

PROBLEM TO PETITION RIGHTS TO ISLAMIC INHERITANCE – PRACTICAL SOLUTION FOUND ELSEWHERE THAN THE LEGAL SYSTEM OF MALAYSIA

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Dampen by their failure to completely replace all Islamic Laws in the Malay States by the English Common Laws, the British vested more authority on the Civil courts to handle inheritance cases and wills, thus stripping the *Syariah* courts of their authority to distribute Islamic inheritance. The current legal system of Malaysia is laced with British influences that have caused many conflicting constitutional issues. The current legal system can neither accommodate a smooth and fluent administration and distribution of Islamic inheritance nor can it allow for a single *Syariah*-compliant system to exist. Muslims will continue to endure spending lots of money and time on the process flows of the inheritance unless the legal system is free of all British influences. This predicament is a problem that is seriously in need of a practical solution that lies in venues other than the legal system, one of which is the use of network flow model which is researched on by this current on-going study.

Keywords: Authority - Constitutional issues - Islamic law - network flow model – *Syariah*-compliant

MASALAH UNTUK MENUNTUT HAK KE ATAS HARTA PUSAKA ISLAM – PENDEKATAN TERBAIK TERLETAK DI LUAR SISTEM PERUNDANGAN MALAYSIA

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Kekecewaan dalam usaha untuk menggantikan keseluruhan Undang-Undang Islam di Tanah Melayu dengan British Common Laws telah menyebabkan British menambahkan kuasa ke atas Mahkamah Sivil untuk menguruskan kes-kes harta pusaka dan wasiat dan melenyapkan hak Mahkamah *Syariah* untuk membahagi harta sehingga ke hari ini. Sistem perundangan masa kini mewarisi pengaruh British yang telah menyebabkan pertembungan antara undang-undang. Sistem perundangan semasa dan terkini tidak mampu untuk mengendalikan pengurusan dan pembahagian harta pusaka secara licin dan tidak juga berkuasa mewujudkan satu sistem berteraskan *Syariah* untuk semua jenis harta pusaka. Sekiranya perkara ini tidak diselesaikan, selagi itulah orang Islam akan menanggung kos yang tinggi dalam bentuk masa dan wang. Masalah ini memerlukan satu penyelesaian yang lebih praktikal yang berada di luar daripada dari sistem perundangan, seperti penggunaan “network flow model” yang sedang dikaji peggunaannya oleh satu kumpulan penyelidik.

Kata-kunci: Kuasa – Isu-isu perlembagaan – Undang-undang Islam, “network flow model” – Berlandaskan syariah

1. INTRODUCTION

Achieving sovereignty from colonization does not guarantee a country freedom from colonial influences, thus it is normal to assume that traces of influences from the colonial powers can be found in the system of any country that has undergone colonization [1]. In particular, when the Federation of Malaya was formed at the end of the 500-year period under colonization for the Malay States, the Malay Rulers accepted the provisions of the Reid Commission. The commission was responsible for the first draft of the federal constitution of Malaya that provided for i) the establishment of a strong central government, ii) a Head of the State to be chosen from among the Malay Rulers, iii) the position and prestige of the Malay Rulers to be safeguarded, iv) a common nationality to be set up for the federation, and v) the special position of the Malays and the genuine interests of the other communities to be preserved [2].

Although all the colonial powers [Portuguese, Dutch, Japan and British] left traces of influence on the legal system of Malaysia, the greatest impact came from the British. British influences were implanted deep into the legal system causing some constitutions to intertwine with each other. Consequently, Muslims encountered difficulty issues involving time and money to manage Islamic inheritance in Malaysia [3-8].

It would normally take a relative approximately three to ten years to petition rights to inheritance, but there were difficult cases that took approximately twenty years to settle [9]. Quite a number of constitutional amendments made over the years have helped to ease the difficulties Muslims faced in claiming rights to inheritance. In particular, the latest addition to the Constitution in the form of the Small Estates (Distribution)(Amendment) Act 2008 have caused migration of cases fitting the definition of Small Estates to the Land Offices, thus majority of inheritance cases involve Small Estates [10].

There are at present four institutions [Amanah Raya Berhad (ARB), Civil High courts, Office of Lands and Mines (Land Offices) and *Syariah* courts] with the authority to handle management of inheritance in Malaysia. Unfortunately, the *Syariah* courts do not have the authority to distribute inheritance except for Simple Estates which are lesser in value than Small Estates [4, 7, 8]. Therefore, the presence of inter-twining constitutional issues within the legal system has rendered it impossible to set up a single *Syariah*-compliant management system for all types of inheritance to exist in the country.

The above discussions suggest there is no fluency in the management and distribution of Islamic inheritance for the authorities as well as the Muslims in general. This predicament has to be addressed; the current on-going study wishes to highlight possibility of solving the problem using a network flow model that will guide the Muslims smoothly through the petition process while at the same time minimizing their difficulties. The literature review section of this paper provides the foundation and underlying principles upon which the significance and objectives of the study to develop alternative solutions to issues and problems associated with the administration and distribution of Islamic inheritance in Malaysia are built. This will be followed by a discussion on the possible use of network flow (NF) model to solve this problem. The paper will conclude by highlighting some recommendations that would be necessary to be put in place in order to smoothen up the current management and distribution process for Islamic inheritance.

2. LITERATURE REVIEW

This paper wishes to highlight the existence of an increasing trend in volumes of unclaimed inheritance over the years [11-13]. The accumulation of unclaimed inheritance is a serious problem and needs to be addressed in order to lift up the predicament it has caused

Muslims to incur over the years. This section will present the rationale of the above study on the need to find an alternative practical and tangible solution in a different arena than the constitution from the following perspectives: i) tracing the historical path of the impact of the British colonization on the legal system, ii) a look at the current legal system of Malaysia, and iii) the need for Muslims to abide by *Syariah*-compliant obligations.

2.1. TRACING THE HISTORICAL PATH OF THE IMPACT OF THE BRITISH COLONIZATION ON THE LEGAL SYSTEM

It is not easy for a country that has gained its sovereignty from colonization to shake off the influences of the colonial powers; it will be bound to some extent to the structural developments that were implanted into the system by the colonial powers [1]. Figure 1 describes the impact of colonization by the Portuguese, Dutch, British and Japan on the legal system of Malaysia. As can be seen, the greatest impact came from the British [14].

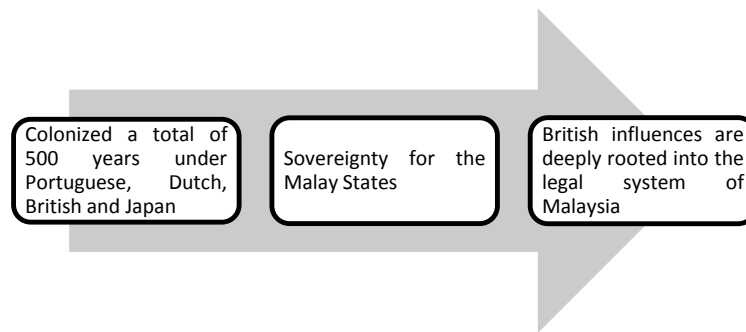


Figure 1: Effects of colonization on the legal system of Malaysia

These influences have also scarred the management and distribution processes of Islamic inheritance in Malaysia. Many estates have gone unclaimed over the years; an estimated RM72 million of inheritance has been reported as “*waiting to be claimed*” as of February 28 2010 [11-13]. Number of unclaimed inheritance cases was also reported to have been on the rise beginning 2005 onwards [15]. In addition, Muslims were found to be unaware of procedures that would guide them through the petition process of an Islamic inheritance without too much hassle, thus they endured processes that were not only lengthy but also costly [4, 7-9, 16, 17]. In particular, some of them could not figure out what to do first and where to go to process the claims, thus a Muslim may be seen trying to do a formal search of the database or request a copy of a death certificate at the National Registration Department one minute and the next minute he was off to the Civil High Court or sitting in front of a Commissioner for Oaths trying to produce a Form of Declaration in place of an untraceable death certificate [8, 18].

This phenomenon has been left unattended for so long, thus this paper stresses the importance of addressing the dilemma faced by Muslims to claim inheritance. However, this paper wishes to assert that the legal system would not be the best place to look for a practical and tangible solution to the current situation. This assertion will be elaborated further in the following sections on issues that took place in the era up to the formation of the Federation of Malaya. The discussion is hoped will help the readers to understand the magnitude of the British influence on the legal system, in particular with respect to the Islamic inheritance management and distribution system up to today. The era before independence will be segmented into three periods, namely pre-colonization period, colonization period and the post-colonization period.

2.1.1.Pre-Colonization Period

Figure 2 pictorially represent the events that led to the formation of the formation of the Malay-Muslim Laws that ruled the land before the arrival of the British.

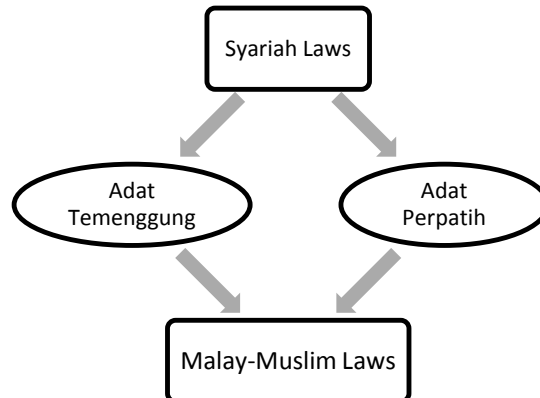


Figure 2: Formation of the Malay-Muslim Laws

Historical texts from this era like *Laws of Melaka*, *Pahang Digest*, *Laws of Kedah*, 99 *Perak Laws* and *Laws of Sungai Ujung* testified to the existence of three customary laws, namely *Adat Perpatih*, *Adat Temenggung* and interpretations based on the Islamic teachings [7, 14]. Marican [19] wrote that both *Adat Perpatih* and *Adat Temenggung* were property laws; *Adat Perpatih* was practiced in Negeri Sembilan while *Adat Temenggung* “in decay” was practised elsewhere in the Malay States. *Adat Perpatih* which originated from a Minangkabau tribe in Sumatra defined that property will be passed down through the matriarchal line [women were given higher priority] [19, 20]. It also provided that a female member of the family be vested with a piece of *kampung* land, a piece of *sawah* land and a house so that she was not deprived [2]. *Adat Temenggung* was on the contrary a patriarchal tradition from Palembang that consisted of traces of Hindu-Buddhist elements [19].

When Islam came to the Malay States, Islamization of the customary laws took place when *Syariah* was introduced to the Malays and this process continued until the arrival of the British [14, 21]. This process impacted the *Adat Temenggung* more than the *Adat Perpatih*; the patrilineal nature of the former made it easier for it to amalgamate with the Islamic laws to form the Malay-Muslim Laws that ruled the Malay States before the British era [2, 20].

When the British came, they introduced a secular system that separated religion from the state, and then gradually imposed the common laws in place of these Malay-Muslim laws [2]. Extensive modifications and distortions were made to the principles of the *Syariah*, thus not much of the customary laws survived except for *Adat Perpatih* in Negeri Sembilan [14, 19] and Masjid Tanah in Malacca [20]. Kamali [22] pointed out that this *adat* contradicted the Islamic laws with regards to marriage, divorce and inheritance. However, the provisions of this customary law was included in the Small Estates (Distribution) Act 1955 [19]. This paper would like to acknowledge that this provision has caused legacy problems in Negeri Sembilan up to today but this issue will not be discussed in this paper.

2.1.2.Colonization Period

The Colonization period of the Malay states witnessed British efforts to replace the Islamic Laws in the Straits Settlements, the Federated and Un-Federated Malay States, the Malayan Union and the Federation of Malaya. Penang, Malacca and Singapore formed the Straits Settlements. Four independent Malay States [Perak, Selangor, Pahang and Negeri

Sembilan] and five Siamese dependencies [Johor, Kelantan, Terengganu, Kedah and Perlis] formed the Federated Malay States and the Un-federated Malay States, respectively [14]. Table 1 displays the changes that took place in these Malay States with regards to the management and distribution of Islamic inheritance.

Table 1: Changes to the Islamic Inheritance Management and Distribution before the Formation of the Malayan Union

Straits Settlements	Federated Malay States and Un-Federated Malay States
<p>Stage 1 - <i>The First Charter of Justice introduce English laws as administered in England in 1807 to Penang while the Second Charter of Justice introduced English Law as administered in England in 1826 into all three settlements [2]. Inheritance was distributed using the Distribution Act, a part of the First Charter of Justice.</i></p>	<p>Residential system was introduced into system in return for British protection of the Malay States while a British Advisor was accepted into the administrative functions of these states in return for British protection of the Malay States.</p>
<p>Stage 2 - <i>Introduction of the Ordinance of the Islamic Law 1880 (such as the Mohamedan Law Ordinance No 5/1880) thus Muslims were not subjected to the previous Distribution Act.</i></p>	<p>Gradual imposition of the British Laws were done using the Civil Law Enactment No. 3 in Federated Malay States and the Civil Law Ordinance in the un-Federated Malay States, followed later on by the Civil Law Ordinance that combined both laws. led to the marginalization of the functions of the <i>Syariah</i> courts.</p>
<p>Stage 3 - <i>Introduction of the Ordinance of the Islamic Law 1924 which provided that Islamic inheritance will be administered according to the Islamic Law except when it contracted the local customary laws already in place since January 1924.</i></p>	<p>Gradual imposition of the British Laws led to the marginalization of the functions of the <i>Syariah</i> courts, that limited the jurisdiction of the <i>Syariah</i> courts and vested more authority on the Civil courts to handle Islamic inheritance cases and wills.</p>

[3, 14, 23]

The British were so adamant to replace the *Faraid* Laws with the Distribution Acts. As can be seen in the Stage 2, the British tried to replace the *Faraid* Laws by introducing English Laws on inheritance such as the *Mohamedan Law Ordinance No 5/1880* through the judicial system. The Muslims did not take kindly to this; they raised very strong objections to the implementation of this Ordinance. It was finally abolished in 1923, and not only were the *Faraid* Laws reinstated in Stage 3, the British also stopped trying to replace the Islamic inheritance laws [3, 23].

Although the *Faraid* Laws survived through the experience in the Straits Settlements, Column 2 of Table 1 indicate that gradual imposition of the British Laws took place after the appointment of a Resident or a British Advisor to advice or administrative issues in the Federated and Un-Federated States, respectively. This resulted in the marginalization of the functions of the *Syariah* courts that limited their jurisdiction but vested more authority on the Civil courts to handle cases involving Islamic inheritance and wills [6, 14, 23]. This move indicated that the British were more cautious and more shrewd in their efforts to replace the Islamic Laws following the experience in the Straits Settlements, thus vesting more authority on the Civil courts has caused Muslims to endure lengthy time-consuming and costly processes before they are eligible to inherit their rights to any inheritance until today.

Malayan Union was formed after the Japanese surrendered in 1945. All states except Singapore were members. The Malays objected to the contents of the Mac-Michael's treaties which reduced the status of the Malay states to that of a colony, limited the legislative power of the Malay Rulers to only Islam and deprived the Malays of their special position and

privileges, thus Malayan Union was abolished after two years [2]. Efforts to impose English Laws continued, however the bad experience in the Straits Settlements prevented the British from interfering into personal matters and the Muslims were allowed to practice the *Faraid* Laws in the Federated and Un-Federated States [3].

2.1.3. Post-Colonization Period

The Post-Colonization period began with the formation of the Federation of Malaya. Sovereignty for the Malay States from the British meant that they had to agree to the basic principles agreed upon during the London Conference in 1956, in the form of a commission called the Reid Commission; this Commission was responsible for the drafting of the first federal constitution of Malaya with provisions as described in Table 2 [2].

Table 2: Basic Principles of Independence

PROVISIONS OF THE FEDERAL CONSTITUTION OF MALAYA	
1	Establish a strong central government
2	A Head of State for the Federation to be elected from among the Malay Rulers
3	Malay Rulers whose position and prestige are safeguarded
4	A common nationality for the whole federation
5	Preserve the special position of the Malays and the genuine interests of the other communities

Efforts to impose English Laws still took place using the Civil Law Ordinance 1956, but the British again did not interfere into personal matters, and *Faraid* Laws were there to stay and to be practiced by the Muslims [3]. This paper wishes to emphasize again those previous efforts by the British to vest more authority to Civil courts in matters related to inheritance and wills by the British have made it difficult for Muslims to manage and distribute inheritance according to *Faraid* Laws until today.

2.2. A LOOK AT THE CURRENT LEGAL SYSTEM OF MALAYSIA

The Federation of Malaya gained autonomy to rule on its own in 1957 but the system was by no means free of British influences. The legal system inherited traces of British influences which are still present in the legal system of Malaysia today. The following sections will take a closer look at the effects of the British influence on the legal system from the following perspectives, i) the dual system of courts – their impacts on the management of Islamic inheritance, ii) laws affecting the management of Islamic inheritance, iii) restrictions of Act 505, and iv) deficiencies in the administration of Islamic Laws.

2.2.1. The Dual System of courts – Their Impacts on the Management of Islamic inheritance

More than half a decade has passed since independence. Muslims' continuous objections against efforts by the British to replace Islamic Inheritance Laws with British Common Laws during the colonization period saved the *Faraid* Laws from extinction [3, 23]. This achievement is clearly spelled out in section 25 of the Civil Law Act 1956 "*Nothing in this Part shall affect the disposal of any property according to Muslim law or, in Sabah and Sarawak, native law and custom*"[24]. Despite this success, this paper wishes to highlight that part and parcel of the difficulties Muslims are facing today to petition rights to inheritance are due to the shrewdness of the British in the colonization period when they marginalized the functions of the *Syariah* courts and vested more power on the Civil courts in matters relating to inheritance and wills.

A direct consequence of this shrewdness is the two court systems upon which Malaysia functions today, namely Civil courts and *Syariah* courts. The management and distribution of Islamic inheritance used to be fully handled by the *Syariah* courts in the Pre-colonization period but this responsibility is now shared by many institutions, as described earlier on [6, 25]. Article 4(e)(i) of the Federal List [as will be discussed further in section 3.2] clearly stipulates that testate and intestate cases fall within the jurisdiction of both Civil High courts and *Syariah* courts, but probate and letters of administration fall entirely under the jurisdiction of the Civil High courts. This provision is also included in the *Probate and Letter of Administration Act 1959 (Act 97)*[26]. Both the Article and the Act imply that there will be some inheritance cases that have to go through both courts [4]. Furthermore, observe the provision of Section 50 of Act 505,

“If in the course of any proceedings relating to the administration and distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or a Syariah Subordinate Court, ..., the Syariah Court may on the request of such court or authority, or on the application of any person claiming to be a beneficiary or his representative and on payment by him 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 to the shares to which they are respectively entitled” [27].

This Act has provided the Civil courts with the jurisdiction to deal with the procedural aspects of the administration of Muslim estates [3, 6, 7, 28-32]. A more in depth discussion will be done in section 3.3. Being unaware of this limitation in the civil procedures of the *Syariah* courts has caused Muslims to endure hefty cost in terms of money and time to petition claims to inheritance over the years [6, 33].

Parliament has provided that the Distribution Act 1958, the Wills Act 1959 and the Inheritance (Family Provision) Act 1971 are statutes on succession, testate and intestate that cannot be applied to Muslims. However, no amendments were made to this effect to the Probate and Administration Act 1959 and the Small Estates (Distribution) Act 1955, thus they are applicable to all persons including Muslims [6]. The Muslims would be in a better position if all matters on succession, testate and intestate are decided on by only the *Syariah* courts, thus this paper wishes to emphasize the necessity for Parliament to exclude the Muslims from the jurisdiction of these Acts.

With respect to the management and distribution of Small Estates, Muslims have to understand the three main criteria to describe Small Estates, as described in the following Figure 4 [4, 10, 31, 34, 35].

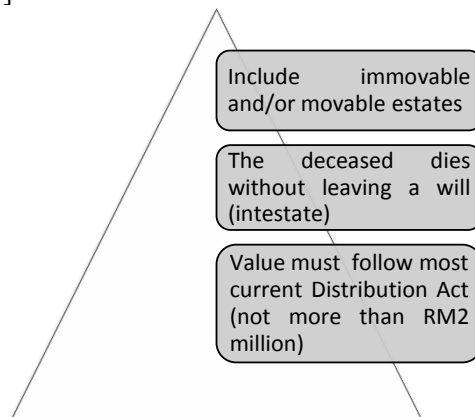


Figure 3: Criteria of Small Estates

Unaware of these criteria, Muslims were found doing either one, two or all of these three things at the Land Offices, which are i) petitioning rights to movable assets only, ii) petitioning rights to assets left behind by a person who wrote a will, and iii) petition rights to inheritance worth more than RM2 million [7]. Cases with the same value of Small Estates have ended up as cases at High courts for various reasons [19]. In particular, if a person dies testate living assets with the value of Small Estates, the case becomes a Civil High Court case and the Civil High Court will appoint an executor or an administrator to distribute the inheritance based on the suggestions of the *Syariah* Court [6]. On the same note, sometimes a person who died testate can be classified to have died intestate under the following circumstances, namely i) an executor or a trustee is not named in the will, or ii) the named executor has pre-deceased him [19].

The Small Estates (Distribution) Act 1955 defined how inheritance in the form of Small Estates of value not exceeding RM10 000 can best be administered. It underwent a few changes since its inception. Amended Acts caused the ceiling value to increase to a) RM25 000 in 1974 [as detailed in the Federal Government Gazette No. PN. PJ2], b) RM50 000 in 1977 [using Act 98], RM300 000 in 1982 [using Act A533], and d) RM600 000 in 1989 [using Act A702]. This final ceiling value was in use until a motion [Act A1331] was tabled in Parliament to increase the value to RM2 million in 2007 [7, 35-37]. However, this Act, also known as the Small Estates Distribution (Amendment) Act 2008 came into effect only on September 1 2009 [10, 35].

This section wishes to draw the readers' attention to the short time lapse between the amendments up to 1989. On the contrary, there was a lapse of 20 years between the last two amendments. Although the last bill was passed in 2007, it took effect only on September 1 2009 [35]. Constitutional amendments can help improve the inheritance distribution process; however history has shown that it would take a long time to pass a constitutional amendment and it would take some more extra time to get it implemented. Therefore, constitutional amendment is not the most practical solution to the inheritance distribution problem at present.

2.2.2.Laws Affecting the Management of Islamic Inheritance

The deep-rooted British influences in the legal system include laws that affect the management and distribution of Islamic inheritance. As a result, Malaysian Muslims are facing constitutional issues related to Islamic inheritance distribution. Table 3 displays parts of the provisions of four articles to be discussed in this section.

Table 3: Particular Articles affecting Management of Islamic Inheritance

Provisions of Particular Articles Affecting Management of Islamic Inheritance [38]

List II - State List [Article 95B (1)(a)] Article 74(2)	<i>"...including the Islamic law relating to succession, testate and intestate, ..."</i>
	<i>"... the Legislature of a State may make laws with respect to any of the matters enumerated in the State List ..."</i>
Article 121(1A)	<i>"The courts referred to in Clause (1) [High courts and inferior courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts"</i>
Article 75	<i>"If any State law is inconsistent with a federal law, the federal law shall prevail and the State law, shall, to the extent of the inconsistency, be void."</i>

The discussion begins by appreciating the complementary nature of List II of the State List [Article 95B (1)(a)] and Article 74(2). List II has defined Islamic laws on succession, testate and intestate as State Laws [3, 28, 38-40]. However, this list on its own would not be able to confer jurisdiction on *Syariah* courts [6], hence this deficiency is taken care of by the provisions of Article 74. In particular, if this complementary nature is properly utilized by the Legislature of a State to confer the *Syariah* courts with necessary jurisdiction for them to issue any judgment, then conflicts will not arise [3, 6, 19, 32].

Previous discussions construct the basis to assume that there are many intertwining constitutional issues within the legal system. Efforts to improve the situation included constitutional amendments. For example, Parliamentary debates on this matter set out to prevent Civil courts from overruling *Syariah* courts' decision or providing other decisions contrary to that made by *Syariah* courts, and to uplift and protect the integrity of the *Syariah* courts as a court that apply Islamic laws [6]. This led to the inclusion of Clause 121 (1A) to the Federal Constitution in 1988.

Syariah Court Judge (SCJ) Harun Hashim in *Mohamed Habibullah bin Mahmaood v Faridah bte Dato Talib* stressed that "... article 121 (1A) is a provision to prevent conflicting jurisdictions between the Civil courts and the *Syariah* Court" [6]. Prior to 1988, many decisions made by the *Syariah* courts were overturned by the civil courts [3, 6, 19, 32, 40]. It is to be noted that the inclusion of Article 121 (1A) to the Constitution did not guarantee total non-interference from the civil courts. As it turned out, there were some distribution cases handled by the Civil courts instead of the *Syariah* courts [19].

There were judgments made on some civil cases that highlighted the incapability of the *Syariah* courts to issue orders within their jurisdiction because there were no provisions in the State Laws that would levy the power to do so [3, 40]. In situations like this, this paper wishes to bring to attention the following prescription given by SCJ Harun Hashim as cited in Marican [29] for *Mohamed Habibullah bin Mahmaood v Faridah bte Dato Talib* case:

"I am therefore of the opinion that where there was a challenge to jurisdiction (as here) the correct approach is to first see whether the Syariah Court has jurisdiction, and not whether the State Legislature has power to enact the law conferring jurisdiction on the Syariah court. The validity of a State law can only be questioned in a separate proceeding under Article 4(3) of the Federal Constitution."

It is also important to understand the provision of Article 75 that in the event of any inconsistencies between the State and Federal Laws, the Federal Law shall prevail and the State law will be declared void [38]. However, it would be of great advantage to the Muslims [in terms of time and money] if the State Laws could draft and enact separate laws on probate and administration for the *Syariah* courts [3, 5]. It would also be to the advantage of the Muslims if the judges of both courts were to promote the general legislative intent behind any provision in order to save time and cost on unnecessary proceedings, as should have been done in the handling of the *Jumaaton vs Raja Hizaruddin* case [3, 6, 41].

Act 505 also directly affects the management of Islamic inheritance however it will not be discussed in this section. This paper feels it is more appropriate to discuss this act in the following section 3.3 on the Restrictions of Act 505.

2.2.3. Restrictions of Act 505

Section 50 of Act 505 provides that any court or authority handling proceedings relating to management of Islamic inheritance may request the *Syariah* courts to "*certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and to the shares to which they are respectively entitled*". Some restrictions of this act are given in the Figure 5 [3, 4, 19, 42].

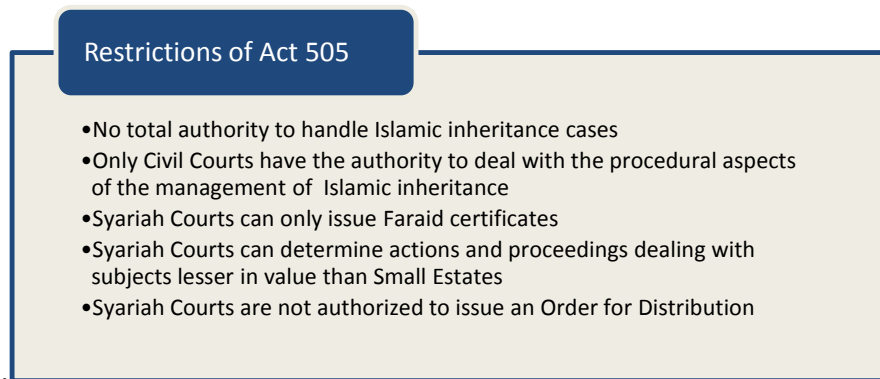


Figure 4: Restrictions of Act 505

These restrictions have caused difficulties in the management of Islamic inheritance. This section will not discuss the first and the second restrictions; they have already been elaborated under Section 3.1. The third and fifth restrictions limit the jurisdiction of the *Syariah* courts to only issuing *Faraid* certificates and not are able to distribute inheritance. Due to not knowing these factors, some Muslims were found trying to register ownership over items listed in the Faraid Certificates [7].

This section wishes to point out that it is not necessary for a Muslim claiming rights to Small Estates to apply for *Faraid* certificates at the *Syariah* courts because the Ministrat Functions Act 1969 has vested the deputy managers at the Land Offices with the authority to act as second class magistrates who can hear and decide on cases involving Small Estates according to the provisions of the Small Estates (Distribution) Act 1955 [7]. These managers need only use the *e-Faraid* software that is embedded into the *e-Tapp* system at the Land Offices since 1999 [43]. Ignorant of this fact has caused Muslims to waste time and money on processes that were redundant such as applying *Faraid* certificates at the *Syariah* courts for inheritance cases involving Small Estates [4, 7].

It is also important to note that *Faraid* certificates do not provide the person obtaining them the authority to distribute the inheritance; it is only the person who obtains the Letter of Administration from the Civil High courts that has the power to do that [4, 19, 31]. When *Syariah* courts do not have the authority to issue an Order for Distribution, Muslims can now submit petitions to claim inheritance at only three out of four institutions [Amanah Raya Berhad, Office of Lands and Mines (Land Office), Civil High courts and *Syariah* courts] which were originally set up to handle management of Islamic inheritance [8, 44]. Furthermore, the civil jurisdiction of the *Syariah* courts only entitles them to hear and determine actions and proceedings dealing with subject matters with a value not exceeding RM50000 [45], which is less than the value of Small Estates.

2.2.4.No uniformity and Co-ordination between Islamic Law Administration

Although there are three independent authorities, namely Majlis Agama Islam or its variations, the Mufti and *Syariah* courts to administer a separate legislation on various aspects of the Islamic Laws in all states except the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, the law and its administration are not be uniform in every state due their nature as State Laws [2, 39, 42]. Since State laws are different for all states and the provisions of Article 74(2) entitles the Legislature of any State to make laws involving items

in the State List, there are too many statutes and laws present that can be applied to the flow processes, leading to increase in time spent and expenses incurred by clients to process a claim [8]. There is also no common enactment of *wasiat* and no common statute for *Faraid* Laws for all states and this has led to the formation of too many *Fiqh* opinions over division of Islamic inheritance [8, 46].

Bodies like the National Council Efforts tried to co-ordinate the administration of Islamic law and affairs of the states and they encountered problems of implementation; they were merely advisory bodies and their decisions were not binding on the states [2]. Consequently, this non-uniformity in the administration of the *Syariah* courts in all states have confined the lodging of petition to claim inheritance within the state in which most of the assets are located [30, 31]. It is really troublesome and costly for a Muslim when he has to claim an inheritance that is located outside the boundaries of the state within which he resides.

2.3. THE NEED FOR MUSLIMS TO ABIDE BY SYARIAH-COMPLIANT OBLIGATIONS

Islam stresses the importance of complying with *Syariah* on matters related to the management of Islamic inheritance; the processes begin right after the death of a Muslim. As such, Muslims would like to be guaranteed a *Syariah*-compliant Islamic administration and distribution process of Islamic inheritance. *Syariah* stipulates that there are four claims obligatory of a relative to fulfill in order to achieve *Syariah*-compliance and they are i) settlement of funeral expenses i) imbursement of debts owed by the deceased, iii) execution of a valid will, and iv) distribution of estates among inheritors [47-50].

These four claims are considered fulfilled when a relative goes through a complete three-phase process: a pre-submission phase, submission phase and distribution phase, as shown in the following Figure 5.

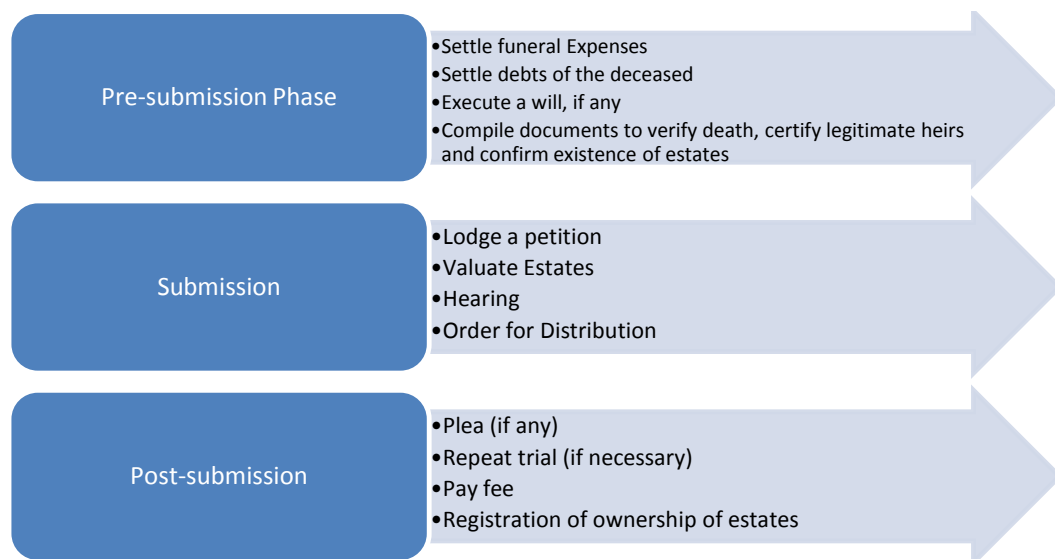


Figure 5: Three-phase Claim Process

All institutions involved with the management and distribution of Islamic inheritance adhere to the same principles and processes. Pre-submission phase requires the clients to

compile the required documents for submission along with a claim form, either to Land Offices, ARB or High Courts [9]. In particular, distribution of Small Estates will only take place once the claim form (Form A or Form P) along with all the required certified documents are submitted for processing at the Land Office [31, 51].

Syariah-compliance necessitates the breakdown of the pre-submission phase further into two sub-phases. It requires the transfer of wealth upon death from a deceased person to living heirs in the form of money, land, or other rights be done according to *Syariah*. *Syariah* rules that at least two thirds of the estate can be inherited by various categories of relatives and permits one third to be bequeath in a will [3, 48, 50, 52, 53]; this transfer takes place in the first sub-phase. This transfer is legitimate once the first three compulsory obligations to the dead are fulfilled [8, 31, 47, 48, 53-56].

The second sub-phase involves activities where clients validate three types of document: documents to determine the type of death of the deceased, documents to certify an existing list of heirs and sharers and documents to confirm the existence of estates [7, 18, 30]. This phase conforms to the principles governing the management and distribution of inheritance according to Islam, namely, *al-muwarriith*, *al-warith*, and *al-mauruth*, respectively [7, 49, 50].

These two sub-phases contain processes that seemed easy to follow, however they have proven to be difficult to be handled by majority of Muslims. Having no one specific *Syariah*-compliant flow process for all types of inheritance was indeed troublesome for majority of Muslims [5, 7, 8, 49]. They had trouble figuring out the most proper manner to lodge a petition to claim rights to inheritance [7, 8]. For example, when documents are missing and cannot be traced, copies of lost documents must be traced at different agencies and these processes take time [4, 7, 8, 18]. These situations have caused them lots of time and money before their claims are realized [7, 9, 18, 48].

When Muslims contract the services of ARB or lawyers to claim inheritance, they will endure paying hefty fees. With respect to Small Estates, ARB charges around two to three percent on the value of estates while lawyers polled by the New Straits Times charge between one and 1.5 percent on the value and not many are aware that it's cheaper to process a claim at the Land Offices [57]. Small Estates cases can be easily settled at the Land Office for a fee as low as RM10 and as high as 0.2% of the value of the estates [58]. Unfortunately, there are also some Muslims who do not know that appointment of a lawyer is necessary for High Civil court cases, but a lawyer is not needed if the submission of claims are through ARB [7].

3. DISCUSSION

The previous section has provided the background study that necessitates finding an alternative and practical solution to the problem of lengthy and costly procedures to claim Islamic inheritance in Malaysia. Constitutional amendments have been shown to be a plausible but not effective solution to the problem. IT advancements like the *e-Syariah*, *e-Faraid* and e-Tapp have also produced a minimal effect on decreasing the number of backlogs in the administration and distribution of inheritance. Looking at the problem from a different angle, *Syariah*-compliance requirements have indicated that the administration and distribution of Islamic inheritance require a series of activities of which some can be performed sequentially with the other activities while others are performed in parallel. Therefore, by defining a network as a sequence of points or nodes linked together by paths, the Islamic inheritance management and distribution process flows can be described as a network flow (NF) model. As discussed in the previous section, backlogs in the management and distribution of Islamic inheritance most often occur in the pre-submission phase of the administration and distribution of Islamic inheritance [7, 8, 18].

An NF model divides a project into significant activities with estimated activity duration, using nodes and arrows. The longest path that contains activities with no slack time defines the critical path which will estimate any project duration, thus the major part of control in any NF model is the determination of the critical path; any delay in the activities on the critical path will delay the entire project [59, 60]. In the effort to optimize time and money in the management and distribution of Islamic inheritance, preliminary investigation of the NF patterns has helped to identify three assumptions needed for the critical path analysis: i) preserving accuracy and realisticity of Islamic inheritance data in Malaysia, ii) building correct assumptions to accommodate variability in data, and iii) efficiency to optimize time and cost [61].

This paper wishes to highlight that work on the NF model has opened new horizons on new ways of estimating activity durations to be used in critical path analysis. In particular, careful comparison study of the potentials of some prominent measures of variation and careful analysis of PERT and CPM have identified median absolute deviation (MAD) as the best alternative measure of dispersion to estimate the activity durations and a modified tool to estimate project durations [61]. It is hoped that by doing so, the issue of variability in the data and project control are catered for, thus providing for efficient optimization of time and money in the claim process.

4. CONCLUSIONS AND RECOMMENDATIONS

This paper has traced some British influences on the legal system of Malaysia with regards to the management and distribution of Islamic inheritance. These inherited influences have raised many conflicting constitutional issues, thus the current legal system can neither accommodate smooth and fluent administration and distribution of Islamic inheritance nor can it allow for a single *Syariah*-compliant system to exist [7, 8]. Muslims will continue to endure spending lots of money and time on the process flows of the inheritance unless the legal system can accommodate smooth flow processes of the Islamic inheritance. This paper wishes to emphasize that the efforts to be undertaken must include: i) resolving the conflicting issues within the legal system; ii) ensuring that the State confers enough laws to accommodate the civil procedures of the *Syariah* courts; iii) the State Laws are uniform in all states; iv) the Islamic Law of Administration is co-ordinate properly and v) the functions of the *Syariah* courts are expanded. The predicament Muslims faced and are facing in trying to petition claims to inheritance is a problem that is seriously in need of a practical solution. The above efforts may take time to be implemented in full, thus it would not be a practical solution to the predicament faced by Muslims at present. Therefore, this paper believes that the practical solution to the problem lies in other venues, one of which is the use of network flow model which is researched on by this current study.

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