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Nomination and Its Legal Status Concerning Moveable Estates for Muslims and Non-Muslims in Malaysia

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Abstract

This paper delves into the nomination overview and its status concerning movable estate only for Muslims and non-Muslims in Malaysia from Islamic and Civil Law perspectives. Discussions focused on issues revolving around movable property, such as the Pilgrimage Fund, Employee Provident Fund (EPF), unit trust and share, takaful and insurance, and pension. The pertinent legal provisions were also analyzed to ascertain legal application in its administration. It concludes that Muslims are subject to Faraid besides civil law, while civil law applies to non-Muslims. Thus, the findings indicate that legal frameworks and guidelines are necessary for uniformity for Muslims.

Keywords: Financial Dispute; Legal Framework; Alternative Dispute Resolution; Comparative Analysis

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1.0 Introduction

In estate administration, the issue that is frequently contested is the distribution of an estate. Moreover, the estimated value of the unclaimed property is projected to reach billions of ringgits (Wan Zahari Wan Yusoff & Muhammad Azwan Sulaiman, 2021). In certain circumstances, the estate is deemed indivisible; thus, a claim is not enforceable. This paper delves into the overview of nomination and the status of a nominee concerning the movable estate of Muslims and non-Muslims in Malaysia, examining it from both Islamic and Civil Law perspectives. The purpose of the discussions is to investigate the various concerns on movable property such as the Pilgrimage Fund (Tabung Haji), Employee Provident Fund (EPF), Takaful, share/unit trust, and pension and its derivative, which are often the subject of dispute whether they are regarded as the nominee's property cum beneficiary or trustee only. Consequently, it is crucial to establish procedures to address these matters.

2.0 Literature Review

Any inheritance law depends on the extent of an individual's control over their assets after death. Quranic succession law governs Muslims. The mandatory distribution of inheritance assets via the faraid approach is a sine qua non for individuals of the Islamic faith, as outlined in Verse 11 of Surah An-Nisa'. The rules and procedures for distributing faraid are explicitly outlined in the Quran and Sunnah (Nizaludin et al., 2019). The 15th Fatwa Committee Conference of the National Council for Malaysian Islamic Religious Affairs (MKI Muzakarah Committee) which convened on March 6, 1978, issued a fatwa affirming that a nominee assumes the role of an administrator, not the beneficiary. Similarly, in 2001 there was a gazetted fatwa in Wilayah Persekutuan issued that a Muslim nominee in any money-saving scheme is to distribute the estate to the heirs according to the faraid division (<http://e-smaf.islam.gov.my>). In contrast, non-Muslims are solely subject to civil law. Presently, Abdullah, et al., 2020 argue that numerous challenges exist in the distribution of assets among beneficiaries, particularly within the Muslim community. These challenges often lead to issues in the estate's administration. The lack of knowledge of the property distribution process among the heirs also has led to their despire for solutions. among beneficiaries,

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particularly within the Muslim community. These challenges often lead to issues in the estate's administration. The lack of knowledge of the property distribution process among the heirs also has led to their despise for solutions.

The Maqasid Protection of wealth (hifz al-mal) is one of the five fundamental principles of Islam stated by Imam Al-Ghazali as Shariah's legal objectives. It is one of the requirements for human existence, and humans cannot exist without it (Wan Zahari Wan Yusoff & Muhammad Azwan Sulaiman, 2021). This article, therefore, suggests estate planning as an internal process that involves managing one's property during their lifetime for the well-being and peace of mind of both the owner and any interested parties. Systematic property planning is crucial to optimize the utilization of an individual's accumulated property throughout their lifetime, particularly for the benefit of their heirs. The absence of proper planning for property can lead to several implications, particularly in cases where the property owner passes away without any prior arrangements (Muhamad Husni & Daud, 2015). Furthermore, the estate in question tends to remain unclaimed, being claimed but not promptly, and experiencing significant delays in distribution. According to the Dewan Rakyat in May 2023, the Accountant-General's Department (JANM) now oversees a sum of RM11.2 billion in unclaimed funds as of April 30th (<https://www.mof.gov.my/>).

Hence, a nomination is a mechanism employed in the distribution of an estate that expedites the process of claiming assets. Nomination is a technique of testamentary disposal following English law. According to Kamarudin et al., (2015), an estate that has been nominated is exempted from the estate-claiming process carried out by the various agencies such as Amanah Raya Berhad, Civil Court and Small Estate Distribution Unit (Unit Pembahagian Pusaka Kecil). Initially, to administer the deceased's estate, one must ask for permission from a particular organization. The power is granted through issuing a letter of representation, the standard terminology for said document. Administrative entities that possess jurisdiction over the management of estates enforce the letter of representation. The administration and distribution of an estate may take longer if the application is submitted to an inappropriate entity or if the letter of representation is incorrect. The Civil High Court, Amanah Raya Berhad, and the Estate Distribution Division are the three administrative bodies that have the power to handle the deceased estate (Md. Azmi & Mohammad, 2011). Another administrative entity involved is the Syariah Court. Its role differs slightly from the other authorities in that it can provide the Faraid certificate in inheritance involving Muslim deceased. The Faraid certificate aims to verify the rightful beneficiaries and their allocated share; it does not confer any power to administer the estate (Noordin et al., 2012).

In Malaysia, funds like the Employee Provident Fund (EPF), Takaful or Insurance, Tabung Haji, Share or Unit Trust, and Co-operative Societies are eligible for nomination. It can be divided into two categories: statutory nominations, which include financial institution savings accounts, and nominations that have the effect of establishing a trust in the nominee's benefit, such as the proceeds of life insurance policies. This paper concludes that the estate of a deceased Muslim is subject to the application of Faraid and civil law whilst civil law only applies to non-Muslims. The paper suggests that nomination be considered one of the viable instruments of Islamic estate planning in speeding up the distribution of the deceased estate among the lawful heirs. Thus, the findings suggest that relevant authorities should take additional steps to increase public awareness. Furthermore, a legal framework and rules are also required to be established.

3.0 Research Methodology

The study is carried out using a library-based methodology that relies on written materials from many sources, like journal articles and statutes. It employs a qualitative literature review to examine nomination from Islamic and Civil Law viewpoints in Malaysia. This study examines nomination from legal viewpoints, focusing on several important statutes namely: the Employees Provident Fund Act 1991, Lembaga Tabung Haji Act 1995, the Islamic Financial Services Act (IFSA) 2013, Financial Services Act 2013, Probate and Administration Act 1959 (PAA) and the Distribution Act 1958 (DA).

Thus, qualitative research approaches as the primary source of data acquisition are needed to form applied research. Applied research can be used to find the solutions and answers to research questions concerning the types of issues or problems arising from the community, the field of industry, or the organization (Williman, 2011).

4.0 Findings and Discussion

4.1 Employees' Provident Fund (EPF/KWSP)

The acronym EPF denotes the Employees' Provident Fund, a savings initiative designed to furnish retirement benefits to employees. Individuals who are engaged in employment, self-employment, or entrepreneurship have the option to make contributions based on their individual needs. EPF Members are entitled to receive annual dividends on their retirement savings and various withdrawal options and benefits. An individual responsible for making contributions is an employee whom an employer has engaged through a service contract or apprenticeship not encompassed within the First Schedule, Second Section of the Employees Provident Fund Act 1991. As of December 2022, there are 15.72 million members total from private sector employees, non-pensionable public sector employees, and voluntary contributors <https://www.kwsp.gov.my/>.

About the nomination, Section 70D of the Employees Provident Fund Act 1991 provides that only individuals who are Malaysian citizens and are members of the Fund are allowed to make any nominations per the provisions of this Act. Concerning which individuals are eligible for nomination, both individual(s) and Amanah Raya Berhad (ARB) are involved in the matter. The nominee designated for Muslim members is a Wasi/Administrator responsible for distributing the EPF savings of the deceased member to the appropriate beneficiary in compliance with Islamic Law. If a member opts to nominate ARB as their nominee, it follows that ARB shall assume the

role of Administrator for the member's entire savings, constituting 100%. However, if a member fails to nominate a beneficiary before passing, their eligible heir(s) may file a Death Withdrawal request with the EPF offices.

Similarly, for non-Muslims, any individual(s) and Amanah Raya Berhad (ARB) are eligible for nomination. Suppose a member opts to nominate ARB as their nominee. In that case, it will result in ARB assuming the administrator role for the member's entire savings, encompassing 100% of the total amount. If a member elects to nominate ARB as a trustee, ARB shall assume the role of trustee for any nominee under 18. Furthermore, suppose a member fails to nominate a beneficiary before their death. In that case, their eligible heir(s) may submit a Death Withdrawal application to the Employees' Provident Fund (EPF) offices.

In conclusion, nomination is the process of naming an individual or individuals to receive a transfer of funds in the event of the member's passing. The nomination process is also present within the EPF in Malaysia. Muslim members can designate a Wasi or Administrator to allocate their savings by Islamic principles. It can be inferred that the Faraid law is relevant to the Kumpulan Wang Simpanan Pekerja (KWSP) or Employees Provident Fund (EPF) in Malaysia. The Faraid law regulates the distribution of assets belonging to a deceased individual among their heirs. In this context, the nomination made at KWSP/EPF serves as an administrator rather than a beneficiary for Muslims. In the absence of a conditional Hibah nomination, the distribution of the deceased's assets shall adhere to the principles of Faraid law. Nonetheless, the nomination shall be deemed invalid if the nominee has not attained age 18, as per the current legislation, rendering them ineligible to serve as a Wasi.

For non-Muslims, the individuals are the sole recipients and beneficiaries of the savings of a deceased member, regardless of the nominee's age unless a member opts to nominate ARB as an administrator or trustee. Hence, ARB rebuts the widely circulated claim that they will automatically receive contributions from members for the EPF in the absence of a nomination of any nominee upon the member's death (Harian Metro, 2020).

4.2 Tabung Haji (TH)

An Islamic organization called Lembaga Tabung Haji (TH) works persistently to offer the most thorough and organized services for the well-being of Malaysian hajj pilgrims along with offering a platform for halal savings. TH also invests to raise the value of its depositors' funds. TH is a statutory body governed by the Tabung Haji Act of 1995 (Act 535). By consistently delivering top-notch Hajj services to Malaysian pilgrims, TH has established a reputation as a global leader in creative Hajj management. However, TH only provides specific Hajj savings and management services to Muslims in this country. To date, TH has around nine million depositors.

Any depositor over 18 must appoint a nominee among his or her heirs to whom the amount or portion of the depositor's account will be paid after the depositor's death. This is under Lembaga Tabung Haji Act 1995, Lembaga Tabung Haji Regulations (Deposits and Withdrawals) 2002, Amendment 2003, Amendment 2013, and Amendment 2017). A nomination is a formal statement made by a TH depositor to appoint or nominate any of his or her heirs as a "Nominee" in line with Shariah Law. The depositor must make nominations during his lifetime, and the nominee(s) will serve as executor or administrator of the depositor's funds in TH upon his death. Therefore, the nomination is made so that the nominees can withdraw the deceased's deposits without submitting a Power of Attorney or Order from the relevant parties (Land Office, Syariah Court, Civil Court, Amanah Raya Berhad). Nevertheless, a nomination will be void under certain circumstances (as per Lembaga Tabung Haji Act 1995, Lembaga Tabung Haji Regulations (Deposits and Withdrawals) 2002, Amendment 2003, Amendment 2013, and Amendment 2017). In conclusion, TH operates similarly to the EPF (Employees Provident Fund) in terms of allowing direct nomination and hence, the procedure for claiming an estate through nomination does not necessarily entail a lengthy process by getting to various agencies and institutions.

4.3 Deceased's Unit Trust and Share

In Malaysia, unit trusts are regulated by the Securities Commission and are governed by the Capital Markets and Services Act 2007 (CMSA). Unit trust investments are considered part of a person's assets and are subject to faraid distribution upon death. If a person who has invested in unit trusts passes away, their unit trust investments will be considered as part of their overall estate and will be subject to faraid distribution according to the Islamic laws in Malaysia. It is recommended for Muslims who are investing in unit trusts or any other assets to have proper estate planning in place to ensure their assets are distributed according to their wishes and by Islamic laws. By using the faraid law to complete the inheritance distribution, Malaysians are made aware of Islamic estate administration. (Noordin et.al,2013). Investors need to understand the Faraid laws and how they apply to their unit trust investments and to seek advice from a qualified Islamic finance expert or religious authority to ensure that their investments are distributed following their wishes and with Islamic principle.

The distribution of a deceased's share in a company is governed by the distribution principles of faraid, which is based on Islamic inheritance law. Faraid determines the distribution of the deceased's assets among the heirs based on their relationship to the deceased person and the proportion of the estate allocated to each. If the deceased person was a Muslim and had not made a will, then the distribution of their assets, including shares will be guided by faraid. The assets will be distributed among the deceased person's lawful heirs, which include the spouse, children, parents, and other close relatives, under the faraid distribution principles.

While for Non-Muslims in Malaysia, the distribution of unit trusts, is governed by the Probate and Administration Act 1959 (PAA) and the Distribution Act 1958 (DA). These laws apply to all individuals, regardless of their religion. When a unit trust investor passes away, the executor or administrator of the deceased's estate will need to apply for a grant of probate or administration from the High Court to manage the deceased's assets, including the unit trusts. The grant of probate or administration is a legal document that confirms the executor's or administrator's authority to manage the estate and distribute the assets according to the deceased's wishes or the relevant laws (AN. M. Sulaiman & Hanrahan, 2008).

If the deceased left a will, the unit trusts will be distributed according to the instructions in the will. However, if the deceased did not leave a will, the unit trusts will be distributed according to the Distribution Act 1958, which provides a specific distribution order among the deceased's family members. In the case of joint account holders of a unit trust, if one of the account holders passes away, the surviving account holder(s) will automatically become the sole owner(s) of the unit trust. However, if both account holders pass away, the unit trust will be treated as part of their respective estates, and the distribution of the unit trust will be governed by the Probate and Administration Act 1959 (PAA) and the Distribution Act 1958 (DA). Unit trust investors need to make a will or an estate plan to ensure that their assets, including their unit trusts, are distributed according to their wishes after they pass away. It is worth noting that the distribution of shares and unit trust holdings may also be subject to the terms of the company's constitution or the unit trust deed, which may specify how the assets will be distributed among the shareholders or unitholders. However, as applicable, these provisions will be subject to the overriding principles of faraid or the Distribution Act for Muslims and non-Muslims respectively. In this regard, the position of the nominee should be clearly stated to eliminate all complexities and ambiguities among the various laws on the nominee.

4.4 Pension

In Malaysia, the Pensions Act 1980 is the governing act for pension benefits, and it came into force on the 1st of January 1976. The Act provides for the administration of pensions, gratuities as well as other benefits for the officers in the public service as well as their dependents. According to the Pensions Act 1980, the pensions, gratuity, and other benefits granted shall be charged under the Federal Consolidated Fund. A pension will be given to an officer who qualifies for it upon compulsory retirement or when they have completed service of not less than 10 years of reckonable service, whichever comes first. On the grounds of national interest or the interest of the public service for federal and state officials, the government may request that the pension be awarded upon retirement.

Concerning the distribution of a Muslim deceased's pension in Malaysia, it would also be governed by Faraid, the Islamic inheritance law that governs the distribution of assets left by a deceased Muslim to their rightful heirs. Under Faraid, the pension fund distribution would follow the Shariah principles and rules of inheritance set out in the Quran and Hadith. The specific distribution of the pension fund would depend on the number and type of heirs the deceased has and their respective entitlements under Islamic law. Typically, the distribution of the pension fund under Faraid would prioritize the rights of the immediate family members, such as the spouse, children, and parents, before extending to more distant relatives. The specific share of each heir would depend on their relationship to the deceased and the rules of inheritance that apply in their particular situation. It is indeed a subject of great dissatisfaction that there are no specific statutory provisions on this matter compared to EPF and Tabung Haji.

Whereas for non-Muslims in Malaysia, the distribution of a deceased's pension fund would be governed by civil law. Under the Distribution Act 1958, the distribution of the pension fund would be based on the rules of intestacy, which specify how the estate of a deceased person is to be distributed if they die without leaving a valid will. The distribution of the pension fund would be made following the rules of intestacy that apply in the particular situation, taking into account the number and type of heirs, their relationship to the deceased, and other relevant factors.

4.5 Takaful

In the realm of takaful (Islamic insurance), nomination refers to the act of a takaful participant designating an individual to receive the takaful benefits in the event of the participant's death before the completion of the takaful plan. The rationale behind obtaining takaful coverage is to guarantee the financial security of one's dependents in the event of an unforeseen circumstance. The act of nominating a beneficiary can expedite the disbursement of takaful benefits, eliminating the requirement of obtaining a Grant of Probate, Letter of Administration, or Distribution Order. This process enables beneficiaries to promptly access the funds, ensuring a timely transfer of financial support to loved ones. It is recommended that the nominees be notified of their nomination for the takaful certificate.

Nomination, in the context of takaful (Islamic insurance), involves the takaful participant nominating a person to receive the takaful benefits in the event of the participant's death before the maturity of the takaful plan. According to the Islamic Financial Services Act (IFSA) 2013, Schedule 10 of the IFSA provides for death payments for family and personal accident takaful certificates under Section 142. The Schedule allows takaful participants 16 years or older to nominate as an executor or beneficiary under conditional hibah to collect benefits upon death.

In Takaful, an executor, also known as a wasi, is nominated to manage the distribution of benefits upon the participant's death. If the certificate holder is a Muslim, this distribution must be made according to faraid as part of the estate distribution. This does not apply if the covered person is a non-Muslim participant. In this case, the executor will need to follow the Probate and Administration Act 1959 [Act 97] for the distribution of Takaful benefits. Therefore, the act of nomination does not confer a gift or ownership to the nominees but rather establishes a trust in which the nominee is obligated to distribute the benefits to the beneficiaries following Islamic legal principles.

Whereas in the context of insurance, it is stipulated under Sub-paragraph 5(1), Schedule 10, Section 130 of the Financial Services Act 2013 that a non-Muslim Policyholder's nomination shall create a trust in favour of the nominee(s) provided that the nominee is either the Policyholder's spouse or child or the nominee's parent assumes the role. A nominee other than Sub-paragraph 5(1), upon the Policyholder's death, shall receive them as an executor rather than a beneficiary. If a Muslim policyholder nominates a beneficiary to receive policy monies, it is expected that the beneficiary will distribute the funds per the principles of Islamic Law.

5.0 Conclusion and Recommendations for Improvement

The term "nominee" carries distinct connotations for individuals Muslim and non-Muslim. For Muslims, subject to conditional hibah, a nominee serves solely as a trustee and is accountable for the equitable distribution of wealth to the rightful legal heirs. Through

nomination, the procedure of claiming inheritance estate is not necessarily through probate and administrative processes thus minimizing the time and cost associated with it. In the context of non-Muslim individuals, the nominee is acknowledged as the sole beneficiary of the estate. However, there is a significant concern with the nomination status of Muslims. Due to their lack of knowledge, some Muslims confused the function of nomination with that of other estate planning instruments such as hibah (inter vivos), hadiyyah (gift), and wasiyyah (bequest) (Nizaludin et al., 2019).

It has been observed that the nomination process among industry practitioners exhibits inconsistencies in practices where it could be seen that Pension and its derivatives, and Unit Trust and shares are scattered as they are governed by either Islamic Faraid law or civil law such as the Islamic Financial Services Act (IFSA) 2013, Financial Services Act (IFSA) 2013, the Distribution Act 1958, and the Probate and Administration Act 1959. In contrast, EPF, Tabung Haji and Takaful were instituted per their respective legislations that permit the appointment of direct nominations. This paper, however, will not extend to all types of movable estates such as ASB and Deposit & Investment Accounts (Individual Customers).

Hence, specific laws relating to the estate must be enacted into which precise characteristics or requirements for defining the word estate can be referred to and standardized. It is essential to identify whether the nominees are regarded as beneficiaries or merely administrators in ensuring that the rights of individuals involved in the estate are granted concerning their merit. It is also suggested that nomination be regarded as a feasible mechanism of Islamic estate planning to expedite the distribution of the deceased's assets among the legal heirs thus, mitigating the issue of unclaimed movable estate. Consider Tabung Haji and the EPF as examples; both were established under their acts allowing direct nomination. The need for heirs of the deceased to be aware of the significance of identifying the property as an estate is also necessary to ensure that the rights of individuals involved with the estate are given the attention they deserve. The study suggests promising directions for future research towards a more comprehensive legal framework to alleviate the occurrence of potential disputes arising from misunderstandings on the nomination status.

Paper Contribution to Related Fields of Study

This paper contributes to movable estate administration and general property law.

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