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RESEARCH ARTICLE

POTENTIAL OF CREATING INHERITENCE COURT IN MALAYSIA: A LITERATURE REVIEW

Md Yazid Ahmad¹, Nurul Awatif Fasihah Abdul Halim¹, Ezad Azraai Jamsari², Mohd Hafiz Safia^{1,3}, Anwar Fakhri Omar¹ and Nor Adila Mohd Noor⁴

1. Research Centre for Sharia, Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia.
2. Research Centre for Arabic Language and Islamic Civilization, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia.
3. Institute of Islam Hadhari, Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia.
4. Academy of Contemporary Islamic Studies (ACIS), UiTM Terengganu, Sura Hujung, 23000 Dungun, Terengganu, Malaysia.

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Abstract

Jurisdiction conflict between the Shariah and Civil Courts which prolongs even after the existence of Article 121 (1A) gives a negative impact to the Shariah Court particularly in matters concerning inheritance property management and administration of Muslims. Implicitly, this situation can cause a surge of unclaimed properties to occur and disputes among heirs in seizing of the properties. From this onset, the objective of this article is to study and examine gaps in previous research works in relation to the potential of creating Inheritance Court in Malaysia. Methodology of this literature review employed a qualitative approach and the design of this study is based upon content analysis. Data gathering was made through document analysis and a method of data analysis was carried out descriptively. Findings of this review reveal that discussion on Inheritance Court in literatures is few in numbers and is limited to only suggestions of its establishment without a more detailed explanation. Hence, this study proposed a more comprehensive study in the context of the potential of creating Inheritance Court being realised and being able to contribute in confronting the occurring conflicts while directly solve the problems of Muslim inheritance in Malaysia.

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Introduction:-

The idea of creating or establishing Inheritance Court originated from issues in Muslim inheritance management which are conflicts of jurisdiction between the Civil Court and The Shariah Court which are up until now have yet to be resolved conclusively. Even though separation of powers between the two courts is clearly provisioned in Article 121 (1A) in the Federal Constitution, interference by the Civil Court into the Shariah Court jurisdiction still occurs whenever disputes between the two courts happen in matters concerning Muslim properties including inheritance (Md. Yazid 2021) such as in the cases of *Rosman Roslan vs Kassim Hj Arshad & Others [2005] 2 CLJ 669* and *Jumaaton & Raja Delila vs Raja Hizarudin [1998] 6 MLJ 556*. Some Civil Court judges tend to hear and decide cases involving Muslim properties including inheritance even though the Federal Constitution has allocated the

Corresponding Author:- Md Yazid Ahmad

Address:- Research Centre for Sharia, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia.

jurisdiction over such matters under the State's power through First Paragraph, List 2, List of States, The Ninth Table, Federal Constitution.

The question concerning 'jurisdiction' and 'power' has also been deliberated and concluded based on the case judgement of *Jumaaton & Raja Delila vs Raja Hizarudin*[1998] 6 MLJ 556 in the Federal Territory Shariah Appellate Court. The Court decided that the Shariah Court possesses no jurisdiction over the administration of Muslim inheritance properties as its specific provision is in List 1, Federal List, The Ninth Table, Federal Constitution which give the jurisdiction to the Civil Court and the Parliament to enact related acts.

Indirectly, this impacted contribution towards a rise in the value of frozen assets which is becoming more significant every year. In 2016, based on records from the Department of Land and Minerals Director-General (JKPTG) under the Inheritance Distribution Division (BPP), the total value of unclaimed inheritance amounted up to RM60 billions since Malaysia achieved independence (Ahmad et. al. 2019). Up to date, some RM70 billions in value of inheritance have not been resolved or claimed, majority of which are owned by *bumiputeras* (Utusan Malaysia, 8 November 2021).

Consequent to this, a question arises which is: is there an idea or proposal toward establishment of Inheritance Court or *Mahkamah Pusaka* in Malaysia to deal with this problem that arises? Preliminary studies found that previous studies have proposed, in order to solve this crisis, various suggestions from the legal and administrative mechanisms, be it strengthening the existing systems, standardizing the laws, fully empowering the Shariah Court, enacting Faraid Act, establishing Inheritance Court or intensifying informative talks to create awareness in the society on the importance of inheritance governance. Nevertheless, there have been no detailed or further study on the proposal toward establishment of Inheritance Court in Malaysia.

Also, another question arises which is: is there any effort to realise the mooted proposals and to what extent efforts have been made in tackling these lingering issues. Hence, the objective of this literature review is necessary to analyse works by previous researchers on the proposal to establish Inheritance Court in Malaysia and to what extent efforts have been made.

Methodology:-

This research on the potential of creating and establishing Inheritance Court employed a qualitative approach and the design of the study was based on content analysis. The method of data gathering through document analysis was done in-depth on literature materials such as journal articles, proceeding working papers, thesis, authoritative books and official portals on the worldwide websites related to the suggestion toward creating or establishing Inheritance Court in Malaysia and the extent of efforts on the proposal have been implemented. Through a data analysis technique, all obtained data were descriptively analysed in order to examine and refine results of written works concerning proposals toward establishment of Inheritance Court in Malaysia and the efforts done toward achieving it

Literature Review Analysis:-

Based on the literature review carried out, it was found that there are various proposals mooted in order to solve issues of Muslim inheritance property management. Among them are establishing Faraid Act, standardizing existing laws, giving full jurisdiction to the Syariah Court and establishing Inheritance Court. Nonetheless, they remain as proposals only based on risen problems and none of those proposals has been realised yet. In order to produce result of this review, the author has searched, examined and analysed a number of previous studies suitable for this research field. Hence, this literature review is divided into two sub-topics which are a proposal toward establishment of Inheritance Court in Malaysia and the concept of Inheritance Court establishment according to Islamic ruling

(a) Proposal Toward Creating Inheritance Court in Malaysia

According to Noor Huda (2008) in her research, among the improvement suggestions for problems existing in management and administration of inheritance properties specifically for Muslims is by establishing Inheritance Court. This was also supported Ahmad Lakim (2016) in his research concerning alternative solutions to tackle the problems regarding inheritance property management by creating Inheritance Property Court which combines inheritance property cases of Muslims and non-Muslims and also is capable of combining jurisdiction and expertise of judges of both civil and shariah courts.

In addition to that, Mohd Marbawi et. al (2015) also gave a suggestion regarding establishment of Inheritance Court which is viewed as a good suggestion for heirs who wish to co-own land in the division registration control. In actuality, proposals for establishment of Inheritance Court are not new and have been previously suggested by several parties (Kamariah Dzafrun 2009; Noor Huda 2008).

The idea of formation of Inheritance Court had been mooted by Tun Abdul Hamid (former Federal Court Judge) while he was a Judge in the Appeal Court in dealing with matters related to Islamic inheritance property administration in the year of 2002 in his article entitled *Civil and Shariah Courts in Malaysia: Conflicts of Jurisdictions* in which he also proposed several suggestions for solving conflicts related to Islamic and civil inheritance property management and administration through harmonisation of the Civil and Syariah Courts by means of establishing Inheritance Court (Abdul Hamid 2002). His suggestion was to unify judges of both courts together in presiding over any case involving inheritance.

This matter of forming Inheritance Court also attracted the attention of the former Chief Justice of Malaysia, YAA Tun Ahmad Fairuz bin Dato' Sheikh Abdul Halim while he delivered his plenary speech in 'Majlis Perasmian Syarahan Umum Syariah dan Undang-undang Tuanku Najihah Yang Pertama' organised by Fakulti Syariah dan Undang-undang KUIM on 11th of August 2005 in his working paper entitled *The Relationships Between Shariah & Civil Law in the Malaysian Legal System: Developments & Future Possibilities* (Ahmad Fairuz 2005).

The proposal for establishment of Inheritance Court was further boosted by the opinion of Jasni (2011) in his written piece *Pembahagian Undang-Undang Pentadbiran Pusaka Islam* (Division of Islamic Inheritance Administration Law) which stated that a court named as *Islamic Bench of the Civil Court* should be established whose composition constitutes judges who are expert and knowledgeable in syariah law and produce judgement which are final in all syariah cases at the Federal level including those related to inheritance. The power of the court should have a higher legal standing than Syariah Appeal Court at the State level.

Meanwhile, a similar study was done on establishing a court but the court under study was Muamalat Court. Based on the study done by Rusni et al. (2013), efforts toward creating a court are not easy as they involve existing statutes and may involve jurisdiction of institutions which are viewed to be unwilling to interfere each other or have its credibility being challenged by the other.

Based on examination of previous studies, the potential of creating Inheritance Court is not a new matter being risen while in fact it has been gaining the attention of various sides. However, an in-depth and detailed study on establishment of this Inheritance Court has never been done. It is therefore time for a specific and comprehensive study to be made to analyse the idea of creating of such a court in Malaysia being realised as this can produce a positive impact to the heirs, institutions involved directly and to the nation.

(b) The Concept of Inheritance Court Establishment

Many researchers and people of authority have shown reaction with positive views on the idea or suggestion of forming Inheritance Court in Malaysia, but what is the concept being introduced for creating this Inheritance Court?

Ahmad Lakim (2016) stated that the desired Inheritance Court to be created has a concept of combining management of inheritance property cases of Muslims and non-Muslims. Further, this court is to combine jurisdiction and expertise of civil and syariah court judges. Apart from that, existence of such a court can solve inheritance matters based on legal and administrative governance whereby it is a requirement to apply existing Islamic law principles.

This matter is also discussed by Rusni et. al. (2013) in their research as, even though their focus was on the formation of muamalat court, they instilled the concept of structuring whereby the Muamalat Court is viewed to be able to handle Islamic banking and finance cases. This matter should be incorporated in Inheritance Court which should be viewed as the best enabler to handling inheritance property affairs through appointment of special judges. This excellent initiative must be translated into action by appointing special judges to specifically handle litigation of inheritance property governance of Muslims which can indirectly produce judges with high degree of expertise in deciding cases related to Islamic inheritance.

Following that, the aspect of training of judges in Islamic inheritance legal fields is indirectly seen as of much relevance. The aspect of training is very much required to bolster judges' knowledge, those of the civil courts in general and those of syariah courts in particular, in the field of Islamic inheritance law. Without denying the expertise in Islamic inheritance law possessed by existing judges who preside over Islamic inheritance property management and administration cases, the aspect of continuous training of judges in the said field must run in parallel with current developments of Islamic inheritance.

Training requirement for these judges should not be limited to judges specifically appointed for Inheritance Court only. Such requirement is also necessary for other judges in preparation to enable them to be competent and having in-depth knowledge and expertise. Indirectly, by having such training, the judges are always ready to preside over cases involving Islamic inheritance should they be appointed specifically under Inheritance Court.

We can follow the example set by other countries which already have a systematic inheritance property administration and management system or even have a unique Inheritance Court in place. Brunei, for instance, has yet to have a specific law on inheritance properties but nevertheless the absence of this substantive law neither affect nor limit the powers of the Shariah High Court provided clearly under the Chapter (15)(viii) and (ix) Syariah Courts Act, Bruneian Law (Mohammad Arif & Siti Mashitoh 2014). Besides, administration of inheritance properties in Malaysia is guided by civil laws. A matter of great sadness is the absence of specific statutes concerning Islamic inheritance property distribution like the existing Distribution Act 1958 (Act 300) for non-Muslims. Hence, administration of inheritance properties of Muslims is dominated by civil law. For example, an intestate estate must refer to the property valuation of the deceased to ascertain the jurisdiction of which agency, either the Department of Land and Mines Director-General, Amanah Raya Berhad (ARB) or The High Court. A testate estate and with appointment of *wasi* by the deceased, should obtain a Probate Grant from The High Court to administer properties of the deceased according to the written will (Siti Mashitoh 2006; Zaini 2006). If the idea of establishing Inheritance Court can be materialised, it can indirectly drive enactment of statutes and law of Muslim inheritance property. Egypt was the first country to enact such law for Islamic Inheritance and for Islamic Will, in 1943 and 1946 respectively. This step was followed by other Arab countries by enacting both laws in their own respective country, with amendments and modifications in certain matters according to local requirement and public interest (*maslahah*).

In the views of Mohd Ridzuan (1995), inheritance law enacted in Islamic countries put too much emphasis on the essence of *faraid* law or its substantive to the point of placing the legal and administrative procedures into the discretion of the respective judge or Qadi without any standardisation or coordination in the enacted regulations. Also, according to him, the effort to create such statute can bring back foundational law and raise the status of the Shariah Court in the country, hence Islamic inheritance law and its governance must be fully placed under the jurisdiction of the Shariah Court. Establishment of this Inheritance Court is also seen as an institution which can bring a good reputation to the Shariah Court which together solve the issues of Muslim inheritance properties.

Based on this literature review, it was found that various suggestions were made to improve the administration, management and governance of Muslim inheritance properties; among them were restructuring of the existing institutions, reinforcing e-*faraid* systems and modules, legal review, establishment of Inheritance Court (Ahmad Lakim 2016), standardising of the law or enacting *Faraid* Act as well as giving full jurisdiction of the matter to the Shariah Court. The proposal to create Inheritance Court remains a basic suggestion or idea of previous researchers to resolve existing issues based on the gap present after the studies were made. A comprehensive study on Inheritance is still not available. Hence, it becomes a necessity for the researcher to identify the proposals toward establishing Inheritance Court so that further and more in-depth research can be carried out.

Table 1:- Proposal Toward Establishment or Creation of Inheritance Court in Malaysia.

Author(s)	Findings
Noor Huda Ismail (2008)	Improvement for existing problems in the management and administration of inheritance properties specifically for Muslims is by establishing Inheritance Court.
Rusni Hassan, Azam Hussain & Adnan Yusoff	To create or establish a Court is not an easy matter as it involves statutes already in existence and will even involve jurisdiction of institutions which do not wish to be

(2013)	seen as interfering each other or having its credibility being challenged by the other.
Mohd Marbawi Taha, Jasni Sulong & Mohd Nasir Ayub (2015)	Related to establishment of Inheritance Court whereby it is viewed as a good suggestion for heirs who wish to co-own land in the control of division registration.
Ahmad Lakim (2016)	Alternatives for inheritance property management by creating Inheritance Property Court which combines management of inheritance property cases of Muslims and non-Muslims.

Source: Researcher 2022.

Table 2:- Concept of Establishing Inheritance Court According to Islamic Ruling.

Author(s)	Findings
Ridzuan Awang (1995)	Enacted inheritance laws in Islamic countries put too much emphasis on the essence of <i>faraid</i> law or its substantive to the point of placing its procedural and administrative matters of the legal system upon the discretion of the respective judge or Qadi without any standardization or coordination in the forms of enacted rulings.
Jasni Sulong (2011)	A court named as <i>Islamic Bench of the Civil Court</i> should be established whose membership constitutes judges who are experts and knowledgeable in Shariah to produce final decisions on all shariah cases at the Federal level including those concerning inheritance and must be of higher standing than the Shariah Appeal Court at the State level.
Ahmad Lakim (2016)	To create Inheritance Property Court which combines Muslims and non-Muslims inheritance property management whereby the court can also combine the jurisdiction and expertise between the civil court and Shariah judges.
Rusni Hassan, Azam Hussain & Adnan Yusoff (2013)	To instil a conceptual idea of structuring a Muamalat Court in which the court can be seen as capable of handling Islamic banking and finance cases.
Mohammad Arif Sabtu & Mashitoh Mahamood (2014)	Even though Brunei so far does not have a specific law on inheritance properties, the absence of such substantive law nevertheless does not affect or limit powers of the Shariah High Court clearly provided in Chapter (15)(viii) and (ix) Shariah Courts Act, The Law of Brunei.

Source: Researcher 2022.

This work is a survey of previous studies on the issue of proposal of creating Inheritance Court in Malaysia. This matter has long been a subject of discussion by parties of authority but it has remained as only basic proposal on creating such a court. Therefore, an in-depth and comprehensive study concerning the proposal of establishing Inheritance Court in Malaysia and to what extent efforts have been implemented should be carried so that the issue of Muslim inheritance property management problems can be dealt with in a good manner.

Conclusion:-

Based on this literature review on the idea of establishing Inheritance Court potential, a comprehensive study needs to be carried out so that this proposal does not remain on paper only without any action by the authority. Establishing an Inheritance Court is not a new matter to be discussed when in fact many parties who see the necessity of creating such establishment have long been voicing their views, proposals and even supports which are very encouraging. Hence, it is a necessity for the government to proactively take action by drafting specific measures through a pragmatic method to realise the mooted idea of establishing Inheritance Court in order to strengthen the administration of Muslim inheritance in Malaysia

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