



ISLAMIC LAW OF SUCCESSION

A Practical Guide To The Laws Of Faraid

Dr. Wan Noraini Mohd Salim

CLJ Publication

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Laws of Faraid*



CLJ
Publication

Copy no: 1275735

Initial: NABA

Date: 11/12

Location: MADP/ISTAC/NILAK/K2/II/CF

Published by

~~The Malaysian Current Law Journal Sdn Bhd~~

E1-2, Jalan Selaman 1/2,
Dataran Palma, 68000 Ampang,
Selangor Darul Ehsan, Malaysia

[Co No 51143 M]

Tel: 603-42705400 Fax: 603-42705401

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Perpustakaan Negara Malaysia

Cataloguing-in-Publication Data

Wan Noraini Mohd Salim

Islamic law of succession : a practical guide to the laws of faraid / Wan Noraini Mohd Salim.

Includes index

Bibliography : p. 191

ISBN 978-967-0379-11-1

1. Inheritance and succession (Islamic law).
 2. Wills (Islamic law) I. Title.
- 297.14

Edited by

Liyana Muhamad Shahaizi

Printed by

Printmate Sdn Bhd
No. 14 & 16, Jalan Industri P.B.P. 7,
Taman Industri Pusat Bandar Puchong,
47100 Puchong, Selangor Darul Ehsan.

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PREFACE

This book aims at explaining the principles of *faraid* within the framework of its application and practice in Malaysia. The concept of the distribution of estate of the deceased Muslim, the author feels, may be better understood with illustrations of appropriate prospective case matrixes, and so efforts are also made to provide specific examples as to how the system works within a specified set of facts and circumstances. Such presentations, it is hoped, will not only benefit the readers in terms of knowledge and understanding of this area of the law, but add value to the scholarly resources on law of succession.

It is to be noted that the Holy Prophet Muhammad (peace be upon him), in a Hadith narrated by Ibnu Majah, Daruqutni and Hakim, has said 'learn the *faraid* and teach it to the people because it is half (part of) the useful knowledge and can be easily forgotten.' Unfortunately, some of us seemed to have lost sight of the true meanings and significance of this saying and as a consequence, albeit rather naively, came to doubt the dynamics and practicability of the *faraid* and its system.

In Malaysia, on account presumably of lack of knowledge of the fundamental aspects of the *faraid*, *intra*-familial disputes in matters of estates and inheritance are not uncommon, and family bonds as a result were unnecessarily threatened and even shattered. Some even ignorantly looked at the system as favouring the male species, while others were ever ready to embrace the alternative estate distribution methodologies, such as *hibah*, trust and *et cetera*, which the banks, financial institutions and other interested entities had been promoting lately. While the spawning of these estate-planning products may be *shari'ah* compliant, or allowable in Islam, the principles of the *faraid*, which were rooted in the Qur'an and the *Sunnah*, must take precedence. It is thus the author's further hope, in this respect, that this book will help dispel any doubt as to the functionality of the *faraid*, as a just and fair determinant to deal with the distribution of a Muslim's estate in this country.

This book is not only designed to cater to the needs of students of Islamic Law, but is also aptly most beneficial to anyone interested to understand the *faraid* and the method of its distribution.

My gratitude and thanks goes to the Ahmad Ibrahim Kulliyah of Laws and the Islamic Law Department, International Islamic University Malaysia for continuously encouraging the staff to write a textbook on every subject taught at the *kulliyah*, and to all who supported and encouraged me to complete the writing of this book.

Dr Wan Noraini Mohd Salim

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Kuala Lumpur

FOREWORD

I have heard complaints that our academicians don't write enough. My own complaint about books on Islam written in Malay or translated from Arabic is that they are mere compilations of who says what. In spite of the intellectually-sounding title, when you read it you find that it is no more than a collection of what earlier writers had said on the subject.

It is for that reason that when I was asked to write the foreword for this book, I insisted on being given a pre-publication copy of the book. I wanted 'to see' what it is like, even if I don't read the book from cover to cover.

Yes, I received it, browsed through it, read portions of it. That is to be fair to the book. To be fair to the author, since I do not know her personally, I have also asked for her curriculum vitae which I have also received.

Now, I can say with confidence that Dr Wan Noraini Mohd Salim is one of those *Shari'ah* academicians who is changing the landscape of Islamic books and answering my complaint. The doyen among them, from a local university, to me, is Professor Mohammad Hashim Kamali, who also hails from the International Islamic University Malaysia. He has been aptly described as 'the most-read author on Islam in English', an epitaph that I fully concur. It is his writing that had started changing the landscape of Islamic books especially in the way he analyses the issues, looks for authorities and analyses them in minute details, applies the principles extracted therefrom and explains his views with cogent and valid reasons that are difficult to refute. That is the mark of his great scholarship.

I am happy to say that I have myself written a few forewords for books written by academia from International Islamic University Malaysia. I must say that I find the satisfying characteristics that I look for. Whether they realize it or not, they form a new group of contemporary writers who give a new dimension to books on *Shari'ah*.

This book is written in English which I have described as 'the language of modern *mu'amalat*' and also the language that is globalizing the *Shari'ah* both in respect of its development and acceptance. I once joked at a Syariah Advisory Council Meeting that if Imam Shafie were to come back into this world he might have to re-learn modern *mu'amalat*, may be partly in English! I am very sure that it will reach more readers than if it were written in any other language.

Like the new generation of *Shari'ah* scholars in Malaysia who are proving to be more and more relevant to contemporary issues, Dr. Wan Noraini has the advantage of both education in *Shari'ah* and Law, in English and Arabic (as well as Malay) and exposed to the Western-type of analytical education beside the style of writing. All these are evidenced in the book which sourced from the Qur'an, *Hadiths*, opinions of traditional *ulamas* as well as from Acts of Parliament and judgments of the civil courts. That enriches the discussion as well as the style of writing. The language is simple and straightforward, without even a hint of Arabic-English that we sometimes find in such books.

Browsing through the book, I realise how useful this and similar books of this generation will be to law students and the legal fraternity. I remember, when I was a law student in the 1960's there were not more than three text books on Islamic law in English in the library, and all were from India. It was the same in the 70's and 80's when I was a legal and judicial officer. The vacuum has now been filled up by this 'new generation' of authors. I dare say that they will have more 'students' (readers) than the Tok Gurus in the *pondoks*, including non-Muslims.

I hope I have settled once and for all, through the judgment of the Federal Court in *Latifah Bte Mat Zin v. Rosmawati Binti Sharibun & Anor* (2007) 5 CLJ 253, the issue regarding the respective jurisdictions of the Civil and Shari'ah Court in the distribution of estates of Muslims: The Syariah Court determines the inheritance, the beneficiaries and their respective shares as evidenced by the *Sijil Faraid*, and the Civil Court gives effect to it by making the order of distribution in accordance with the *Sijil Faraid*.

However, in my experience as a High Court Judge, I saw a weakness in the implementation, not the system. The Civil Court accepts the *Sijil Faraid* without question, rightly so since the matter to be determined therein is within the jurisdiction of the Syariah Court and the Syariah Court Judges are presumed to be knowledgeable in the Islamic law of inheritance and are always right. That may not be so. What is more important is the ascertainment of facts. Just to mention one case that I came across, a non-Muslim lawyer one day appeared before me with an application for a vesting order by his client, a Muslim, of a piece of land. From the affidavit of the applicant prepared by the lawyer and the *Sijil Faraid* issued by the Syariah Court, I noticed that the applicant was the fifth generation of the registered proprietor. The family tree showed that at every level, there was only one surviving male beneficiary right down to the applicant. The only evidence to support it was the affidavit of the applicant himself. I found it hard to believe and rejected the application and told the lawyer to come back with more convincing evidence. The case did not come back again.

Clearly what happened there was that, the lawyer relied on the applicant and the Syariah Court Judge, in turn, relied on the statement of facts provided by the lawyer and issued the *Sijil Faraid*. What is important is that an inquiry should be held by the Syariah Court to determine the beneficiaries before the *Sijil Faraid* is issued. I am quite sure that that is not an isolated case.

This book is aptly described as a practical guide to the laws of *faraid*. It is not a book that one can read at leisure unless one is only interested to know the principles. It is a must for students of *faraid*, for Syariah Court Judges, lawyers and Civil Court Judges too.

I congratulate the author and the publisher and wish the book a success.

Tun Abdul Hamid Mohamad
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21 June 2012

LIST OF ABBREVIATIONS

| | | |
|-------------|---|--------|
| article | - | art. |
| articles | - | arts. |
| order | - | O. |
| page | - | p. |
| pages | - | pp. |
| paragraph | - | para. |
| rule | - | r. |
| rules | - | rr. |
| schedule | - | sch. |
| schedules | - | schs. |
| section | - | s. |
| sections | - | ss. |
| sub-section | - | sub-s. |

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Siti binti Yatim v. Mohamed Nor bin Bujali [1928] 1 LNS 30 45
Syed Ibrahim bin Umar al Sagoff v. AG [1947] 1 LNS 102 27

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INTRODUCTION

Wealth is an important resource in human's worldly life. It is a symbol that reflects the status of a person in society. It is also a medium that can transform a person's life from rags to riches and the humble to the arrogant. It may affect a family by uniting or shattering it. A son, in pursuit of wealth, may take to killing his father; a businessman, to stay on top, may attempt to kill off a rival; one may even risk his life in order to achieve satisfaction and fulfill worldly desires through illegal means. On the other hand, wealth is undoubtedly beneficial to mankind. Through wealth, we can better serve our religion and nation, help others, educate our children, provide our families with better food, clothing, shelter and transportation, and even care for them after death. Wealth, however, cannot determine a person's status in the eyes of Allah (s.w.t) and does not guarantee his place in paradise. It is something that he cannot take to the grave. Everything he leaves behind will then be part of his estate, to be inherited by his heirs according to the law of distribution determined by the Lawgiver.

There are rules and principles governing the administration and distribution of a Muslim's estate upon his death that are based on specific divine sources. The sources also reveal specific persons who are entitled to the estate of the deceased with specific and non-specific portions. It is therefore necessary to stress and emphasise that knowledge of the basic rules and principles of the distribution of estate is very important, as it can avoid disputes and hostility among family members. It can also avoid misappropriation of property and guarantee that the right persons get what is rightfully theirs.

It is, however, beneficial and significant to start with the historical background of the law of succession in Islam, to enable a better understanding of the rules and principles in the administration and distribution of a Muslim's estate upon his death.