land is sold and its value divided among them based on the rule of *farā'īd*.²⁰

This regulation in actual practice has usually caused dissatisfaction among those involved because it rarely provides a fair solution. We may turn for an example to the case of Kamil Bin Hamsani,²¹ (See appendix C 3) who jointed the FELDA scheme in 1985 but later died, leaving two wives, a son and a daughter. In this case the widows refused to cooperate with each other. When the officer suggested that the property be transferred to the first wife on the basis that her son could help her in managing the land, the second wife, together with her daughter, rejected the suggestion, as they demanded their share of the property. The officer in charge finally decided that the land should be sold off and the proceeds from the sale be distributed among the heirs in accordance with *farā'īd*.

In such cases of polygamy, according to present practice, the first wife, provided she stays on the FELDA land, will be given prior claim to be appointed as the new owner or holder of the land, as mentioned before. But this practice is clearly not compatible with the principles of *farā'īd*. This is because under the rule of *farā'īd* all widows have the same right to inherit the property left by their husband; that is, one-fourth of the property if there is no issue and one-eighth if there are surviving children.²²

Another example of a case connected with FELDA land or a group settlement area is that of Kamalul Bin Hj. Syuib.²³ (See appendix C 4) Here the land came under the category

of a group settlement area, and so it was decided that only one heir could be appointed as the new holder. The officer's suggestion, to hand over the land to the deceased's brother, was rejected by the other heirs (widow, brother and sister). Therefore, as is usual, in order to solve the problem the officer ordered that the land be sold and each of the heirs obtain their share based on *farā'īd*.

It is clear From the above cases that section 16 of the Land Act (Group Settlement Area) 1960 is incompatible with the principles of *farā'īd* because it allows only one heir to take over the land left by the deceased while the other heirs are prevented from getting their shares. The various portions allocated to each legitimate heir are, however, clearly stipulated in Q.4:11-12. This allocation has been regarded as *farīḍatan min Allah*, which means the obligations imposed by God, and therefore under the rules of *farā'īd* legitimate heirs cannot be prevented from receiving their rightful share.

Also section 16 of the said act does not prescribe that the newly appointed holder must reimburse the other beneficiaries, who have given up their shares in the land, in monetary or other forms that are equal in value to their shares. This means that the newly appointed holder or owner obtains the land freely, while the other legal heirs are prevented from receiving what is due to them as prescribed under the rule of *farā'īd*. This unfair situation has been the main reason why most of the beneficiaries or heirs involved have refused to relinquish their shares; this has been the only way they have been able to protect their share.²⁴

6.4.3 Cases Pertaining to Malay Reservation Land

The Malay Reservation Land as might be expected, is land specially reserved for the Malays who alone are allowed to hold any rights to it. According to the Malaysian Constitution a Malay is a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom.²⁵

The first Malay reservation enactment was established in 1913 by the British who decide that there should be a special gazetted area reserved for the Malays in order to protect them from others who were intent on competing for the land.²⁶ However according to Roff and Awang Kechik, the enactment was introduced in order to sustain the Malays in their practice of traditional agriculture in the rural areas, and thus to indirectly prevent them from participating in modern industry.²⁷ Most of the land reserved for the Malays by the British administration categorised as from the third, fourth and fifth class, is located in undeveloped areas far from the main city. While the land of first and second class, which was in is the main urban areas remained eligible for purchase by non-Malays.²⁸

On the surface, it might seem that non-Malays were legally barred from owning land reserved for the Malays. However there were still loopholes by which the restriction could be evaded. Non-Malays could obtain a legal financial interest in reservation land by leasing it from Malay landholders, since the law permitted leases for a period of three

years.²⁹ Therefore, an urgent need arose for the revision of the 1913 enactment and in 1933, it was amended and revised. Essentially the revision prohibited further mortgages and charges by non-Malays.³⁰

Even though the enactment made a vital contribution to safeguarding the Malays' land, it also created certain difficulties in respect of the distribution of inheritance to those involved in inter-racial marriage between Malay and non-Malay.

The problem created by the clause in question is that when the spouse of the deceased, although a Muslim is not a Malay, he or she is prevented from inheriting the land, even though according to the rule of *farā'id* he or she is legally entitled to inherit from the property of the deceased. This can be observed in the case of Jamilah bt Amran,³¹ who was survived by a husband of Indian origin, three sons and one daughter. In this case, the land of the Malay reservation land could not be transferred to the husband because he was a non-Malay. In order to settle the problem, all the heirs agreed to transfer the ownership to the eldest son of the deceased. The husband was quite fortunate since the land was able to be transferred to one of the heirs (his son) so indirectly he can continue to stay on the land.

The case is different, however, if the spouse is the sole heir of the deceased, as in the case of Ismail Bin Shamsuddin³² (See appendix C 6) whose widow was of Chinese origin. For this reason, according to the Malay Reservation Act, she was not entitled to inherit or remain on the land. Therefore the officer sympathetically proposed that the land should

be sold and by that she should automatically receive one fourth of its value as her prescribed share under the rule of *farā'iḍ*, while the other three quarters was to be forwarded to the *bait al-Māl*.

This regulation is also clearly incompatible with Islamic law as distribution according to rule of *farā'iḍ* law is based on religion and not on ethnic origin. This can be clearly seen in the *ḥadīth* narrated by Usāmah ibn Zaid: "*A Muslim cannot inherit from a non-Muslim and a non-Muslim cannot inherit from a Muslim*".³³ In another *ḥadīth* narrated by the 'Abd Allāh Ibn 'Amru "*No succession between two different religion.*"³⁴

Regarding the matter of land reservation, Islam had already prohibited all land reservation schemes except for the benefit of the Muslim community as can be seen in the *ḥadīth* narrated by Ibn 'Abbās "*No reservation land (ḥimā) is permitted except for the sake of Allah and his Messenger*".³⁵

According to al-Shafi'ī the *ḥadīth* has two interpretations. Firstly, means that no one but the prophet has the authority to reserve the land and secondly, no person is allowed to reserve the land except on the basis of policy or rule made by the Prophet, that the reservation has to be made for the benefit of the Muslim community and not for individual interest.³⁶

According to Ibn Qudāmah, although the *ḥadīth* allows the prophet to reserve land for both himself and the Muslims, the Prophet never reserved any for himself but only for the Muslim community.³⁷

According to al-Māwardī and al-Ramlī the *ḥadīth* means that no reservation of land is allowed except in the interest of Islam, as practised by the Prophet in order to abolish the practice of the pre-Islamic Arab custom whereby land was reserved for the sake of individual interest.³⁸

Therefore, from the above discussion it seem that land reservation are not allowed in the Islamic law except for the benefit of the whole Muslim society.

6.4.4 Cases of Nomination

An asset of nomination is any movable property saved in a financial institution where the person saving has appointed one or more nominees as the owner of the savings after his or her death. Nomination is another important element involving cases of *waṣiyyah*; it became an increasingly important issue as the country developed and the structure of the civil service expanded. The issue of nomination came to the fore in order to safeguard the deceased's pension, employee provident fund (later EPF), Insurance, co-operative funds, post office and bank savings.

Controversy arose when nominees began to claim that they were the beneficiaries rather

than the *wasī* or executors of a legacy. In straightforward cases, where the nominee appointed is acceptable to all the heirs, the problem is minimal. However, if the person concerned is unacceptable for any reason it is inevitable that the problems will surface. Having divorced and married for a second time, some individuals do not realise that there is a need for them to alter their nomination to the benefit of the present wife. Otherwise, after the husband's death for instance, the financial institutions will pay the whole sum of the to the divorcee when, by right it should be paid to the widow. Also once the payment has been made, it is usually very difficult for the legal heirs to recover it, even with the intervention of the officer in charge, who can only advise the claimant about the measures that can be taken, i.e. to appeal to the High Court. This undoubtedly will cost the heirs involved a lot of money, and in most instances the heir will not be able to afford it.³⁹

A good example of this situation can be seen in the case of Mohd Parid Bin Mohd Talib.⁴⁰ (See appendix C 7) In this case, the deceased (Mohd Parid) divorced and remarried. The problem was that he had nominated his divorced wife as beneficiary one year before he passed away. The deceased's widow therefore made a request to the officer in charge to distribute the savings among the legitimate heirs of the deceased. The deceased's ex-wife was later called by the officer in order to settle the matter concerning the distribution of the deceased's savings as according to Islamic law, she was no longer entitled to receive any share from the saving, the ex-wife however refused to co-operate and insisted that the savings belonged to her. In such a situation the officer in charge has no power to compel the nominee since in accordance with the High Court's ruling in

previous cases i.e *Re Man Bin Mahat*⁴¹ and *Bahadun Bin Hassan*,⁴² the savings of the deceased rightfully belong to the nominee, even though the High Court's decision contradicts the principle of Islamic law of *wasyyah*. It is beyond the jurisdiction of the officer in charge to override the decision made by the court.

This contradiction can also be seen in the case of *Saudah Bt Yussoff*⁴³ (See appendix C 8) where the deceased had appointed her mother as the nominee regarding her savings in the employee provident fund. In this case the widower requested that the savings be distributed among the legal heirs, but the deceased's mother refused, claiming that the savings belonged to her. The officer again noted that he had no power to force the nominee to distribute the savings among other heirs.

The situation in the case of nomination becomes even more complicated if the deceased secretly nominates a person as executor. This happened in the case of *Che Kahar Bin Che Din*.⁴⁴ (See appendix C 9) The deceased nominated his secretly wed second wife as the nominee regarding his savings. The second wife refused to divide the savings among other legal heirs. Her intransigence inevitably caused animosity and frustration among the other heirs, especially the first wife and her children. After much acrimony and several consultations with the Small Estate Officer the second wife finally agreed to settle the dispute by dividing the saving equally among all the heirs. The ruling of the High Court favouring the nominee has thus caused confusion and denied justice to the other heirs since under Islamic law they are also entitled to the deceased's savings.

There are also cases where the nominee is not among the legitimate heirs, which is usually the cause of much resentment as in the case of Nasaruddin bin Omar⁴⁵ (See appendix C 10) who appointed his gardener as the nominee. In such cases the officer in charge cannot do anything to rectify the situation if the nominee refuses to distribute the savings among the legitimate heirs despite their complaints.

There appear to be several reasons why some testators refuse to nominate their immediate heirs, such as gratitude and indebtedness to particular individuals who have cared for them in sickness and health, and displeasure at the lack of loyalty shown by some children (especially sons who have migrated to the big towns); they felt that such sons have neglected their duty to look after their parents' welfare. There is also the fear that that personal differences and feelings of jealousy and suspicion will arise among the heirs.⁴⁶

From the cases discussed above, it is clear that in the case of nomination the division of property depends on the nominee him/herself. This is because the rulings made by the High Court have been in the nominee's favour, even though they contradict Islamic law. This is because from the Islamic legal point of view making a nomination regarding savings or property is the same as making a *wasīyyah*. Therefore, a person is allowed to make a nomination as long as it does not violate the rule of *wasīyyah*: the nominated person must not be from among the legitimate heirs and the amount of the property given to him or her must not be more than one-third. On the other hand, if the nominee is among the legitimate heirs and the portion given to him or her is more than one-third of

the net estate, the will or bequest has to be approved by all the heirs after the death of the nominator in order to be valid.⁴⁷

Under the present practice however, most of the nomination cases do not comply with the rule of *waṣiyyah* mentioned above since most of the nominees appointed are legitimate heirs and the amount is more than one third. Also the withholding of consent by the other heirs tends to be ignored. The National Islamic Ruling Council Committee has therefore declared firmly that nomination as practised by the Malay society is against the principles of the Islamic law of *waṣiyyah*. The ruling was endorsed by the 96th Rulers' Council Conference on 20 September 1973. The council therefore declared that nominees in the Employee Providence Fund, savings in the financial Banks or the pilgrimage board, insurance or co-operatives are considered as the *waṣiyyah* of the deceased. Therefore nomination must comply with the rule of *waṣiyyah* in order to be valid, and nominees are advised to divide the legacy among the rightful heirs according to *farā'iq*.⁴⁸

Because the first ruling was ignored, at the 117th Rulers' Council Conference on 21 February 1980, the ruling committee once again highlighted the matter and urged the Attorney General to formulate a specific law forbidding Muslims from making a nomination.⁴⁹ The National Ruling Council's suggestion however did not bring about any apparent change. Only the *Tabung Haji* (Pilgrimage Board) has changed their practice by insisting that any nominee to the savings in their institution be regarded as the *waṣī* or executor for the deceased.⁵⁰

6.5 Cases Referred to the *Sharī'ah* Court

Among the cases handled by the Small Estate Unit there are also those which need to be referred to the *sharī'ah* court before the final decision (distribution order) is made, i.e. cases involving *farā'id*, *waṣiyyah*, *hibah* and jointly acquired property. These cases are referred to the *sharī'ah* court in order to obtain the *farā'id* certificate (if the cases need to be settled in accordance with *farā'id*) or to check their validity in the case of *waṣiyyah* or *hibah*. In the case of jointly acquired property it is the responsibility of the *sharī'ah* court to determine the share of the claimant.

These cases are referred to the *sharī'ah* court because the Small Estate Unit officers have no guidelines to follow, since the law regarding the distribution of Muslim inheritance has not yet been codified either by the federal or the state governments. This is an obvious weakness of the present administrative system because the law regarding non-Muslim inheritance has already been codified in measures such as the Distribution Act 1955 and the Will Act, 1959. These codified regulations enable an officer to easily settle the cases without having to refer the matter to another department, as in the case of *farā'id* and other related matters.

The aim of analysing cases referred to the *sharī'ah* Court is to determine to what extent *farā'id* law as applied in the state of Pahang has been reformed as is the situation in other Muslim countries such as Egypt, Sudan, Tunisia, Morocco, Syria and Pakistan.

6.5.1 Cases of *Farā'id*

As indicated earlier, the Shāfi'ī school is the official school of law followed in the state of Pahang. Therefore, all cases of *farā'id* settled by the *Sharī'ah* court are based on the unreformed traditional law of this particular school. In the case of Khairuddin Bin Ramli⁵¹ (See appendix C 11) for instance, it was decided that the widow who was the sole heir to the deceased, was not entitled to receive the residue of the deceased's property, as the rule of *al-Radd* regarding the surviving spouse is not applied in the state of Pahang. Therefore, the residue was returned to the *bait al-Māl* for the benefit of Muslim society. While in the case of Siti Hajar Bin Abu⁵² (See appendix C 12) who left behind a husband and two daughters. The *sharī'ah* court rules that the husband should get a quarter (one-fourth), the daughters share one half of the property (two-fourths) and the residue (one quarter or one-fourth) was to be forwarded to the *bait al-Māl*. However, the heirs are given the opportunity to regain the share if they can pay the equivalent sum to the *bait al-Māl*.

Al-Radd literally means return while legally it can be defined as a redistribution process of the deceased's property when the shares are less than the estate.⁵³ There is no clear evidence either in the Quran or the *Sunnah* (prophet tradition) regarding the rule of *al-Radd*, and so scholars in this respect may be divided into three groups. They are

- i) Zaid bin Thābit for example, who held that that the rule of *al-Radd* or redistribution of the residue of the inheritance once again to the *aṣḥāb al-Furūd* in

the absence of *‘aṣabah* is not applicable. The residue of the inheritance therefore must be returned to the *Bait al-Māl* for the benefit of Muslim society. This is because in his opinion each heir from the *aṣhāb al-Furūd* has already received a fixed share as revealed in the Quran and thus they are not entitled to receive more. As the Prophet said in the *ḥadīth* narrated by Abi Umāmah “God has already fixed each heir with their portion thus no *waṣiyyah* shall be made for them”.⁵⁴ This view was adopted by the Shāfi‘ī and Mālikī Schools.

- ii) Meanwhile ‘Umar ibn al-Khaṭṭāb and ‘Alī ibn Abī ‘Ṭalib argued that the rule of *al-radd* can be applied to the *aṣhāb al-Furūd* but not the surviving spouse because the relationship between spouses is not a blood relationship but a marital one. For them the blood relationship is preferable, as is mentioned in Q.8: 75 and Q.33: 6.⁵⁵ According to al-Zuhailī⁵⁶ this opinion is shared by most Muslim jurists including those of the Ḥanafī and Ḥanbalī schools. This view however, has also been adopted by the later jurists of Shāfi‘ī and Mālikī schools but only on the condition that the *bait al-Māl* is not being administered for the benefit of the Muslim society.
- iii) Finally Bin ‘Affān considered that the rule of *al-Radd* is applicable to all *aṣhāb al-Furūd* including the spouse, because the marriage relationship must also have place in the succession and inheritance, as both spouses have a right to each other’s property. Another reason given by ‘Uthmān is that if in the case of *al-‘Aul*,

the share of all heirs will be reduced including the spouse, therefore in the case of *al-Radd* their shares including that of the spouse may also be increased.

In Egypt, Syria and Tunisia reform was introduced by merging the second and third opinions. Therefore in these countries the rule of *al-Radd* is applicable to the *Ashāb al-Furūd* including the spouse.⁵⁷ The reform was probably made because the spouse is usually the one who suffers the most emotionally from the death of their partner. In addition it was hoped that the reform would alleviate the spouse's financial difficulties, especially those of a widow who is also a housewife and totally dependent on her husband's income.

Hence, by this reform in the case where the surviving spouse is the sole heir, he or she will get the another share on top of her share as the *aṣḥāb al-Furūd* (that is one fourth) from the residue of the inheritance. In other words, the surviving spouse will obtain the whole property left behind by the deceased if she or he is the sole heir.

If, however, there is another heir from either the *aṣḥāb al-Furūd* or *dhawū al-Arḥām*, the surviving spouse will get the same amount of share from the residue of the property as he or she has already received by virtue of his or her capacity as *aṣḥāb al-Furūd*. As for the other heirs, if they are equal in their degree of closeness to the deceased such as three daughters, they will share the residue equally. But if they are of different capacities, e.g. the deceased's mother and daughter, their portion is as fixed in the rule of *farā'id*.

It is clear from the above discussion that *farā'id* as it has been applied in the State of Pahang is still based on the traditional law of the Shāfi'ī school; it has not been reformed and remains uncodified. This situation is due to the objective of the present administrative system, which focuses only on updating its information regarding land ownership.⁵⁸ Moreover, for the agencies involved i.e. the Small Estate Unit and the Amanah Raya Corporation the reform of *farā'id* is not an issue, since in their perception it is not their responsibility but that of the *Sharī'ah* Court.⁵⁹ As for the *Sharī'ah* Court, the most pressing matter is to establish the Federal *Sharī'ah* Court and to unify enactments between the Malay states.⁶⁰ In other words, the development of the Islamic law of succession whether testate (*farā'id*) or intestate (*waṣiyyah*) in the State of Pahang has been neglected by the authorities in favour of due to other priorities.

6.5.2 Cases of *Waṣiyyah*

The word *waṣiyyah* literally means bequest, testamentary disposition and last will or mandate.⁶¹ Technically, it can be defined as a gift of property by the owner to another contingent on the giver's death.⁶²

The practice of disposing of property through *waṣiyyah* reaches back to before the coming of Islam. In the pre-Islamic era, the Arabs used to distribute their property among non-family members leaving their own relatives in poor condition.⁶³ With the spread of Islam, reform regarding the disposition of property was introduced as mentioned in Q. 2:

“ It is prescribed for you, when death approaches any of you, if he leaves wealth, that he make a bequest to parents and next of kin, according to reasonable manners. (This is) A duty upon the pious. ”

Other important new rules introduced by the Prophet were that: i) no testamentary disposition can be made in favour of the legal heirs as in the *ḥadīth* reported by Abu Umāmah “ God has already fixed each heir with their share, thus no *waṣīyyah* shall be made for them”⁶⁴. ii) the amount disposed must not exceed the limit of one third of the total value of the property, as is clearly indicated in the *ḥadīth* narrated by Sa’d bin Abī Waqqās

“ I was taken very ill during the year of the conquest of Mecca and felt that I was about to die. The Prophet visited me and I asked “O messenger of Allah I own a good deal of property and I have no heir except my daughter. May I make a will, leaving all my property for religious and charitable purpose? He (the Prophet) replied: No.” I again asked: “May I do so in respect of two-thirds of my property?” He replied “No.” I again asked: “May I do so with one half of it?” He replied: “No.” I again asked: “May I do so with one third of it?” the Prophet replied: “ Make a will disposing one third in that manner because one third is quite enough of the wealth that you possess. Verily if you die and leave your heirs rich it is better than leaving them poor and begging. Verily the money that you spend for the pleasure of Allah will be rewarded, even a morsel that you lifted up to your wife’s mouth”⁶⁵

The importance of *waṣiyyah* is also shown by the *ḥadīth* as narrated by Jābir Ibn ‘Abd Allāh

“ *Whoever dies after making a will dies on the straight path and following the Prophet’s tradition. The one who died in piety or achieves martyrdom receives absolution*”⁶⁶

This *ḥadīth*, together with Q. 2: 180 indicates that Muslims are obliged to make provision for a *waṣiyyah*. Al-Ṭabarī however, noted that according to Ibn ‘Abbās and Ibn ‘Umar this obligation was abrogated by the verses of inheritance, i.e. Q. 4:11-12 and Q. 4:176.⁶⁷

According to the Shāfi‘ī school of law the capacity to make a *waṣiyyah* is accorded to every one (regardless of the person is a Muslim or not and without distinction of sex) who is adult, sane and free; it can be given to any person not rendered incapable by reason of imbecility.⁶⁸ It is compulsory that testamentary dispositions must have some lawful object, for example a *waṣiyyah* cannot be made for the upkeep of temples.⁶⁹

A *waṣiyyah* is classified as a contractual transfer of property (*‘aqd*) and is completed by the offer or *ijāb* of the transfer and the acceptance (*qabūl*) of the transferee. To be valid a *wasīyyah* must have four components namely i) the person who makes the bequest (*mūrith*) ii) the person in whose favour the bequest is made (*muṣā lah*) iii) the thing bequeathed (*muṣā bihī*) iv) the offer (*ijāb*) and the acceptance (*qabūl*).⁷⁰

When a person becomes so ill as to be in a danger of death (*marāḍ al-Maut* or mortal illness) he or she may no longer dispose of more than one third of his or her property.⁷¹

Nonetheless, sick persons, not in any danger, may freely dispose of their property even to the extent that if they unexpectedly die during their sickness, their dispositions are considered valid.⁷² Islamic law has laid down the following as dangerous maladies as far as *waṣiyyah* is concerned i) colic, ii) pleurisy, iii) constant flow of blood from the nose, iv) chronic diarrhea, v) phthisis, vi) commencement of paralysis even where merely partial, and vii) vomiting in general if very violent and accompanied by pain or effusion of blood and also by either continuous or intermittent fever.⁷³ If there are doubts as to the precise nature of a malady it should be ascertained by two doctors who should be free men of irreproachable character.⁷⁴

Generally, the law regarding *waṣiyyah* has been practised in the state of Pahang and other Malay states since colonial times when the state enactment for the administration of Islamic law was introduced by the British.⁷⁵ As in cases of *farā'id*, *waṣiyyah* cases will only be considered valid as long as they do not contradict the pronouncements of the Shāfi'ī school of law.⁷⁶

A study of cases settled in the State of Pahang shows that several issues have arisen regarding *waṣiyyah*. One of these is that the amount bequeathed is sometimes more than the restricted limit. This can be seen in the case of Mohamad Rauf bin Hanafi.⁷⁷ (See appendix C 13) The deceased (Mohamad Rauf) indicated verbally that his six-acre rubber plantation was to be given to his adopted mother. The value of the plantation was later discovered to be more than the restricted limit. The *sharī'ah* court therefore ruled that the *waṣiyyah* was valid only up to the limit of one third, so that the adopted mother was only

entitled to two acres of the land while the remainder was ordered to be distributed among other legal heirs.

It appears that the last part of the *ḥadīth* narrated by Sa'd Ibn Abī Waqqās mentioned before (p. 25) “*Verily if you die and leave your heirs rich it is better than leaving them poor and begging*” has sometimes been manipulated and wrongly interpreted by certain individuals to justify their desire to leave a particular person more than the restricted limit.

In the case of Musa B Putih⁷⁸ (See appendix C 14) the deceased left a *waṣiyyah* giving all his property to his wife, but this was not approved by the other heirs. The *Sharī'ah* Court ruled that the *waṣiyyah* was not valid, because under the Islamic law of *waṣiyyah*, an individual is permitted to bequeath up to one third of his property to anyone other than the legal heir as prescribed by the prophet in the *ḥadīth* narrated by Sa'd bin Abī Waqqās.⁷⁹ Any division in favour of a legitimate heir is valid only if it is unanimously approved by the other heirs.⁸⁰ This is in accordance with the Prophet's tradition as reported by Ibn 'Abbās:

“*A bequest in favour of an heir is not valid except when the other heirs give their consent*”.⁸¹

In simple terms this *ḥadīth* is saying that those relatives whose shares are fixed under the rule of *farā'id* are not allowed to have either larger or smaller shares by means of

waṣiyyah, unless all the heirs have agreed to this after the death of the testator, nor can anyone deprive a legal heir without his consent through any *waṣiyyah*. However, under the Egyptian Law of Bequest, 1946⁸², it has been provided that a bequest in favour of heirs within the restricted limit is valid and effective regardless of the consent of the other heirs. The same reform was made in Sudan⁸³ and Iraq⁸⁴ whereas in Syria⁸⁵, Tunisia⁸⁶ and Morocco⁸⁷ as well as other Muslim countries such as Pakistan and Malaysia the matter is still based on the traditional law, which states that a bequest in favour of an heir is not valid unless consented to by the other heirs.

Another issue commonly faced by the agency regarding *waṣiyyah* which has sometimes caused disputes among the relatives of the deceased is that *waṣiyyah* are seldom written down. Their intangible nature makes it difficult to ascertain their genuineness and validity as sometimes the witnesses involved are unavailable or have already passed away.⁸⁸ The case of Amatullah Bt Shakir⁸⁹ (See appendix C 15) is typical. In this particular case, the Imām (prayer leader) of Temerloh mosque claimed that the deceased (Amatullah) made a *wasīyyah* verbally in front of her son (Abd. Manaf) that she wanted to send the Imam to Mecca with her savings money when she passed away. Abd. Manaf however, met with an accident and lost his memory; consequently, the court decided that the *waṣiyyah* was not valid as the evidence provided by the claimant was not sufficient.

Besides the cases mentioned above there have been a few that can be considered as very unusual if not unique, namely *waṣiyyah* to non-Muslims. In the case of Sulaiman Bin Abdullah⁹⁰ (See appendix C 16), the deceased converted to Islam but his wife and

children did not and by that under the Islamic they are no longer husband and wife. Sulaiman bequeathed (in written form) one third of his property to his ex-wife and children. The *sharī'ah* court ruled that the *waṣiyyah* was valid as it did not violate the principle of testamentary law in Islam, that a person can make a *waṣiyyah* to anyone regardless of their religion.⁹¹

In regard to orphaned grandchildren, whether by the predeceased son or daughter, cases settled in the state of Pahang have not been settled in their favour. This can be seen in the case of Mahmud bin Semail⁹² (See appendix C 17) where an application was made by the heirs to include the orphaned grandchildren by the predeceased son and daughter (both of them died in the car accident) in the distribution scheme. The *sharī'ah* court, however, ruled that no share can be allocated for the orphaned grandchildren under the school of Shāfi'ī and therefore the application was not approved. It was assumed that near relatives would take the responsibility of supporting their financial needs.

In order to deal with this problem in particular, Egypt, Sudan, Syria, Tunisia, Morocco enacted a new rule known as *waṣiyyah wājibah* or obligatory bequest. This new regulation stipulated that the property left by the deceased should provide an obligatory bequest, limited to one third, if the grandparents had not made any allocation for their grandchildren through a *waṣiyyah* or *hibah*. The entitlement of these orphaned grandchildren to an obligatory bequest is however, not identical among these countries. Syria and Morocco limit the entitlement to the lineal descendants of the predeceased son,⁹³ while Egypt, extends its to the orphaned children of a predeceased daughter but

limits it to the first generation. Regarding the children of the predeceased son, however, no limitation is imposed.⁹⁴

In attempting to resolve the same problem, Pakistan has introduced a more controversial change which goes beyond any obviously needed reform by applying the doctrine of representation, a doctrine unrecognised in the Islamic law of succession, as in Islam the nearer heir will exclude the more remote.⁹⁵ Section 4 of the Pakistan Muslim Family Laws Ordinance, 1961 provides that the grandchildren of the *propositus* shall receive *per stripes* a share equivalent to the share which their father or mother would receive if they were alive.⁹⁶ This provision therefore was regarded as contrary to Islamic law as it introduced the doctrine of representation into the succession scheme.

6.5.3 Cases of *Hibah*

Although Islamic law permits testamentary disposition only within the limit of one-third of one's property, the Muslims are also allowed to give away their property during their lifetime as a *hibah* or gift.⁹⁷ *Hibah* is defined as a gift from one living person to another without consideration of property belonging to him during his lifetime,⁹⁸ it is the immediate and unqualified transfer of the corpus of the property without any return.⁹⁹

There are three important elements of the law of *hibah*. There has to be a declaration of offer (*ijāb*), a declaration of acceptance (*qabūl*) and actual delivery of possession (*qabdah*).¹⁰⁰ According to Islamic law, neither the offer nor the acceptance of a gift need

be made in writing, whether the property given is movable or immovable. Three important conditions of the *hibah* need to be stressed i) the donor must possess legal capacity; ii) the donee must be actually alive at the time of the *hibah*; iii) the property given must be in existence when the declaration of *hibah* is made.¹⁰¹

According to the Shāfi'ī and Hanafī schools of law the acceptance (*al-Qabd*) of the property is among the conditions validating the *hibah*, which means that if a donor makes a declaration of *hibah* which is accepted by the donee but is not followed by the delivery of possession, then on the death of the donor the *hibah* is regarded as void and the property will descend to the donor's heirs.¹⁰² In the view of the Mālikī and Ḥanbalī schools of law, however, the acceptance of the good is not a condition necessary for the validity of the *hibah* as long as there is agreement (*'aqd*) between the donor and donee. This means that even if the donor or the donee dies before the acceptance of the good, the *hibah* is still valid.¹⁰³

As for the question of the validity of the *hibah* made during the death illness (*marad al-maut*) it is valid if it does not exceed one third of the estate unless this has been allowed by the heirs. However if the donor makes a *hibah* during the death illness and then recovers, the *hibah* is still deemed valid.¹⁰⁴

The study found that cases of *hibah* in the State of Pahang normally involve claims to the *hibah* after the death of the *propositus*. Claims are made because the transfer of ownership to the donee has not been officially completed at the time of the donor's death.

This can be seen in the case of Raduan bin Mat Isa,¹⁰⁵ (See appendix C 18) who gave his land to his cousin five years before his death. When he died, however, the transfer of ownership had not been officially completed at the District Land Office and therefore the land was still in the name of the deceased. The case was referred to the *sharī'ah* court and the donee brought two witnesses in order to prove his claim. The court ruled that the *hibah* was valid as an agreement had been concluded between the donor and donee. The court further stressed that the registration of ownership with the Land Office is an administrative procedure and not the condition that determines the validity of such *hibah*.

However there have also been cases involving claims to a *hibah* in which the claimant failed to provide sufficient proof or evidence to the *sharī'ah* court, as in the case of Soadah Bt Ramli.¹⁰⁶ (See appendix C 19) In this case only one witness was available as, according to the claimant, the second witness had passed away. The court, however, ruled that the *hibah* was invalid since the claimant had failed to convince the court with sufficient evidence to support his claim.

From both cases cited above, it seems that the *sharī'ah* court require at least two witnesses to be provided by the claimant in support of the claim. This is in accordance with Q. 2:282 which states

“And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them errs, the other can remind her...” while Q. 65:2 prescribes that

witnesses must be at least two in number¹⁰⁷ “..... And take as witness two just persons from among you and establish the testimony for Allah”

In the case of Sulaiman Bin Jais,¹⁰⁸ (See appendix C 20) which involved *hibah* during death sickness, the *sharī'ah* court ruled that the gift made by the deceased (Sulaiman) was valid, as its value made did not exceed one third of the total property. Although it was made verbally, the court still considered it as valid as there were more than two witnesses to prove the claim. The court's decision showed that the bequeathable limit of one-third, as in the case of *waṣiyyah*, is also applicable in the case of *hibah*. Therefore, according to the Shāfi'ī school of law, if the *hibah* exceeds the restricted limit it must be approved by the other heirs in order to be valid.

The cases discussed above show clearly that most of the claims related to *hibah* arise after the donor passes away. Similarly to a *waṣiyyah*, a *hibah* is often made verbally not written and as yet neither of the authorities i.e. the officer in charge and the *sharī'ah* court has made a serious effort to encourage a change of practice.

6.5.4 Cases of Jointly Acquired Property

The term 'jointly acquired property' refers to the property jointly acquired by husband and wife during converture.¹⁰⁹ Judge Briggs defined it as the property acquired during the subsistence of the marriage of a husband and wife out of their resources or by their joint efforts.¹¹⁰

Jointly acquired property is a concept derived from Malay custom and therefore is not to be found in the provisions of Islamic law.¹¹¹ The concept of jointly acquired property owes its existence to the Malay tradition whereby a wife contributes her effort and money in order to help her husband to maintain the welfare of the family. Consequently, it is acknowledged that the wife deserves to receive a half share of the jointly acquired property when the marriage ends due to the death of the husband or in the case of divorce.¹¹² Procedurally, the claims made in both situations are similar: the case is forwarded to the *sharī'ah* court order to determine the share of the spouse.¹¹³

In the State of Pahang, it seems that the *sharī'ah* court tends to ensure that the spouse receives a half share of the jointly acquired property regardless of the number of surviving children or whether or not the spouse contributed directly in obtaining the property. In the case of Kamaruddin bin Salahuddin¹¹⁴ (See appendix C 21) for instance, the widow claimed her share of the deceased's savings on the basis that they were jointly acquired property, as part of the savings had come from her salary. The court after confirming that the savings were jointly acquired property, ruled that the widow was entitled to a half share.

In the case of of Khalil bin Abdul Rauf¹¹⁵ (See appendix C 22) the *Sharī'ah* Court also awarded the spouse half of the savings as her share of the jointly acquired property although the claimant (the first wife) was a fulltime housewife. In the case of Zainab Bt

Ashaari,¹¹⁶ (See appendix C 23) the claimant (deceased's husband) was awarded by the court half of the couple's saving as his share from the jointly acquired property.

However, if these cases are compared with those settled in other Malay states, it seems that in these states no specific rate has been fixed as the share of the jointly acquired property due to the surviving spouse; each case was treated differently and the outcome depend on the decision of the presiding judges.

In the state of Kedah, in the case of *Wan Nab vs Jassin*,¹¹⁷ the spouse was given only one third as her share of the jointly acquired property. But in other cases such as *Habsah bt Mat vs Abdullah bin Jusoh*,¹¹⁸ the court ruled that the spouse should receive half of the property.

In Perak, in the case of *Wan Manhattan vs Haji Abdul Samat*¹¹⁹ it was ruled that the widow , as a full time housewife, was not entitled to any part of the property. In Trengganu and Negeri Sembilan, the jointly acquired property is divided equally between the spouses. This can be seen for instance in the case of *Lijah vs Commissioner of Land, Trengganu & Anor*,¹²⁰ *Mohammad vs commissioner of Land and Mines*¹²¹ and *Hasmah vs Abdul Jalil*.¹²²

In Selangor, such as in the case of *Haji Ramah vs Alpha*,¹²³ the surviving spouse was given one fourth of the jointly acquired property, but in *Ramah vs Laton*,¹²⁴ the spouse was awarded half of the property by the court.

Although the jointly acquired property was not discussed by the early Muslim jurists, the local *qādī* attempted to identify jointly acquired property as *Mal al-Sharikah* or company property, as in the case *Ramah vs Laton*.¹²⁵ The claim was based on the formulation given by the *mufī* of *Ḥadramaut* in his book known as the *Bughyah al-Mustarshidīn* which stated that

*“Property owned by a husband and wife may be combined to the extent that it is difficult to determine each individual’s share. In such situations, if a divorce or a death occurs, no one will be allowed to claim their shares, unless it has been predetermined or an agreement has been reached between them. If there is no such agreement and their shares are not clear-cut, the division of shares between them may or may not be equally distributed. If one party has physically contributed more, the division needs to be based on the relative amount of energy used.”*¹²⁶

It is clear that this statement, when examined carefully, referred not to jointly acquired property but to the *Māl al-Mushā’*. By definition *Māl al-Mushā’* is the individual properties of the husband and the wife that have combined over time, to the extent that it is difficult to separate them or to determine whose share is greater. *Māl al-Mushā’* is therefore different from jointly acquired property which is the property acquired by the couple during their marriage.

In order to determine whether jointly acquired property can be categorised as a *mal al-sharikah* (company property) or not, the jurists’ definition of *mal al-Sharikah* needs to be examined. According to the Shāfi‘ī school of law there is only one type of company

which is considered valid; that is the *sharikah al-'Inān*, which is a certain alliance of property between two people, for their use in trading, where profits are divided according to an agreement between them.¹²⁷

Jointly acquired property therefore cannot be identified as *sharikah al-'Inān* as this company requires the drawing up of an 'aqd or contract and capital contribution from each member of the company. In the case of jointly acquired property however, there is no 'aqd between husband and wife and it is not required that there should be a capital contribution by both parties. In other words, in the view of the Shāfi'i school, any company that exists without an 'aqd or agreement and joint capital is not valid.

According to the Ḥanafī school of law, the type of *sharikah* or company which does not need joint capital is known as *sharikah al-'Abdān* (also known as *sharikah al-'Amal*). This type of company requires an agreement between two or more people to accomplish certain tasks, the outcome of which will be divided between them according to conditions that they have agreed upon.¹²⁸ This company also requires an 'aqd between both parties; hence, it is inappropriate to identify jointly acquired property with *sharikah al-'Abdān*.

Nevertheless the Ḥanafī school recognises a type of company that does not require an 'aqd between the parties involved, known as *sharikah al-Milk*.¹²⁹ This type of company may exist in two forms. Firstly, the company may exist through the efforts of the parties involved: for instance, in cases where two people share the purchase of an item or are given the item, both would be considered as partners in the *sharikah al-Milk*. Secondly,

the company may function in the manner of *ijbār*, i.e. without any action being taken by the parties concerned to establish it. Such companies can occur in the case of succession. An example would be in the case of two heirs who inherit a vehicle, which would, thus, be co-owned by both heirs in the name of the *sharīkah al-Milk*.

From this understanding of *sharīkah al-Milk*, it can be concluded that jointly acquired property as it exists in Malay custom can be appropriately categorized as *sharīkah al-Milk* as defined by the Ḥanafī school of law. Even though this company is not considered valid by the Shāfi‘ī school, in the public interest, views from other schools of law may be taken into account, as stated in the Administration of Islamic Law Enactment, 1991 section 41(2), which reads as follows;¹³⁰

“Where the mufti is of the opinion that following the qaul mu‘tamad of the Shāfi‘ī school may lead to a situation, which is repugnant to the public interests, the Mufti may follow the qaul mu‘tamad of Hanafī, Maliki or Hanbali schools.”

Hence, the matter of jointly acquired property is no longer to be considered as mere customary law. Once the property is considered as a company asset, it can then be divided according to the distribution procedure of company assets; that is, according to the ratio of right or capital contributed by the parties concerned.

6.6 Conclusion

In general, the cases settled by the Small Estate Unit can be divided into two categories. The first consist of the cases settled directly by the officer in charge, i.e. cases involving interest, Malay Reservation Land, Group Settlement Areas, and nomination. The second category comprises those cases that need to be referred to the *sharī'ah* Court i.e. cases involving *farā'id*, *waṣiyyah*, *hibah* and jointly acquired property prior to the final decision (distribution order) being issued.

The study revealed that among the cases settled by the officer in charge, there were those whose outcome was not compatible with Islamic law, such as in cases involving interest. The imposition of interest upon the heirs was based on section 15 of SEDA 1955, which allows the payments to be made in instalments. However, the officer in charge seemed to be unaware of the subsection of the same provision, which offers other forms of settlement without imposing interest.

In the cases related to the Group Settlement Areas such as FELDA land, the study found that section 16 of the Land Act (Group Settlement Area), 1960 is in stark contradiction to the principles of the Islamic law of succession. According to section 16 only one heir is allowed to take over the land left by the deceased; hence the other heirs are denied their shares in the property. As a result, in most of these cases the heirs refused to follow the regulation and in order to resolve the dispute the officer in charge ordered the land to be sold and the heirs received their shares based on the rule of *farā'id*.

The regulation concerning Malay Reservation Land was also found to be against the rule of *farā'id*, as non-Malays have been prohibited from taking their share of the land even if they are Muslim. From the Islamic perspective, however, all Muslim heirs are entitled to their share regardless of their ethnicity and cultural background.

Another type of case whose settlement was found to be in clear contradiction to the principles of Islamic law concerned the practice of nomination. In most instances, cases of nomination involve movable property such as savings in financial institutions. The officer in charge has no power to compel the nominee to divide the savings among the heirs as part of the property left by the deceased as he is bound by the decision of the High Court, which has ruled that the savings rightfully belong to the nominee, although this judgement goes against the Islamic law of *waṣiyyah*. Thus it is entirely the nominee's prerogative whether to distribute the property to the other heirs. The officer in charge can only recommend that the parties involved settle the matter through amicable agreement.

In cases referred to the *sharī'ah* court, all decisions are based on the traditions of the Shāfi'ī school of law. Up to the present, no serious effort has been made by the authorities to reform or codify the Muslim succession law, whether concerning the rule of *farā'id* or of *waṣiyyah*. This is an obvious weakness of the present administrative system's management of the distribution of Muslim inheritance, especially as in respect

of non-Muslim cases a long-established law exists, codified in the Distribution Act, 1955 and the Will Act, 1959.

Since the rules of *farā'id* are still unreformed, the rule of *al-radd* is not applicable to the spouse although it has been applied in other Muslim countries such as Egypt, Sudan, Syria and Tunisia. Therefore in Pahang the residue of the estate is forwarded to the *hait al-Māl*.

An examination of cases of *waṣiyyah* and *hibah* revealed that most of the *waṣiyyah* or *hibah* were not written down. This has sometimes led to problems as witnesses cannot be found, having moved to another district or, in some cases having passed away. As yet, however, no regulation has been enacted to ensure that *waṣiyyah and hibah* are drawn up as written documents in order to remain valid in unforeseen circumstances. In Pahang, any *waṣiyyah* that exceeds the restricted limit (one third of the net estate) is regarded as invalid unless approved by the heirs and any allocation made for the benefit of the heirs in the name of the *waṣiyyah* is also considered invalid. In cases involving orphaned grandchildren, the decisions made by the *sharī'ah* court do not run in their favour. This traditional view of the law, however, has been modernized by reform in a few Muslim countries such as Egypt, Syria, Sudan and Tunisia. In these countries *waṣiyyah* made in favour of legitimate heirs within the one third property limit are acceptable regardless of the consent of the other heirs. In the case of orphaned grandchildren, the new regulation known as 'obligatory bequest' has been introduced.

The attitude of the *sharī'ah* court in not applying the new regulations introduced in other Muslim countries, is not easily explained, because the state enactment did authorise the court to apply rulings by other schools, including any new regulations, provided they could be held to be beneficial Muslim society. Therefore, it can be concluded that the Islamic authorities in Pahang have given a low priority to the development of the Islamic law of succession.

The codification of the Islamic law of succession is important, as it can be a legal guideline for those involved in the settlement process, especially in those cases not discussed by the early Muslim jurists such as the matter of jointly acquired property. At present, in settling cases of jointly acquired property, the decisions made by the *sharī'ah* court differ from one case to another. In the State of Pahang, however, the court tends to award the surviving spouse half of the property.

Notes to chapter Six

- ¹ Interview conducted with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his office in Temerloh. See also Interview conducted with Mr. Kam Ian Hai, Manager of the Amanah Raya Corporation for the State of Pahang on 19 December 1997 at his office in Kuantan.
- ² Interview with Mr. Kam Ian Hai, *ibid.*
- ³ Section 15 (4) of SEDA 1955.
- ⁴ *Ibid.*
- ⁵ Unpublished case of Pahang's Small Estate Unit: PTT 3/1/1753 (40/93).
- ⁶ All payment must made through the office in order to avoid any dispute.
- ⁷ Section 15 (4) of SEDA 1955 reads as follows:
"The collector, at his discretion, in order to prevent the excessive sub-section of land or the holding of small lots of land in common by numerous persons or in complicated fractional interest
(a) where the share of a beneficiary is small, may order the land or any part thereof allocated to any other beneficiary or a specific interest therein to be charged to the beneficiary for the amount of his share, together with interest at such rate as may be just, not exceeding five per centum per annum, in lieu of allocating to him a proprietary interest;
(b) where the value of any interest or share in the land or lot allocated to a beneficiary is less than the value of the share in the estate to which the beneficiary is entitled, may direct that the difference in value be added up to him in money by other beneficiaries in such proportion as is equitable and may order, if necessary, that any such payment and interest thereon at such rate as may be just, not exceeding five per centum per annum, be secured by a charge upon any shares of those other beneficiaries and
(bb) may order that the undivided distributive share of any beneficiary in any land or lot be allocated to another beneficiary and that such other beneficiary pay to the first-mentioned beneficiary such sum of money as may be determined by the collector to be the value of such undivided distributive share:
Provided that no order shall be made under this paragraph unless the collector has first informed the beneficiaries concerned of the terms of his proposed order under this paragraph and the second-mentioned beneficiary has deposited with the collector the sum of money proposed to be determined by the collector as the value of the distributive share of the first mentioned beneficiary;

- (c) may order the land or any part of it to be sold in such manner as may be prescribed;
or
- (d) may order the land or any part of it to be sold by tender among the beneficiaries in such manner as may be prescribed, but subject to a reserve price determined by the collector which shall not be less than the market value of the land, or part of the land, as the case may be, at the date of the tender”

⁸ Section 15 (6) of SEDA 1955.

⁹ See section 2 of SEDA 1955.

¹⁰ Unpublished case of Pahang’s Small Estate Unit: PTM 9/23/181 (94).

¹¹ Al-Ṭabari noted that the type of usury banned by Jewish law is similar to that usury practice by the Arabs before the coming of Islam. This similarity between the prohibition of usury among the Jews and Muslims could be understood as arising because the order of religions is one and the same for all time. The various orders of divine legislation confirm one another, as each of them originates from God. See Al-Ṭabari, Muḥammad ibn Jarīr, *Jāmi’ al-Bayān ‘An Ta’wīl Ay al-Qur’ān*, Cairo, Dār al-Ma’arif, 16 volumes, n.d.p. 391. While Ibn Kathīr, in his interpretation of Q. 30:39 says that the Jews were at that time involved in usury banned by God. That is they continued to practise it through various kinds of tricks and deceptions. See Ibn Kathīr, Ismā’īl ibn Kathīr al-Qurashī, *Tafsīr al-Qur’ān al-‘Aẓīm*, 7 volumes, Cairo, Dār al-Ihyā’ al-Kutub al-‘Arabī, 1952, p. 598.

¹² Q. 30:39 reads as follows. “That which you give in usury for increase through the property of other people, will have no increase with Allah, but that which you give for charity, seeking the countenance of Allah.”

¹³ Q. 4:161 reads as follows: “ For that they took usury, though they were forbidden, and that they devoured men’s wealth wrongfully, we have prepared for those among them who reject faith a grievous chastisement”

¹⁴ See footnote 12

¹⁵ Q. 3:130 read as follows: “ O ye who believe! Devour not usury, doubled and multiplied but fear Allah that ye may really prosper.

¹⁶ Q. 2:275 read as follows: “Those who devour usury will not stand except as stands one whom the satans by his touch hath driven to madness. This because they said that trade is like usury. But Allah hath permitted trade and forbidden usury. Those who receiving admonition from their Lord desist shall be pardoned for the past; their case is for Allah to judge. But those who repeat the offence are companions of the fire. They will abide therein for ever”.

Q. 2:276 reads as follows: "Allah will deprive usury of all blessing but will give increase for deeds of charity for he loveth not any ungrateful sinner".

- ¹⁷ Q. 2: 278 read as follows: "O ye who believe! Fear Allah and give up what remains of your demand for usury, if ye are indeed believers."
Q. 2:279 read as follows: If ye do it not take notice of war from Allah and his messenger but if ye repent ye shall have your capital sums deal not unjustly and ye shall not be dealt with unjustly.
- ¹⁸ FELDA, *Annual Report*, Kuala Lumpur, 1990, p.8.
- ¹⁹ Sulong Mohamad, *Petempatan FELDA: Perspektif Perancangan Bandar dan Desa*, (FELDA Settlement Area, Perspective in Town and rural Development) Kuala Lumpur, Dewan Bahasa dan Pustaka, 1985, p. 33.
- ²⁰ Interview with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at the Small Estate Unit in Temerloh.
- ²¹ Unpublished case of Pahang's Small Estate Unit: HPI.K 349 /23/174 (93).
- ²² Q.4: 12 "...in that which you left their share (Your wife) is a fourth if you leave no children but if you leave a child, they get an eighth of that which you leave...."
- ²³ Unpublished case of Pahang's Small Estate Unit: PTB 349/17/380 (95).
- ²⁴ Interview with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh.
- ²⁵ Article 160 (2) of the Malaysian Constitution.
- ²⁶ A. Nazri Abdullah, "Fokus" (Focus), in *Dewan Masyarakat*, Vol. 20, no. 11, November, 1982, p. 14.
- ²⁷ Abdul Rahman Awang Kechik "Tanah Rizab Melayu Hasrat Inggeris ketika merancang" (The Intention of the British in Setting Up the Malay Reservation) in *Dewan Masyarakat*, vol. XVII, no. 7, 15 Julai 1979, p. 44 and William Roff, *Nasionalisma Melayu*, Kuala Lumpur, Penerbitan universiti Malaya, 1975, p. 157.
- ²⁸ Nik Abdul Rashid, *Ke Arah Meninggikan Tanah Rizab melayu*, (Toward Developing the Malay Reservation Land) paper presented in Seminar Ke Arah Nilai Tanah Rizab Melayu, Kuala Lumpur, 1979, p. 3.
- ²⁹ Paul Kratoska, "End That We Cannot Forsee", *Journal of Southeast Asian Studies*, Vol. 14, 1983, p. 155.

- ³⁰ Sections 7 and 8 of the Malay Reservation Enactment 1933.
- ³¹ Unpublished Case of Pahang's Small Estate Unit PTT 349/106/517 (90).
- ³² Unpublished case of Pahang's Small Estate Unit PTB:349/59/311 (97).
- ³³ al-Bukhārī, Muḥammad ibn Ismā'il, *al-Jāmi' al-Sahīḥ*, Beirut, Dar Ihyā' al-Turāth al-'Arabī, vol. 4, p. 243. See also Al-Shaukānī, *Nail al-Autār*, Matba'ah al-'Uthmāniyyah al-Misriyyah, Egypt, n.d., vol. 6, p. 73.
- ³⁴ Ibn Mājah, Muḥammad ibn Yazīd al-Qazwīnī, *Sunan Ibn Mājah*, Egypt, Dar Ihyā' al-Kutub al-'Arabī, 1953, Vol. 2, p 911.
- ³⁵ Abū Dāūd, Sulaimān ibn al-Ash'ath, *Sunan Abū Dāūd*, Tunis, Dar al-Shanūn, 1992, vol. 3, p. 290-291
- ³⁶ al-Shāfi'ī, Muḥammad ibn Idrīs, *al-Umm*, Egypt, Mustafā al-Bābī al-Ḥalabī, n.d. vol. 3 page 270.
- ³⁷ Ibn Qudāmah, 'Abd Allāh ibn Ahmad, *Al-Mughnī*, Egypt, Matba'ah al-Qāhirah, 1968, vol. 5, p. 429.
- ³⁸ Al-Māwardī, Abū Hassan 'Alī Bin Muhammad, *Kitāb al-Aḥkām al-Sultāniyyah*, Egypt, Matba'ah al-Imām, n.d, p. 185. See also Al-Ramlī, Muhammad ibn Abī al-Abbās, *Nihāyat al-Muhtāj*, Egypt, Mustafā al-Bābī al-Halabī, 1938, p. 338.
- ³⁹ Interview with Mrs Rosnaha Bt Osman, supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at the Small Estate Unit in Temerloh.
- ⁴⁰ Unpublished case of Pahang's Small Estate Unit, PTM 349/100/97).
- ⁴¹ (1965), 2 M.L.J 1.
- ⁴² (1974) M.L.J. 4.
- ⁴³ Unpublished case of Pahang's Small Estate Unit HPK.J 349/209/697 (96).
- ⁴⁴ Unpublished case of Pahang's Small Estate Unit HPK J 349/211/1993.
- ⁴⁵ Unpublished case of Pahang's Small Estate Unit PTB 349/99/1992.
- ⁴⁶ Interview with Mrs Rosnaha supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at Small Estate Unit in Temerloh.

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- ⁴⁷ al-Sharbīnī, Muḥammad al-Khatīb, *Mughnī al-Muhtāj, Ilā Ma'rifah Ma'anī Alfāz al-Minhāj*, Beirut, Dār al-Fikr, vol 3, pp. 43-46.
- ⁴⁸ (1974) 1, MLJ, X.
- ⁴⁹ (1980) JH, vol.1 (1) pp. 6-7.
- ⁵⁰ Ibid.
- ⁵¹ Unpublished case of Pahang's Small Estate Unit PTM 349/167/1997.
- ⁵² Unpublished case of Pahang's Small Estate Unit HPK. J. 349/201/66 (93).
- ⁵³ Bewly, Aisha, *A Glossary of Islamic Law*, London, Ta-ha Publisher, 1998, p. 153.
See also Keller, Noah Ha Mim, *The Reliance of the Traveler; A Classic Manual of Islamic Sacred Law*, Modern Printing Press, Dubai, 1991, p. 497.
- ⁵⁴ al-Bukhārī, *al-Jāmi' al-Sahīh*, vol. 2, p. 288.
- ⁵⁵ Q. 8: 75 "And blood relations among each other have closer ties in the decree of Allah (regarding inheritance)"
- ⁵⁶ Al-Zuhailī, Wahbah, *al-Fiqh al-Islāmī Wa Adillatuh*, Beirut, Dār al-Fikrī, vol 8, pp. 358-360
- ⁵⁷ Section 30 of Egyptian Law of Inheritance, 1943.
See also Section 288 of the Syrian Law of Personal Status, 1953.
See also Article 143A of the Tunisian Code of Personal Status, 1958.
- ⁵⁸ Interview with Professor Tan Sri Ahmad Ibrahim, Dean of the Law Faculty, of the International Islamic University on 8 January 1998 at his office in Kuala Lumpur.
- ⁵⁹ Interview with Mr. Muhammad bin Abdullah, Head Director of the Small Estate Unit on 10 December 1997 at his office in Kuala Lumpur.
- ⁶⁰ Interview with Mr. Abdul Rahman Yunus, *Sharī'ah* High Court Judge of Pahang State on 12 January 1998 at his office in Kuantan.
- ⁶¹ Wehr, Hans, edited by Cowan, J. Milton, *A Dictionary of Modern Written Arabic*, Librairie Du Liban, Beirut, p. 1075.
- ⁶² Abdul Rahman Doi, *Shariah, The Islamic law*, London, 1984, p.239.

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- ⁶³ Al-Zuhailī, Wahbah, *Al-Fiqh al-Islāmī*, p. 7
- ⁶⁴ Al-Bukhārī, *al-Jāmi' al-Sahīh*, p. 288.
- ⁶⁵ al-Nisābūrī, Abi Hussin, Muslim Bin Hajjāj al-Qushairī, *Sahīh al-Muslim*, Dār Ihyā' al-Kutub al-'Arabī, 1955, Vol. 3, pp. 1250-1251. See also Ibn Mājah, Muhammad bin Yazīd al-Qazwīnī, *Sunan Ibn Mājah*, Egypt, Dar Ihyā' al-Kutub al-'Arabī, 1953, Vol. 2, p. 904
- ⁶⁶ Ibn Mājah, *Ibid*, p.901.
- ⁶⁷ al-Ṭabarī, *Tafsīr*, vol. 9, pp.390- 391.
- ⁶⁸ al-Sharbīnī, Muḥamad al-Khatīb, *Mughnī al-Muhtāj ilā Ma'rifah Ma'ānī Alfāz al-Minhāj*, Beirut, Dār al-Fikr, vol 3, p. 39.
- ⁶⁹ *Ibid*, p. 40.
- ⁷⁰ Al-Zuhailī, Wahbah, *Al-Fiqh.*, p. 15.
- ⁷¹ al-Sharbīnī, Muḥamad al-Khatīb, *Mughnī* , vol. p. 50
- ⁷² *Ibid*.
- ⁷³ *Ibid*.
- ⁷⁴ *Ibid*.
- ⁷⁵ Awang, Mohd Ridzuan, *Undang-Undang dan Pentadbiran Pusaka Orang Islam di Malaysia*, (Law and Administration of Muslim Inheritance in Malaysia) Kuala Lumpur, al-Rahmaniah, 1988, pp. 12-17
- ⁷⁶ *Ibid*.
- ⁷⁷ Unpublished case of Pahang's Small Estate Unit PTB 349/176/92.
- ⁷⁸ Unpublished case of Pahang's Small Estate Unit PTK. 349/578/97.
- ⁷⁹ See footnote 65 above.
- ⁸⁰ al-Sayyid Sābiq, *Fiqh al-Sunnah*, Egypt, Dar al-Kuttāb al-'Arabī 1985. vol. 3, p.600.

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- ⁸¹ al-Shaukāni, *Nail al-Autār*, Vol 6, p. 46. See also al-Mubārak, Faiṣal Bin ‘Abd al-‘Azīz, *Bustān al-Ahbār Mukhtaṣar Nail al-Autār*, Maktabah al-Salāfiyyah, Cairo, 1354 H., vol. 2, P. 136.
- ⁸² See article 37 of Egyptian Law of Bequest, 1946
- ⁸³ See Circular No. 53 of 1945 as long as the principle of bequeathable third is not violated.
- ⁸⁴ Article 1108 of the Iraqi law of Personal Status, 1959. The Iraqi law relating to bequests is quite significant as a person cannot bequeath more than one third of his estate without the consent of the State and the bequest can only be proved by means of a written document signed by the testator and oral evidence is only allowed in special cases when there is a material impediment to the production of such a document.
- ⁸⁵ Article 238/2 of the Syrian Law of Personal Status.
- ⁸⁶ Article 179 of Tunisian Code of Personal Status 1956.
- ⁸⁷ Article 176 of the Moroccan Code of Personal Status 1958.
- ⁸⁸ Interview with Mrs Rosnaha supporting staff at the Small Estate Unit of the Middle Zone on 20 January 1998 at the Small Estate Unit in Temerloh.
- ⁸⁹ Unpublished case of Pahang’s Small Estate Unit PTM 349/457/96.
- ⁹⁰ Unpublished case of Pahang’s Small Estate Unit PTT 349/234/96.
- ⁹¹ al-Sharbīnī, Muḥamad al-Khatīb, *Mughnī*, Vol.3, p. 39.
- ⁹² Unpublised case of Pahang’s Small Estate Unit HPK.J 349/26/95.
- ⁹³ Syrian Law of Personal Status, 1953, article 257, Moroccan Code of Personal Status 1958, articles 266-69.
- ⁹⁴ Egyptian law of Bequest, 1946 articles 76-79.
- ⁹⁵ Mahmud, Tahir, *Family Law Reform in the Muslim World*, Bombay, N.M. Tripathi PVT. LTD., 1972, p. 289.
- ⁹⁶ Section 4 of the Pakistan Muslim Family Laws Ordinance, 1961.
- ⁹⁷ Abdul Aziz Zaid, *The Law of Bequest*, London, 1986, p. 165.

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- ⁹⁸ Nasir, Jamal J., *The Islamic law of Personal Status*, London, Graham & Trotman, 1990, p.281.
- ⁹⁹ Fyzee, Asaf A. A., *Outlines of Muhammadan Law*, Oxford, Oxford University Printing, 1974, p.218.
- ¹⁰⁰ al-Sayyid Sābiq, *Fiqh al-Sunnah* vol. 3, pp. 538-540.
- ¹⁰¹ Ibid.
- ¹⁰² Ibid p. 541.
- ¹⁰³ Ibid.
- ¹⁰⁴ Ibid. pp.540-541.
- ¹⁰⁵ Unpublished case of Pahang's Small Estate Unit PTT 349/76/94.
- ¹⁰⁶ Unpublished case of Pahang's Small Estate Unit PTM 349/51/1992.
- ¹⁰⁷ However in the case of *zinā* (adultery) the number of witnesses should be four as prescribed by the Q 4:15 *And those of your women who commit illegal sexual intercourse, take the evidence of four witnesses from amongst you against them and if they testify, confine them (i.e. women) to houses until death comes to them or Allah ordains for them some (other) way*.
- ¹⁰⁸ Unpublished case of Pahang's Small Estate Unit PTB 349/60/91.
- ¹⁰⁹ . Hooker, M.B, *Personal Law of Malaysia*, Oxford University Press, 1976, p. 77.
- ¹¹⁰ (1950) MLJ 63.
- ¹¹¹ Ahmad Ibrahim, *The Distribution of Estates according to Shāfi'ī Law*, Singapore, Malayan Law journal (Pte), 1976, p.7.
See also Ahmad Ibrahim , *Islamic Law in Malaya*, Singapore, Malayan Sociological Research Institute, 1965, p. 224.
- ¹¹² Abdullah Sidik, *Pengantar Undang-Undang Adat Di Malaysia*, (Introduction to Customary Law in Malaysia) Kuala Lumpur, Universiti Malaya, 1975, p. 116.
- ¹¹³ Before the amendment of article 121 of the Federal Constitution in 1988, the cases of jointly acquired property were tried by the Civil Court.
- ¹¹⁴ Unpublished case of Pahang's Small Estate Unit HPK. J 349/549/93.

¹¹⁵ Unpublished case of Pahang's Small Estate Unit PTT 349/29/95.

¹¹⁶ Unpublished case of Pahang's Small Estate Unit PTR. 349/59/90.

¹¹⁷ (1925) Vol XV, JMBRAS 20.

¹¹⁸ (1950) MLJ 60.

¹¹⁹ (1937) Vol.15, part 1, JMBRAS 25.

¹²⁰ (1963) MLJ 76.

¹²¹ (1963) MLJ 227.

¹²² (1958) MLJ 10.

¹²³ (1924) 4 FMSLR 179.

¹²⁴ (1926) 4 FMSLR 116.

¹²⁵ Ibid.

¹²⁶ 'Abdul Rahmān Bin Muhammad, *Bughyat al-Murtarsyidīn*, Egypt, Mustafā al-Bābī al-Halabī Wa Aulāduh, 1936, p. 195.

¹²⁷ al-Shīrazī, Abū Ishāq, *al-Muhazzab*, Damascus, Dār al-Qalam, 1996, Vol. 3, p. 333.

¹²⁸ al-Kassānī, 'Alāuddin Abī Bakr Bin Mas'ud, *Badā'i al-Sanā'i*, Dār al-Fikr, n.d., vol. 7, p. 353.

¹²⁹ Ibid.

¹³⁰ See section 41 (2) of the Administration of Islamic Law Enactment, 1991.

CHAPTER SEVEN

Conclusion

The research can be divided into two related areas. Firstly, it concerns the theoretical aspects of the law of intestate inheritance in Islam known as *farā'īd*. The aim of this theoretical discussion apart from discussing the working of *farā'īd* and its principles was also to discover whether *farā'īd* is the only method available to Muslims in disposing of their inheritance or whether there are any other options which might be applied in certain circumstances.

Secondly, the study considers the practical aspects of how *farā'īd* is implemented in the State of Pahang. The analysis has been mainly based on an empirical survey of the manner in which the present administrative system is managing the distribution of Muslim inheritance. Unfortunately, no empirical studies exist of the practical implementation of *farā'īd* in Pahang. This research was therefore undertaken in order to examine the impact of the present administration of Muslim inheritance on two matters: (i) the development of *farā'īd* within the state and (ii) the application of *farā'īd* in the settlement process compared to mutual agreement. To this end, an in-depth exploration of the major factors contributing to this situation has been carried out.

Farā'īd is the law concerning the distribution of the intestate inheritance of Muslim deceased. It is a most important part of Islamic law, to which Muslim jurists from the

early days of Islam have given special attention. The Prophet himself encouraged this attention, as he was reported to have said that *farā'iḍ* constitutes half of useful knowledge and it would be the first knowledge to be taken away from his *ummah* or community.¹

The importance of *farā'iḍ* is also due to its close ties with the Quran, whose provisions regarding it are more detailed than in respect of any other branch of Islamic law. Therefore most Muslim scholars and jurists have held the opinion that *ijtihād* or personal analogy cannot be recognised as a source of the development of *farā'iḍ*, along with the Quran and Sunnah, except if it has been regarded as an *ijmā'*.²

Farā'iḍ therefore, was the part of Islamic law least affected by reform in the twentieth century that took place such as in Sudan, Egypt, Syria, Tunisia and Pakistan.³ For instance, only the principles of *al-Radd* have been modified to allow a spouse to take the residue of the inheritance along with other Quranic sharers. Other modifications have been mostly associated with the rules of *waṣiyyah*: for example, in order to settle the issue of the shares of orphan grandchildren, which are ignored in the rules of *farā'iḍ*, reform has been made by introducing the concept of *waṣiyyah al-wājibah* or obligatory bequest. The reform also allows *waṣiyyah* to be applied to the heirs as long as it is within the limitation of one-third of the net estate.⁴ Its aim was to overcome certain problems faced by present-day Muslim society, which were not considered by the early traditional jurists. As far as this study has shown, however, this reform is not applied in Pahang as the state still follows the traditional precepts of the Shāfi'ī school of law.

In elaborating the working of *farā'iḍ* and its general principle, the work of Abū al-Shujā' al-Isfihānī (Shāfi'ī jurist) has been chosen as the basis for the discussion. This is because in the state of Pahang, this particular text is the most common text used in teaching Islamic law including *farā'iḍ* for the beginners. However, the views of other Sunni Schools (Ḥanafī, Mālikī, and Ḥanbalī) as well as the Shī'ī school (Imāmīyyah or Ithnā 'Ash'arī school) have also been included. The review found that there are major differences between the working of *farā'iḍ* under the Sunni and Shī'ī school although both of the schools claimed the Quran and Sunnah as well as *Ijmā'* (jurists consensus) as the basis for the working of *farā'iḍ*. These divergences are mainly due to their differences in interpreting and understanding the Quran as well as their perception of the authority of such *ḥadīth*.

Since *farā'iḍ* is a rule revealed in the Quran and since it literally means obligations, many have assumed that it is an obligatory law, which Muslims have no choice but to obey. The study, however, concluded that it is not an obligation for Muslims to dispose of their inheritance based on the fixed fractional share prescribed in the Quran, as the rules of *farā'iḍ* also acknowledge distribution or settlement based on the concept of mutual agreement, as can be seen in the principle of *al-Takhārij*. According to this principle, the heirs involved are allowed to renounce their share voluntarily and in return are reimbursed with another share by the other heirs in a form previously agreed among them. However, the reimbursement is not obligatory since it depends on the agreement reached by the heirs involved.⁵

The study has revealed that in the early history of Pahang, the law of inheritance practised by the Malays was based on customary law. In Malay society generally

there are two types of customary laws, the *Adat Perpateh* and the *Adat Temenggung*. The former is based on the matriarchal principle and the latter on the patriarchal principle.⁶

In regard to the law of inheritance in the *Adat Perpateh*, its principles are totally incompatible with those of the Islamic law of inheritance because of its preference for the female over the male. Regarding the *Adat Temenggung* the evidence suggests that titles and dignities always passed through the male line while succession to the land followed the female line. In the course of time after the spread of Islam, *farā'īd* was gradually adopted. However, in respect of the *Adat Temenggung* it has also been found that among the villagers, the inheritance is often distributed by mutual agreement whereby the male and female heirs get an equal share. This practice was known as the *Adat kampong*, and is still prevalent as an alternative to *farā'īd*.⁷

That the practice of distributing the deceased's estate by mutual agreement has continued to the present day is due to two main reasons. Firstly, the concept of distribution based on mutual agreement does not contradict the principle of Islamic law generally and of *farā'īd* in particular and secondly, the present administrative system approves it as an alternative method to *farā'īd*.⁸

The study suggests that the present administrative system of managing the distribution of inheritance is derived from the system established by the British during the colonial period. The British, after introducing laws concerning the administration of land known as the "torrent system" found that it was also necessary to introduce laws concerning the administration of inheritance, as in Malaysia land and inheritance can

hardly be separated. Indeed, most of the property owned by Malays at that time included or was related to land. Therefore, apart from settling cases of inheritance it was also the aim of the administration to help the Land Office in upgrading its information concerning the transfer of land ownership. As a result SEDA 1955 and PAA 1959 were introduced.⁹

Both acts were administrative in character, being chiefly concerned with providing guidelines for the officer in charge on how to conduct the settlement process. They did not however, contain provisions concerning *farā'iḍ*. Thus, regarding the distribution law, the British instead of enforcing *farā'iḍ*, introduced the Distribution Ordinance 1958 (later renamed the Distribution Act 1958) although it was not applicable to the Muslims since firstly, *farā'iḍ* was already the recognised law for the Muslims and secondly, the Distribution Ordinance was totally incompatible with the principles of Islamic law and *farā'iḍ*. Therefore, the Ordinance is only relevant to non-Muslim cases.¹⁰ Furthermore, under the British administration, although *farā'iḍ* was acknowledged as the distribution law for Muslims it was neglected and remained uncodified.

The introduction of SEDA 1955 and PAA 1959, on the other hand, seems to have had significant impact on the jurisdiction of the *sharī'ah* court. Under these acts the *sharī'ah* court no longer had legal jurisdiction in the matter of Muslim inheritance and its role was restricted to certifying the shares of the beneficiaries in accordance with *farā'iḍ* if requested to do so by the interested parties.¹¹

After the country gained its independence¹² the situation remained unchanged as the existing acts were reinforced by the federal government. Thus, the status of the *sharī'ah* court and its jurisdiction in the matter of Muslim inheritance did not alter, which later created resentment among many Muslims. This led the government to form a committee in 1988 to look into the situation and suggest measures to be taken to raise the status of the *sharī'ah* court and to upgrade its jurisdiction.¹³ Therefore, in 1988, a significant amendment was made to the Malaysian Constitution by inserting a new clause to article 121. The aim of this amendment was to prevent the High Court from overruling or interfering with any matter falling under the jurisdiction of the *sharī'ah* court.¹⁴

However, the study found that the amendment did not appreciably increase the jurisdiction of the *sharī'ah* court, although matters related to Islamic law such as *waṣiyyah*, *hibah*, and jointly acquired property could no longer be referred to the High Court. This is because the power to grant the probate and letter of administration remained the prerogative of the High Court and until now no amendment has been made to SEDA 1955 or PAA 1959 in order to transfer this power to the *sharī'ah* court.¹⁵

As was the case before independence, under the present administration inheritance is divided into three categories: normal, small and simple estate. A normal estate consists of movable and immovable property valued at more than RM 600,000.00. Its settlement is the concern of the High Court.¹⁶

Small estate refers to the movable and immovable property whose value is less than RM 600,000.00; settlement is the concern of the Small Estate Unit. Finally, a simple estate comprises only movable property with a value of less than RM 600,000.00. Its settlement is the responsibility of the Amanah Raya Corporation. The study, however, concentrated on only two agencies, the Small Estate Unit and the Amanah Raya Corporation, as the High Court is not an administrative agency. The settlement of normal estate, is handled by those who have been appointed by the High Court as the holder of the letter of administration.¹⁷

Nevertheless, regarding the settlement process administered by these two agencies the study found that the procedures are more or less the same, i.e. receiving the application from the claimants, checking with the Registry Department of the High Court whether there has been a previous claim made on the same property or not, investigating the accuracy of the information submitted by the claimant concerning the heirs and the deceased's property, valuating the deceased's property, conducting the hearing process, referring to the *sharī'ah* court if the case needs to be settled in accordance with *farā'id* or if it involves *waṣiyyah*, *hibah* or jointly acquired property, waiting the result from the *sharī'ah* court, initiating an appeal process to the High Court if necessary, issuing the Distribution Order and finally submitting the result to the District Land Office (for cases that involve immovable property).¹⁸

The only clear difference that can be observed between these two agencies is the time taken to settle the cases and the number of cases handled by each agency. The cases dealt with by the Small Estate Unit usually take longer than those handled by the Amanah Raya Corporation because the Small Estate Unit deals with two types of

property, i.e. immovable and movable property. Therefore the burden of cases handled by the Small Estate Unit is greater than that of the Amanah Raya Corporation, which only deals with movable property.

The study also revealed that cases of Muslim inheritance usually involve both types of property whose value is less than RM 600,000.00. Therefore Muslim cases usually fall into the category of small estates. For this reason the number of cases handled by the Small Estate Unit is greater than that handled by the Amanah Raya Corporation.

The study also found that the present authoritative agencies i.e. the Small Estate Unit and the Amanah Raya Corporation are not sensitive toward the development of the Islamic law of inheritance, especially *farā'iḍ*, although it is closely related with their task. Both agencies perceived that their duties are merely to settle the cases brought to them; they did not acknowledge any responsibility to develop the Islamic law of inheritance. Both agencies felt that the matter is purely the responsibility of the Islamic functionaries such as the *sharī'ah* court or State Religious Council since they are the experts in the matter. The *sharī'ah* court on the other hand pointed out that it should not be blamed, as it has no legislative power to codify the law. Therefore up to the present day no attempt have been made to codify and develop the Islamic law of inheritance, especially *farā'iḍ*, in order to provide a practical solution to the problems faced by contemporary Malay society such as has been carried out in other Muslim countries including Egypt, Sudan, Syria and Pakistan. Thus, it can be said that the position of *farā'iḍ* and its development since the country gained its independence until the present day remains as it was during the British colonial period.

Whatever the reasons proffered both parties, it seems that the present situation bears witness to lack of cooperation between the agencies and the Islamic functionaries, which has led to *farā'iḍ* being left undeveloped. It would be reasonable to expect both parties to make a joint effort to solve the matter, since if *farā'iḍ* was codified these agencies would become less dependent on the *sharī'ah* court as the officers in charge would have a specific legal reference which would enable them to deal with cases of *farā'iḍ* and other related matters such as *waṣiyyah*, *hibah* and jointly acquired property. The effect would be to make the settlement process of Muslim inheritance much more efficient than before. The absence of any codified legal reference with respect to Muslim cases is clearly unfair, because the government did provide such a reference for non-Muslims namely the Distribution Act 1958, according to which the officers can settle the distribution of non-Muslim estates without referring it to the High Court and thus expedite the settlement.

The government, on the other hand, may feel that there is no urgent need to codify *farā'iḍ* as there is no pressure either from these agencies or from the Islamic functionaries, although the government are certainly aware that many complaints have been raised by local Muslim scholars concerning the ineffectiveness of the present administrative system in handling Muslims' cases.¹⁹ At the same time the government may purposely be neglecting this area as they may regard any reform as dangerous to the ruling party and as giving an advantages to opposition parties such as Islamic Party of Malaysia (PAS), which has always urged the government to fully implement Islamic law in the country. The government may fear that if they codify *farā'iḍ*, they

will be urged to codify more Islamic laws in the near future and that this process would be bound to strengthen the more radically Islamic forces of opposition.

The most recent annual data (from 1990-2000) gathered from both agencies, i.e the Small Estate Unit and the Amanah Raya Corporation revealed a significant outcome: fewer claimants used *farā'iḍ* in the state of Pahang compared to those who distributed their inheritance by mutual agreement. Therefore, in order to investigate the reasons for this phenomenon, a survey was conducted using an open-ended questionnaire.

The survey found that of the total number of 265 respondents who participated in answering the questionnaire, only seventy (26.4 per cent.) used *farā'iḍ*, and of those who used *farā'iḍ* only a small percentage (8.6 per cent) or six respondents indicated that they consciously and willingly used *farā'iḍ* (in order to uphold the religious law). Most of the respondents (sixty four) or 91.4 per cent who used *farā'iḍ* indicated that they had no option but to settle their case by *farā'iḍ*. Several reasons were given, but most of them (forty-seven respondents) or 67.1 per cent) stated that their decision was due to the disagreements arising among the heirs: according to present practice, if the heirs fail to reach agreement *farā'iḍ* will be applied to settle their case, which will be forwarded to the *sharī'ah* court.²⁰ However, the study found that there is no specific section either in SEDA 1959 or PCTA 1995 which provides that whenever heirs fail to reach agreement the case must be settled on the basis of *farā'iḍ*. This shows that the officers in charge tend to save time by deciding not to concentrate on a complicated case and to settle it by reference to *farā'iḍ*. Hence this type of case will be referred to the *sharī'ah* court straight away.

Of those who chose to settle their case by mutual agreement instead of *farā'id*, the survey found that the highest percentage (33.3 per cent) or sixty five respondents stated that this was because they wanted a faster settlement process and because of the advice given by the officer, who preferred that they should settle their case by mutual agreement. Thus it is surprising to discover that the claimants who have no great knowledge of the matter will allow themselves to be guided by the officer and decline to settle by *farā'id*.

Therefore, the study concluded that the present administration in many ways, directly or indirectly, did influence the claimants not to use *farā'id* in the settlement process by suggesting to them that if they chose to settle their case on the basis of *farā'id* they would have to wait for one to two months longer than in the case of mutual agreement, since their case would have to be referred to the *sharī'ah* court.

There seem to be two main reasons why officers encourage the claimants to settle their cases by on mutual agreement. Firstly these officers may feel that they have the right and duty to make sure that each case should be settled as quickly as possible as there is always a backlog of cases, which need to be brought into the hearing process and to be settled.²¹

From the researcher's personal observation during the fieldwork survey, the second reason is that the officers in charge are not competent to handle cases of *farā'id* because they lack a firm background in Islamic law in general and *farā'id* in particular. In addition they have not been provided with any form of codified legal reference, since *farā'id* has not been codified; and in any case they have not been

trained to deal with the matter. Hence it is impossible for them to handle *farā'id* cases and other matters associated with Islamic law as mentioned earlier. They therefore feel that encouraging the claimants to settle their case by mutual agreement will somehow cover up their weaknesses. This indicates that the present administrative system has in one respect failed to provide Muslim claimants with officers who are capable of dealing with cases related to matters of Islamic law.

Because of the incapability of the officers in charge regarding Islamic law, under the present administration it has become a common procedure, as mentioned previously, that in all *farā'id* cases and other related cases such as those involving *waṣiyyah*, *hibah* and jointly acquired property, reference will be made to the *sharī'ah* court.

As for the *sharī'ah* court itself, it seems that it did not give the priority to helping these officers with their problems for the reason that it also has its own responsibilities which understandably take precedence. Nevertheless the researcher's personal observation suggests that the *sharī'ah* court is also frustrated by the present administrative system, which has removed its jurisdiction in the matter of Muslim inheritance as well as restricting its role through the enforcement of the Federal Acts SEDA, 1955 and PAA, 1959, even though, according to the Federal Constitution as stated in State List II, the matter of Muslim inheritance whether testate or intestate is under the jurisdiction of the *sharī'ah* court. It is therefore, the perception of many of the *sharī'ah* court's officers, especially the judges, that the present administration has indirectly downgraded the status of the court. This situation has created an uneasy relationship between the agencies and the *sharī'ah* court which has in turn effected the settlement process.

The study found that the time taken by the *sharī'ah* court for the simple calculation of *farā'iḍ* case is more than two months. Whereas in complicated cases such as the case of death ensuing upon death, it has sometimes taken the court as long as five to six months to give its feedback. In other words, the time necessary to obtain the *farā'iḍ* certificate or other certification from the *sharī'ah* court, is usually longer than the expected period (one month).²²

Since the present administrative system has taken over the responsibilities of the *sharī'ah* court in this area, both of the settlement agencies are expected to be capable of handling all the cases of *farā'iḍ* as well as other related cases such as those involving *waṣiyyah*, *hibah* and jointly acquired property; this is their area of responsibility, according to the present administrative system. The agencies are not supposed to be dependent on the *sharī'ah* courts unless it is strictly necessary.

As a consequence the officers in charge, especially those of the Small Estate Unit, find that their workload is already too much to cope with due to their large administrative zone and insufficient staff. Thus, to ask them to take charge of *farā'iḍ* and related cases can only increase their existing problem. This is clearly an unfair decision unless the government makes an effort to change the situation by increasing the number of staff and dividing their administrative zone into smaller zones as well as providing them with legal reference by codifying *farā'iḍ*.

The problem will remain unsolved however, if the officers of both agencies are not trained in *farā'iḍ*. Thus there must be an initiative from the government to give these

officers the opportunity to broaden their Islamic legal knowledge, in the area of *farā'iḍ* in particular. This means that a proper training programme must be provided by the government to fully train the officer or alternatively to employ staff with an Islamic background who are capable of handling *farā'iḍ* cases.

Although the survey data showed that those who settle their cases on the basis of *farā'iḍ* are fewer than those who settle by mutual agreement, as regards the perception of the respondents toward *farā'iḍ* the study found that generally they are aware of *farā'iḍ* as the law provided by Islam to settle the distribution of their inheritance. The fact that most of them settled by mutual agreement (that is the practice of Adat Kampong, does not mean that they have a negative perception concerning *farā'iḍ* their decision was based on the weaknesses of the present administrative system. However, out of 265 respondents there are seven respondents who stated that in their view *farā'iḍ* is no longer suitable to be applied in contemporary Malay society because it discriminate against women. Although the number of those who objected to the use of *farā'iḍ* is small, the finding shows that in the present Muslim society in the state of Pahang there are those who still do not have a clear understanding of the concept of distribution of inheritance in Islam.

Chapter 6 of the thesis concerns the form of cases settled by the authoritative agencies. As the Amanah Raya Corporation denied access to detailed records of their cases, the study was able to focus only at the cases compiled by the Small Estate Unit. In general, the study discovered that among the cases handled by the Small Estate Unit there were four types where the decisions made were incompatible with the principles of Islamic law and *farā'iḍ*. They are: (i) cases involving the issue of

interest, (ii) cases involving Group Settlement Area land (iii) cases involving Malay Reservation land and (iv) cases of nomination.

Although the acts provide a few options, the evidence suggests that some of the officers either blindly followed decisions made in previous cases or were ignorant of the options available through SEDA 1955, or were simply not sensitive enough to religious precepts to prevent decisions being in contradiction to Islamic law. This is extremely important, especially when cases involve matters which are regarded as enormities in Islamic law such as the imposition of interest or usury (*ribā*) on a Muslim's inheritance, as is stressed in the Quran (2:278) "*O you who believe! Be afraid of Allah and give up what remains (due to you) from ribā (from now onward), if you are (really) believers*". The officers in fact have the alternative of using options c and d from section 15 (4) of the SEDA 1955 to avoid the problem. The study's findings show the importance of employing officers who have sufficient Islamic legal knowledge to handle Muslim cases so that such a major fault can be avoided.

The flawed decisions made by officers in contradiction to Islamic law are also and perhaps mainly due to the acts themselves. In the case of Group Settlement Area land for example, the Land Act (GSA) 1960 ruled that land cannot be inherited by more than one heir. This regulation has caused dissatisfaction among heirs, but the officers in charge, while realising that it is impracticable, have no power to overrule the law. In handling such cases, the officers in charge will suggest the most suitable person among the heirs to take the land but normally their suggestion will be rejected by the other heirs because if they were to agree with the suggestion of the officer they might

well get nothing as the regulation does not prescribe that the heir who receives the land should reimburse them with an amount equal to their share. Therefore, because of the disagreement among the heirs, the officer will usually decide that the land should be sold and its value distributed among the heirs according to *farā'iq*

A similar problem was found in cases related to Malay Reservation Land. Disputes arise because this type of land can only be inherited by a Malay even if the non-Malay heir involved is a Muslim. These cases usually occur when the surviving spouse of an inter-racial marriage is the sole heir. In these circumstances, the officer has no choice but to order the land to be forwarded to the *bait al-Māl*. In cases of nomination, since the rule of the High Court is in favour of the nominee the officer has no power to overrule its decision although it was clearly contradictory to the principle of *waṣiyyah* in Islam.²³

Apart from the cases mentioned above, the study has also analysed those forwarded to the *sharī'ah* court, in order to discover to what extent the Islamic law of succession, especially *farā'iq*, has been reformed. These cases are four in number, as mentioned earlier: i) *farā'iq* cases, (ii) cases involving *waṣiyyah*, (iii) cases involving *hibah*, and (iv) cases involving jointly acquired property.

The study found that in all these cases, the decisions made by the court were totally based on the traditional principles of the Shāfi'ī school of law. Up to the present, no reforms have been made to the Islamic law of inheritance. This is due to several factors: firstly, because *farā'iq* is yet to be codified; secondly, a low priority given by

the *sharī'ah* court to the matter of Muslim inheritance as their role under the present administrative system is very limited.

The present study finally concluded that the development of *farā'iḍ* in the State of Pahang still needs much more attention from the authorities in order to be developed and reformed. This is important in order to provide a better settlement process for those who want to settle their case by *farā'iḍ* and to avoid misunderstanding toward its concept among Malay Muslim society.

Notes to Chapter 7

- ¹ al-‘Asqalānī, Ibn Ḥajr, *Fatḥh al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, Beirut, Dār al-Ma‘rifah, n.d., vol. 12, p. 3.
- ² Ibid, p. 4. See also al-Zuhailī, Wahbah, *al-Fiqh al-Islāmī wa Adillatuh*, Damascus, Dār al-Fikr, 1989.vol. 8, p. 244.
- ³ Mayer, Ann Elizabeth, “Inheritance” in Esposito, John L., (e.d.) *The Oxford Encyclopedia of the Modern Islamic World*, New York, Oxford University Press, 1995, vol. 2, p. 203. See discussion in chapter 2.
- ⁴ See discussion in chapter 2
- ⁵ See discussion in chapter 2
- ⁶ See discussion in chapter 3
- ⁷ Ibrahim, Ahmad and Joned, Ahilemah, *The Malaysian Legal System*, 2nd edition, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1995.p. 21.
- ⁸ See Section 15 (1) SEDA 1955.
- ⁹ See discussion in chapter 3 and 4.
- ¹⁰ Ibrahim, Ahmad, “Perwarisan Harta Dalam Islam dan Undang-Undang di Malaysia” in Ibrahim, Ahmad (ed) *al-Ahkam*, vol. 3, Kuala Lumpur, Dewan Bahasa dan Pustaka, 1991, p. 44.
- ¹¹ Ibrahim, Ahmad and Joned, Ahilemah, *The Malaysian Legal System*, pp. 43-48. See discussion in chapter 4

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- ¹² Malaysia gained its independent from Great Britain on 1 August 1957.
- ¹³ Ibrahim, Ahmad and Joned, Ahilemah, *The Malaysian Legal System*, p. 58.
- ¹⁴ Ibid. See discussion in chapter 4.
- ¹⁵ See discussion in chapter 4.
- ¹⁶ Ibid.
- ¹⁷ Ibid.
- ¹⁸ Ibid.
- ¹⁹ Utusan Malaysia, Saturday, 4 March 2000.
- ²⁰ Interview with Mr Aziz in response to question no. 20.
- ²¹ Ali, Aziz, *Ke Arah Mempertingkatkan Pentadbiran Pusaka di Pahang*, (Toward Better Administration of inheritance in Pahang) unpublished working paper presented at Small Estate Unit internal discussion in Kuantan, July 1998, p. 14.
- ²² See discussion in chapter 4.
- ²³ See discussion in chapter 6

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Interview conducted by the researcher with Mr Aziz Bin Ali, Small Estate Officer of the Middle Zone on 12 December 1997 at his Office in Temerloh

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Appendix A-1

Data on the used of *Farā'id* and Mutual Agreement from Amanah Raya Corporation (1995-1999)

Year	No of Cases	Case Settled	<i>Farā'id</i>		Mutual agreement	
			No.	%	No.	%
1995	380	300	43	14.3	257	85.7
1996	586	565	41	7.3	524	92.7
1997	591	580	39	6.7	541	93.3
1998	580	575	44	7.7	531	92.3
1999	626	613	63	10.3	550	89.7
Total	2763	2633	230	8.7	2403	91.3

Source: General Record of Amanah Raya Corporation 1995-1999

Appendix A-2:

Data on the used of *Farā'id* and Mutual agreement from SEU (East Zone) 1990-1999

Year	No. of Cases	Case Settled	<i>Farā'id</i>		Mutual agreement	
			No.	%	No.	%
1990	975	861	99	11.5	762	88.5
1991	964	814	76	9.3	738	90.6
1992	1054	909	83	9.1	829	90.9
1993	1117	963	101	10.5	862	89.5
1994	1174	994	121	12.1	873	87.8
1995	1135	988	72	7.3	916	92.7
1996	1046	879	93	10.6	786	89.4
1997	1404	1193	69	5.8	1124	94.2
1998	1517	1355	123	9.1	1232	90.9
1999	1369	1186	193	16.3	993	83.7
Total	11,755	10,142	1030	10.2	9112	89.8

Source: General Record of Small Estate Unit (East Zone) 1990-1999

Appendix A-3

Data on the used of *Fara'id* and Mutual agreement from SEU (West Zone) 1990-1999

Year	No. of Cases	Case Settled	<i>Fara'id</i>		Mutual agreement	
			No.	%	No.	%
1990	934	866	163	18.8	703	81.2
1991	834	729	121	16.6	608	83.4
1992	1093	1002	201	20.1	801	79.9
1993	1142	992	76	7.7	916	92.3
1994	1276	1026	134	13.1	892	86.9
1995	1368	1155	153	13.2	1002	86.8
1996	1423	1179	250	21.2	929	78.8
1997	1500	1246	190	15.2	1056	84.8
1998	1331	1071	146	13.6	925	86.4
1999	1681	1366	103	7.5	1263	92.5
Total	12,582	10,632	1,537	14.5	9,095	85.5

Source: General Record of Small Estate Unit (West Zone) 1990-1999

Appendix A-4

Data on the used of *Fara'id* and Mutual agreement from SEU (Middle Zone) 1990-1999

Year	No. of Cases	Case Settled	<i>Fara'id</i>		Mutual agreement	
			No.	%	No.	%
1990	1429	1256	180	14.3	1076	85.7
1991	1363	1177	119	10.1	1058	89.9
1992	1391	1163	232	19.9	931	80.1
1993	1248	1015	289	28.5	726	71.5
1994	1416	1155	293	25.4	862	74.6
1995	1586	1378	350	25.4	1028	74.6
1996	1408	1191	171	14.4	1020	85.6
1997	1515	1285	283	22.0	1002	78.0
1998	1582	1283	191	14.9	1092	85.1
1999	1510	1219	116	9.5	1103	90.5
Total	14,448	12,122	2,224	18.3	9,898	81.7

Source: General Record of Small Estate Unit (Middle Zone) 1990-1999

Appendix B: Questionnaire

Soalan Kaji selidik

Mengenai

Farā'id di negeri Pahang: Teori dan Pelaksanaan

Penerangan dan Arahan:

Kaji selidik ini adalah bertujuan untuk mengumpulkan maklumat mengenai kaedah pembahagian pusaka yang di gunakan di dalam menyelesaikan sesuatu kes pusaka.

Kaji selidik ini merangkumi dua bahagian utama:

- i) Bahagian pertama: Mengenai latar belakang responden
- ii) Bahagian kedua: menumpukan kepada objective kaji selidik ini iaitu tentang kaedah yang di gunakan di dalam pembahagian pusaka

Di harapkan pihak tuan dan puan dapat mengisinya dengan sempurna kerana maklumat yang di berikan ini adalah amat penting untuk tujuan penyelidikan ini. Untuk makluman pihak tuan dan puan semua jawapan yang di berikan adalah di anggap rahsia dan tidak akan di gunakan untuk tujuan lain selain daripada kajian ini. Untuk menjawab soalan-soalan ini ianya tidak akan mengambil masa lebih daripada 30 minit.

Tuan dan Puan adalah di harapkan agar dapat mengisinya di pejabat Pusaka kecil ini juga dan mengembalikannya kepada staff yang sedia membantu. Sekiranya masa tuan atau puan tidak mengizinkan, di harapkan pihak tuan atau puan dapat mengeposkannya melalui sampul surat yang telah distemkan kepada alamat yang tertera.

Terima kasih di atas segala kerja sama yang telah tuan dan puan hulurkan

Mohamad Khairul Anwar Osman

March 1999

Untuk
Diedarkan di

Pejabat Pusaka Kecil/Amanah Raya Berhad

Latar Belakang Respondent

1 Nama¹:

.....

2 Jantina

- a) Lelaki b) Perempuan

3 Umur

- a) 18 - 20 b) 20 -30 c) 30-40
- d) 40-50 c) 50-60 d) 60 keatas

Pekerjaan

.....

4 Bidang pengkhususan

.....

.....

5 Status Diri

- a) Suami b) Isteri
- c) Ibutunggal d) Belum berumahtangga

6 Taraf Pendidikan

- a) Spm
- b) B.A
- c) M.A
- d) Ph.D
- e) Lain-lain:

¹ Anda tidak semestinya menulis nama anda

7 Dimanakah anda mendapat pendidikan / pengetahuan agama

- a) Di Sekolah Menengah Aliran Agama
- b) Di sekolah Menengah Bukan Aliran Agama
- c) Degree didalam pengajian Islam
- d) Mengambil Subject elective semasa di University
- e) Kuliah-kuliah di Masjid atau Ceramah
- f) Melalui pembacaan
- g) Lain-lain

.....

.....

.....

.....

.....

Soalan

1 **Bagaimana anda mendapat maklumat tentang cara untuk menyelesaikan harta pusaka anda.**

.....
.....

2 **Di Agency manakah kes anda diselesaikan**

- a) Amanah Raya Berhad
- b) Small Estate Unit

3 **Bentuk Kes:**

- a) Ada masalah dan pertelingkahan sesama waris
- b) Tiada masalah sesama waris

4 **Apakah masalah tersebut?(sila nyatakan dengan ringkas)**

.....
.....
.....
.....
.....
.....
.....

5 **Berapa lamakah masa yang diambil oleh agency tersebut untuk menyelesaikan kes anda?**

.....

.....
.....

b) Tidak berpuas hati. Sila sertakan alasan anda

.....
.....
.....
.....

7 Apakah masalah yang anda hadapi semasa membuat urusan untuk menyelesaikan kes pusaka anda

.....
.....
.....
.....

8 Apakah bentuk pembahagian yang di gunakan untuk membahagi-bahagikan harta pusaka anda

- a) Pakat
- b) Faraid

11 Apa pendapat anda tentang penggunaan Faraid di dalam menyelesaikan sesuatu kes itu

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12 Apakah pendapat anda tentang kesesuaian membuat Pembahagian cara Faraid di masa kini?

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Appendix C 1

Translation

DETAILS REGARDING THE CASE OF: SAMLAH BT MAMAT

1	Fail No.	PTT 3/1/1753 (40/93)
2	Applicant	Kassim bin Mohamed Amin
3	Relationship	Son
4	Date of Application	5/4/93
5	Date of Sending Form B to the High Court	6/4/93
6	Date of Receiving Form C from the High Court	16/5/93
7	Date of Applying the value of property	18/5/93
8	Date Receiving the valuation	25/5/93
9	Date of Hearing	5/7/1993
10	Date requesting <i>farā'īd</i> certificate	None
11	Date of receiving the <i>farā'īd</i> certificate	None
12	Date of issuing the order	15/7/93
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. Small plot of land (3 acres), many heirs involved (9), disagreement between heirs.
- iii. The land was directed to be sold to one of the heirs. The eldest son Kassim bin Mohamad Amin bought the land.
- iv The shares of the other heirs will be paid within two years. Each of them by mutual agreement will receive $1/9 = \text{RM } 1670.00$
- v Case related to section 15(4). Interest of 4% per annum was charged to the buyer and to be paid to small Unit Office, Temerloh RM 120.00 (RM 60x 2 years)
- vi All payment must be made through Small Estate Unit Office, Temerloh
- vii Case Settled.

Appendix C 2

Translation

DETAILS REGARDING THE CASE OF: UMAR BIN KADIR

1	Fail No.	PTM 9/23/181 (94)
2	Applicant	Suraya bt Abdullah
3	Relationship	Wife
4	Date of Application	2/2/1994
5	Date of Sending Form B to the High Court	2/2/1994
6	Date of Receiving Form C from the High Court	23/4/1994
7	Date of Applying the value of property	26/4/1994
8	Date Receiving the valuation	14/5/1994
9	Date of Hearing	29/7/1994
10	Date requesting <i>farā'iq</i> certificate	30/7/1994
11	Date of receiving the <i>farā'iq</i> certificate	19/10/1994
12	Date of issuing the order	30/10/1994
13	Payment to the <i>bait al-Māl</i>	none

HEARING DECISION

- i All heirs were present
- ii. Small plot of land (1 acre), many heirs involved (8) and there was a disagreement between heirs.
- iii. The land was instructed to be sold to Rohaya Bt Umar priced RM 9,000.00
- iv Shares of the other heirs will be paid within 1 year period.
- v Share of each according to *farā'iq* is as follows; widow $9/72 = \text{RM } 1125.00$, three daughter and each got $16/72 = \text{RM } 2000,00$, two brother each of them get $10/72 = \text{RM } 1250.00$ and a sister $5/72 = \text{RM } 625.00$.
- vi Case related to section 15(4) and therefore the buyer was charged with 4% interest = RM 360.00 per annum and to be paid at the Small Estate Unit, Temerloh.
- vii All payments must be made through Small Estate Office
- viii Case settled.

Appendix C 3

Translation

DETAILS REGARDING THE CASE OF: KAMIL BIN HAMSANI

1	Fail No.	HPJ.K 349/23/174 (93)
2	Applicant	Shamsiah Bt Sudin
3	Relationship	First wife
4	Date of Application	18/9/1993
5	Date of Sending Form B to the High Court	21/9/1993
6	Date of Receiving Form C from the High Court	30/10/1993
7	Date of Applying the value of property	1/11/1993
8	Date Receiving the valuation	25/11/1993
9	Date of Hearing	20/12/1993
10	Date requesting <i>farā'iq</i> certificate	21/12/1993
11	Date of receiving the <i>farā'iq</i> certificate	21/3/1994
12	Date of issuing the order	16/3/1994
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. Case involved with GSA land (10 acres). GSA land cannot be transferred to more than one heirs.
- iii. Disagreement between heirs. The land was sold and the money was distributed according to *farā'iq*.
- iv Each widow get $3/48 = \text{RM } 1,687$, son get $28/48 = \text{RM } 15,750$. and a daughter get $14/48 = \text{RM } 7,875$.
- v Case related to section 16, Land Act (GSA) 1960.
- vi All payments must be made through small estate Unit
- vii Case settled.

Appendix C 4

Translation

DETAILS REGARDING THE CASE OF: KAMALUL BIN HJ SYUIB

1	Fail No.	PTB 349/17/380 (95)
2	Applicant	Kamisah B. Ahmad
3	Relationship	Wife
4	Date of Application	4/8/1995
5	Date of Sending Form B to the High Court	4/8/1995
6	Date of Receiving Form C from the High Court	30/9/1995
7	Date of Applying the value of property	1/10/1995
8	Date Receiving the valuation	15/10/1995
9	Date of Hearing	3/12/1995
10	Date requesting <i>farā'iḍ</i> certificate	4/12/1995
11	Date of receiving the <i>farā'iḍ</i> certificate	15/2/1996
12	Date of issuing the order	19/2/1996
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. Case involved with GSA land, 12 acres valued RM 32,00.00
- iii. Land was suggested to be transfer to the deceased brother but objected by the widow and insisted the land to be sold and the money distributed according to *farā'iḍ*. The land was sold back to FELDA.
- iv Based on *farā'iḍ* the widow get $\frac{1}{4}$ = RM 8000.00, brother get $\frac{2}{4}$ = RM 16,000.00 and sister get $\frac{1}{4}$ = RM 8,000.00
- v Case involved with section 16 Land Act (GSA) 1960.
- vi All payment must be made through small estate Office, Temerloh
- vii Case settled

Appendix C 5

Translation

DETAILS REGARDING THE CASE OF: JAMILAH BT AMRAN

1	Fail No.	PTT. 349/106/517 (90)
2	Applicant	Jamalulail Bin Abdullah
3	Relationship	Husband
4	Date of Application	17/12/1990
5	Date of Sending Form B to the High Court	18/12/1991
6	Date of Receiving Form C from the High Court	3/21991
7	Date of Applying the value of property	5/3/1991
8	Date Receiving the valuation	28/4/1991
9	Date of Hearing	13/5/1991
10	Date requesting <i>farā'iq</i> certificate	None
11	Date of receiving the <i>farā'iq</i> certificate	None
12	Date of issuing the order	15/5/1991
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. The deceased left five legitimate heirs. A widower of Indian origin, three sons and a daughter
- iii. Immovable property left was a three acres Malay reservation Land valued RM 20,000.00. Therefore the widower cannot inherit the land.
Movable property left was saving RM 10,000.00
- iv All heirs agreed to settle by mutual agreement. The land was transferred to the eldest son and movable property was distributed equally where each heir get $1/5 =$ RM 2000.00
- v Case involved with the Malay Reservation Land
- vi Case settled.

Appendix C 6

Translation

DETAILS REGARDING THE CASE OF: ISMAIL BIN HJ SHAMSUDDIN

1	Fail No.	PTB 349/59/311 (97)
2	Applicant	Halimah Bt Abdullah
3	Relationship	Wife
4	Date of Application	12/3/1997
5	Date of Sending Form B to the High Court	13/3/1997
6	Date of Receiving Form C from the High Court	12/4/1997
7	Date of Applying the value of property	15/4/1997
8	Date Receiving the valuation	10/5/1997
9	Date of Hearing	13/6/1997
10	Date requesting <i>farā'iq</i> certificate	15/6/1997
11	Date of receiving the <i>farā'iq</i> certificate	21/9/1997
12	Date of issuing the order	26/9/1997
13	Payment to the <i>bait al-Māl</i>	RM 60,000.00

HEARING DECISION

- i All heirs were present
- ii. The deceased left a widow of Chinese origin
- iii. Among the immovable property left was a Malay Reservation land, which by law cannot be transferred to other than Malay origin. The widow requested to buy the land but was refused due to the law.
- iv The movable property left valued RM 50,00.00. The widow get $\frac{1}{4}$ = RM 12,500 and the remaining RM 37, 500 was forwarded to *bait al-Mal*.
- v Case involved with Malay Reservation Land.
- vi Case settled.

Appendix C 7

Translation

DETAILS REGARDING THE CASE OF: MOHD PARID B. MOHD TALIB

1	Fail No.	PTM 349/100/97
2	Applicant	Azlina Bt Megat
3	Relationship	Wife
4	Date of Application	4/4/1997
5	Date of Sending Form B to the High Court	5/4/1997/
6	Date of Receiving Form C from the High Court	17/5/1997
7	Date of Applying the value of property	18/5/1997
8	Date Receiving the valuation	1/6/1997
9	Date of Hearing	20/7/1997
10	Date requesting <i>farā'īd</i> certificate	None
11	Date of receiving the <i>farā'īd</i> certificate	None
12	Date of issuing the order	25/7/1997
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. The deceased left five legitimate heirs, a widow, mother, father and two sons.
- iii. Distribution was based on mutual agreement. Immovable property was transferred to the widow and movable property was divided equally between heirs and each of the get 1/5 share = RM 4000,00.
- iv The deceased's saving in Employee Provident Fund was in the ex-wife name and she refused to hand it in. Case involve with nomination is beyond the jurisdiction of the agency.
- v The agency therefore advises the heirs involved the matter between themselves.
- vi Case involved with the issue of nomination.
- vii Case settled.

Appendix C 8

Translation

DETAILS REGARDING THE CASE OF: SAUDAH BT YUSOFF

1	Fail No.	HPK.J 349/209/697 (96)
2	Applicant	Rosli Bin Yatim
3	Relationship	Husband
4	Date of Application	3/1/1996
5	Date of Sending Form B to the High Court	3/1/1996
6	Date of Receiving Form C from the High Court	17/3/1996
7	Date of Applying the value of property	18/3/1996
8	Date Receiving the valuation	20/4/1996
9	Date of Hearing	24/5/1996
10	Date requesting <i>farā'iq</i> certificate	None
11	Date of receiving the <i>farā'iq</i> certificate	None
12	Date of issuing the order	29/5/1996
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. The deceased left three legitimate heirs.; a widower, mother and son.
- iii. The immovable property left a terrace house value RM 120,000.00 and movable property was Employee Provident Fund (EPF) RM 15,000.00 where the mother was *nominated* for
- iv The immovable property was settled through mutual agreement and it has been transferred to the widower. The movable property on the other hand was awarded to the nominee (the mother). This because the officer can overrule the decision of the High Court. Thus the agency only can advised the mother to distribute the saving among other heirs as from the Islamic law point of view she cannot take all the saving.
- v But mother however refused. The agency advised the husband to explain matter to mother peacefully and settled the matter between themselves.
- vi Cases related with the issue of nomination
- vii Case settled.

Appendix C 9

Translation

DETAILS REGARDING THE CASE OF: CHE KAHAR BIN CHE DIN

1	Fail No.	HPK.J. 349/211/1993
2	Applicant	Faezah Bt Abd Rahman
3	Relationship	First wife
4	Date of Application	12/7/1993
5	Date of Sending Form B to the High Court	12/7/1993
6	Date of Receiving Form C from the High Court	24/9/1993
7	Date of Applying the value of property	26/9/1993
8	Date Receiving the valuation	5/10/1993
9	Date of Hearing	28/9/1993
10	Date Referring the case to the <i>Sharī'ah</i> court	-
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	-
12	Date of issuing the order	15/10/1993
13	Payment to the <i>bait al-Māl</i>	-

HEARING DECISION

- i All heirs were present
- ii. Legitimate heirs are 2 widows, six sons and six daughters
- iii. The existence of the second marriage was not know by the first wife. The deceased nominated the second wife as nominee to his saving in Employee Provident Fund.
- iv The first wife requested not to allow the second wife to have all the money by herself. However the second wife insisted that she had a full legal right as nominee on the saving and in addition to that she already withdraw her share from the deceased immovable property but that settlement was refused by the first wife.
- v The agency has no power concerning the case of nomination. Finally the case settled when the second wife agreed to tolerated and the saving was distributed equally among the heirs.
- vi Case involved with the issue of nomination
- vii Case settled.

Appendix C 10

Translation

DETAILS REGARDING THE CASE OF: NASARUDDIN BIN OMAR

1	Fail No.	PTB 349/99/1992
2	Applicant	Ismail Bin Nasaruddin
3	Relationship	Son
4	Date of Application	22/6/1992
5	Date of Sending Form B to the High Court	23/6/1992
6	Date of Receiving Form C from the High Court	14/7/1992
7	Date of Applying the value of property	14/7/1992
8	Date Receiving the valuation	28/7/1992
9	Date of Hearing	21/8/1992
10	Date Referring the case to the <i>Sharī'ah</i> court	-
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	-
12	Date of issuing the order	23/8/1992
13	Payment to the <i>bait al-Māl</i>	-

HEARING DECISION

- i All heirs were present
- ii. Legitimate heirs one son
- iii. The deceased nominated his gardener to his saving in the bank while other immovable properties transferred to the deceased's son
- iv The son demands the saving to be considered as part of the inheritance so he can get his share on that.
- v The issue of nomination is not under the authority of the agency. Therefore, the son was advised to settle it peacefully with the nominee. According to the law, the nominee has the full right on the saving
- vi Case involved nomination
- vii Case settled

Appendix C 11

Translation

DETAILS REGARDING THE CASE OF: KHAIRUDDIN BIN RAMLI

1	Fail No.	PTM 349/167/1997
2	Applicant	Simah Bt Kassim
3	Relationship	Isteri
4	Date of Application	23/3/1997
5	Date of Sending Form B to the High Court	23/3/1997
6	Date of Receiving Form C from the High Court	24/5/1997
7	Date of Applying the value of property	21/5/1997
8	Date Receiving the valuation	15/6/1997
9	Date of Hearing	11/7/1997
10	Date Referring the case to the <i>Sharī'ah</i> court	12/7/1997
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	30/10/1997
12	Date of issuing the order	1/11/1997
13	Payment to the <i>bait al-Māl</i>	RM166,200.495

HEARING DECISION

- i All heirs were present
- ii. The deceased her a widow as the sole heir.
- iii. The widow entitled only $\frac{1}{4}$ of the estate equivalent to RM 55,400.165. However, the widow appealed to have the remaining of the estate as applied in Egypt.
- iv The case was referred to the *Sharī'ah* Court. The court however dismisses the appeal on the ground that the rule of *al-Radd* to the surviving spouse is not applicable in the state of Pahang. However the widow can recover the remaining of the estate by paying the equivalent value to the *bait al-Māl*.
- v The widow agreed to pay the *bait al-Māl* in order to regain back the property = RM 114,000.00.
- vi Case involved *al-Radd* to surviving spouse.
- vii Case settled

Appendix C 12

Translation

DETAILS REGARDING THE CASE OF: SITI HAJAR BT ABU

1	Fail No.	HPK.J 349/201/66 (93)
2	Applicant	Suhaimi Bin Shahidan
3	Relationship	Husband
4	Date of Application	25/2/1993
5	Date of Sending Form B to the High Court	27/2/1993
6	Date of Receiving Form C from the High Court	8/4/1993
7	Date of Applying the value of property	9/4/1993
8	Date Receiving the valuation	2/5/1993
9	Date of Hearing	6/7/1993
10	Date Referring the case to the <i>Sharī'ah</i> court	11/7/1993
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	26/9/1993
12	Date of issuing the order	2/10/1993
13	Payment to the <i>bait al-Māl</i>	1/12=RM 6028.50

HEARING DECISION

- i All heirs present
- ii. Legitimate heirs, a widower, son and two daughter
- iii. The deceased left saving of RM 12, 342.00 and five acres land valued RM 60,000.00.
- iv All heirs wanted distribution based on *farā'id*. The widower therefore get $3/12 =$ RM 18, 085.50. the daughter each of them get $4/12 =$ RM24,114.00. the remaining $1/12 =$ RM 6028.50 was forwarded to bait al-Mal.
- v Case settled

Appendix C 13

Translation

DETAILS REGARDING THE CASE OF: MOHAMED RAUF BIN HANAFI

1	Fail No.	PTB 349/176/92
2	Applicant	Sharul Nizam
3	Relationship	Son
4	Date of Application	13/1/1992
5	Date of Sending Form B to the High Court	14/1/1992
6	Date of Receiving Form C from the High Court	25/2/1992
7	Date of Applying the value of property	28/2/1992
8	Date Receiving the valuation	19/3/1992
9	Date of Hearing	18/7/1992
10	Date Referring the case to the <i>Sharī'ah</i> court	20/7/1992
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	12/10/1992
12	Date of issuing the order	21/10/1992
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. Legitimate heirs consisted of 3 sons and 3 daughters
- iii. The deceased made a bequest to give rubber plantation estate (6 acres) valued RM 60,000.00 to his adopted mother. The court decided that the bequest was not valid as *such bequest cannot exceed 1/3 of the net estate*. So the adopted mother only entitled to 2 acres of the plantation.
- iv The remaining 4 acres is transferred to the eldest son by mutual agreement, the outcomes from the plantation is to be divided according to mutual agreement among the heirs.
- v Movable property (savings) was distributed according to mutual agreement and each of them get equal share = RM 4,416.66.
- vi Case involved with bequest more than 1/3 of the property.
- vii Case settled.

Appendix C 14

Translation

DETAILS REGARDING THE CASE OF: MUSA BIN PUTIH

1	Fail No.	PTK 349/578/97
2	Applicant	Putih B. Idris
3	Relationship	Father
4	Date of Application	3/2/1998
5	Date of Sending Form B to the High Court	3/2/1998
6	Date of Receiving Form C from the High Court	11/3/1998
7	Date of Applying the value of property	12/3/1998
8	Date Receiving the valuation	1/4/1998
9	Date of Hearing	18/6/1998
10	Date Referring the case to the <i>Sharī'ah</i> court	22/6/1998
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	13/9/1998
12	Date of issuing the order	25/9/1998
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs present
- ii. The deceased left a widow, mother, father four sons and a daughter
- iii. The deceased made a bequest to give all the inheritance to the widow. The *Sharī'ah* Court decided that bequest was not valid as it violates the Islamic law of bequest.
- iv Therefore, all the heirs decided to settle their case by mutual agreement. The land, house and rubber plantation is transferred to the widow.
- v The saving is divided equally between the heirs, each of them get $1/8 = \text{RM } 4000.00$
- vi Case involved with bequest to the legitimate heir
- vii Case settled

Appendix C 15

Translation

DETAILS REGARDING THE CASE OF: AMATULLAH BT SHAKIR

1	Fail No.	PTM 349/457/96
2	Applicant	Abdullah b. Ashraf
3	Relationship	Husband
4	Date of Application	12/11/1996
5	Date of Sending Form B to the High Court	12/11/1996
6	Date of Receiving Form C from the High Court	30/1/1997
7	Date of Applying the value of property	1/2/1997
8	Date Receiving the valuation	14/2/1997
9	Date of Hearing	16/4/1997
10	Date Referring the case to the <i>Sharī'ah</i> court	16/4/1997
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	27/6/1997
12	Date of issuing the order	8/7/1997
13	Payment to the <i>bait al-Māl</i>	

HEARING DECISION

- i All heirs present
- ii. Deceased left a widower, mother, two daughters and two sons.
- iii. In this case the claimed of *waṣiyyah* by imam of Seberang Temerloh was declared invalid by the *Sharī'ah* Court due to the reason that the claimant failed to provide the court with sufficient evidence.
- iv Immovable property is given to the widower as agreed by all the heirs
- v Movable property is divided by *farā'iḍ*. The widower got $18/72 = \text{RM } 22,938.75$. Mother $12/72 = \text{RM } 15,295.00$, sons each of them got $14/72 = \text{RM } 17,841.25$ and daughters each of them got $7/72 = \text{RM } 8,920.63$.
- vi Cases related to claim of *waṣiyyah* without sufficient proof.
- vii Case settled

Appendix C 16

Translation

DETAILS REGARDING THE CASE OF: SULAIMAN BIN ABDULLAH

1	Fail No.	PTT 349/234/96
2	Applicant	Nur Shafikah Bt Salim
3	Relationship	wife
4	Date of Application	23/4/1996
5	Date of Sending Form B to the High Court	25/4/1996
6	Date of Receiving Form C from the High Court	1/6/1996
7	Date of Applying the value of property	3/6/1996
8	Date Receiving the valuation	19/7/1996
9	Date of Hearing	11/8/1996
10	Date Referring the case to the <i>Sharī'ah</i> court	12/8/1996
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	15/9/1996
12	Date of issuing the order	21/9/1996
13	Payment to the <i>bait al-Māl</i>	-

HEARING DECISION

- i Legitimate heirs consist of widow , one son and two daughters
- ii. The deceased left saving in several banks = RM 36.450.00. While the immovable left was a house and two cars. The settlement is by mutual agreement.
- iii. The deceased make a bequest that one third of his saving is for his ex-wife and children (3 sons and 2 daughters) which all of them are non-Muslim
- iv The case referred to the *Sharī'ah* Court and the court certify the validity of the will
- v Case related to the bequest to non Muslim heirs
- vi Case settled

Appendix C 17

Translation

DETAILS REGARDING THE CASE OF: MAHMUD BIN ISMAIL

1	Fail No.	HPK.J 349/26/95
2	Applicant	Solomon bin Mahmud
3	Relationship	Son
4	Date of Application	12/1/1995
5	Date of Sending Form B to the High Court	12/1/1995
6	Date of Receiving Form C from the High Court	10/3/1995
7	Date of Applying the value of property	11/3/1995
8	Date Receiving the valuation	26/3/1995
9	Date of Hearing	13/4/1995
10	Date Referring the case to the <i>Sharī'ah</i> court	14/4/1995
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	1/8/1995
12	Date of issuing the order	23/8/1995
13	Payment to the <i>bait al-Māl</i>	-

HEARING DECISION

- i All heirs were present
- ii. Legitimate heirs are a widow, 2 sons, 3 daughters
- iii. All heirs agree to settle the movable property by mutual agreement
- iv In this case, the claimant, requested that the children from his brother and sister who has died to be included in the distribution scheme so by that they also will get their share from their grandfather (the deceased). The orphans are 2 boys and one girl (from their predeceased brother) and 2 boys (from their predeceased sister)
- v Case was referred to the *Sharī'ah* Court. The court however, decided that Orphan grandchildren are excluded from the succession scheme due to the present of their uncles and aunts.
- vi Case related to the orphan grandchildren
- vii Case settled.

Appendix C 18

Translation

DETAILS REGARDING THE CASE OF: RADUAN BIN MAT ISA

1	Fail No.	PTT 349/76/94
2	Applicant	Ahmad Shukor bin Raduan
3	Relationship	Son
4	Date of Application	23/4/1994
5	Date of Sending Form B to the High Court	23/4/1994
6	Date of Receiving Form C from the High Court	1/6/1994
7	Date of Applying the value of property	1/6/1994
8	Date Receiving the valuation	14/6/1994
9	Date of Hearing	27/9/1994
10	Date Referring the case to the <i>Sharī'ah</i> court	29/9/1994
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	18/12/1994
12	Date of issuing the order	25/12/1994
13	Payment to the <i>bait al-Māl</i>	-

HEARING DECISION

- i All heirs were present
- ii. Legitimate heirs are widow, 3 sons and 3 daughters
- iii. In this case, all the properties were distributed according to mutual agreement. All immovable property was transferred to the widow. The car was sold and the money together with the saving was divided equally between the heirs. Each of them get $1/7 = \text{RM } 6,318.92$.
- iv The case involve with the claimed of *hibah* by Zamri Sungib that the deceased has made a hibah two years ago that the one acre rubber plantation is his and the tranfer of ownership is yet to be completed
- v The *hibah* was certified valid by the *Sharī'ah* court as the claimants has successfully provide two witness to support his claim. The court argued that transfer of ownership officially carried by the land office is not the criteria for validation of *hibah* as it only an office procedure.
- vi Case involved with claimant of *hibah*.
- vii Case settled.

Appendix C 19

Translation

DETAILS REGARDING THE CASE OF: SOADAH BT RAMLI

1	Fail No.	PTM 349/51/1992
2	Applicant	JAMILAH Bt Arif
3	Relationship	Son
4	Date of Application	2/6/1992
5	Date of Sending Form B to the High Court	3/6/1992
6	Date of Receiving Form C from the High Court	29/7/1992
7	Date of Applying the value of property	30/7/1992
8	Date Receiving the valuation	18/8/1992
9	Date of Hearing	28/8/1992
10	Date Referring the case to the <i>Sharī'ah</i> court	2/9/1992
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	10/11/1992
12	Date of issuing the order	21/11/1992
13	Payment to the <i>bait al-Māl</i>	-

HEARING DECISION

- i All heirs were present
- ii. Legitimate heirs a widower, 4 sons and 3 daughter
- iii. All heirs agreed to settled the property left by mutual agreement. However there was acclaimed from the deceased's neighbour (shamsul Bahrain) that the house he is staying in was a gift (*hibah*) to him from the deceased five years ago, but the transfer was yet to be completed
- iv The *Sharī'ah* court decided that the *hibah* (gift) was not valid since the claimant failed to provide clear evident to support his claim.
- v The information given by the claimant is unclear/
- vi Case involved with claim of gift or *hibah*.
- vii Case settled.

Appendix C 20

Translation

DETAILS REGARDING THE CASE OF: SULAIMAN BIN JAIS

1	Fail No.	PTB 349/60/91
2	Applicant	Ismail Bin Sulaiman
3	Relationship	son
4	Date of Application	2/3/1991
5	Date of Sending Form B to the High Court	3/3/1991
6	Date of Receiving Form C from the High Court	26/5/1991
7	Date of Applying the value of property	27/5/1991
8	Date Receiving the valuation	17/6/1991
9	Date of Hearing	1/8/1991
10	Date Referring the case to the <i>Sharī'ah</i> court	6/8/1991
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	14/10/1991
12	Date of issuing the order	27/10/1991
13	Payment to the <i>bait al-Māl</i>	-

HEARING DECISION

- i All heirs present
- ii. Legitimate heirs consist of a widow, three sons and three daughters
- iii. Settlement based on mutual agreement
- iv Case involved with claim of *hibah* (gift) from Mamat bin Busu that the deceased has given him two months prior to his death three cows
- v The court certify that the *hibah* was valid since the claimant was able to provides the court with sufficient evident (from two witness and widow)
- vi Case related to claim of *hibah* during the death sickness
- vii Cases settled.

Appendix C 21

Translation

DETAILS REGARDING THE CASE OF: KAMARUDDIN BIN SALAHUDDIN

1	Fail No.	HPK.J 349/549/93
2	Applicant	Zaiton Bt Abdul Wahid
3	Relationship	Wife
4	Date of Application	18/7/1993
5	Date of Sending Form B to the High Court	18/7/1993
6	Date of Receiving Form C from the High Court	29/8/1993
7	Date of Applying the value of property	30/8/1993
8	Date Receiving the valuation	15/8/1993
9	Date of Hearing	25/9/1993
10	Date Referring the case to the <i>Sharī'ah</i> court	25/9/1993
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	16/11/1993
12	Date of issuing the order	20/11/1993
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. The deceased left a widow, mother, father and a son.
- iii. All the immovable property distributed by mutual agreement
- iv The widow claimed her share from jointly acquired property from the deceased's saving (RM 50,000.00). The *Sharī'ah* court decided $\frac{1}{2}$ of the saving = RM 25,000.00.
- v The remainder of the saving is divided by mutual agreement. Each of them get equal share $\frac{1}{4}$ = RM 6,250.00
- vi Cases related with jointly acquired property
- vii Case settled

Appendix C 22

Translation

DETAILS REGARDING THE CASE OF: KHALIL BIN ABDUL RAUF

1	Fail No.	PTT 349/29/95
2	Applicant	Maryam Bt Shafii
3	Relationship	First wife
4	Date of Application	24/3/1992
5	Date of Sending Form B to the High Court	25/3/1992
6	Date of Receiving Form C from the High Court	22/4/1992
7	Date of Applying the value of property	2/5/1992
8	Date Receiving the valuation	1/7/1992
9	Date of Hearing	2/9/1992
10	Date Referring the case to the <i>Sharī'ah</i> court	6/9/1992
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	18/11/1992
12	Date of issuing the order	20/11/1992
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heirs were present
- ii. The deceased left three widows, three sons, three daughters and father.
- iii. The first widow claimed her share from jointly acquired property from the deceased's saving in the Bank of Agriculture. The *Sharī'ah* court granted her ¼ of the saving to the claimant = RM 18,160.00 as her share from the jointly acquired property.
- iv The deceased's Employee Provident Fund RM 50,346.00 and remaining of the saving in the Bank of Agriculture = RM 54,480.30 was distributed by mutual agreement where each heirs get 1/10 = RM 10,482.63.
- v The palm estate was transferred to the eldest son where the income from the estate will be distributed based on mutual agreement. The car was given to the second son. Each widow get the house that they are currently stay in..
- vi Case involved with the jointly acquired property.
- vii Case settled

Appendix C 23

Translation

DETAILS REGARDING THE CASE OF: ZAINAB BT ASHAARI

1	Fail No.	PTR 349/59/90
2	Applicant	Dzulkefli B. Harun
3	Relationship	Husband
4	Date of Application	30/5/1990
5	Date of Sending Form B to the High Court	1/6/1990
6	Date of Receiving Form C from the High Court	22/7/1990
7	Date of Applying the value of property	23/7/1990
8	Date Receiving the valuation	12/8/1990
9	Date of Hearing	4/10/1990
10	Date Referring the case to the <i>Sharī'ah</i> court	5/10/1990
11	Date of Receiving the result from the <i>Sharī'ah</i> Court	24/11/1990
12	Date of issuing the order	25/11/1990
13	Payment to the <i>bait al-Māl</i>	None

HEARING DECISION

- i All heir were present
- ii. The deceased left a widower, father and two sons
- iii. The widower claimed his jointly acquired property from the deceased's saving in Bank of Islam. The *Sharī'ah* Court decide that $\frac{1}{2}$ of it is his share as jointly acquired property = RM 25,000.00
- iv The remaining movable property is divided according to *farā'id*. Widower get $\frac{6}{24}$ = RM 15,000.00, father get $\frac{4}{24}$ = RM 10,000.00, sons each of them get $\frac{7}{24}$ = 17,500.00
- v The remaining immovable property was distributed by mutual agreement and it was decided to be transferred to the widower .
- vi Case involved with jointly acquired property
- vii Case settled