

GENDER PERSPECTIVE OF THE FARĀ'ID SYSTEM: IS IT BIAS AGAINST WOMEN?

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ABSTRAK

Sistem farā'id merupakan satu kaedah pembahagian harta yang terdapat dalam undang-undang Islam. Hak-hak pewaris terhadap harta si mati telah disebut dengan jelas dalam al-Quran, Sunnah dan juga Ijmā'. Salah satunya yang disebut dalam al-Quran adalah "pihak lelaki, akan menerima dua kali ganda harta lebih dari pihak wanita". Justeru itu, artikel ini bertujuan menerangkan hak-hak wanita dalam sistem farā'id dan adakah benar sistem ini dianggap berat sebelah dan tidak berpihak kepada wanita.

Introduction

The issue on gender bias has been discussed thoroughly and comprehensively by the people over the world. This is including the rights of women under *farā'id* system which is deemed to be bias against Muslim women. According to Tabet (2005) in her article on "Women in Personal Status Law: Iraq, Jordon, Lebanon, Palestine, Syria" which is based from the words by Professor Sheikh Muḥammad Sa'īd Ramaḍān Al-Būṭī pointed out the cause of this traditional debate about women inheritance, which has been going on for a long time, was sparked off by the following decree: "to the male, a portion equal to that of two females".

This rule is in fact a fragment of the following verse of the Quran. "God (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females" This verse establishes a law exclusively concerning the inheritance of the children. For the other heirs, men and women, there are specific laws. Generally,

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the share of these heirs does not depend on sex. In some cases, the share of the woman may even be superior to that of the man.¹

It is therefore the aim of this study to seek the understanding of the issues and attempt to provide some viable solutions for the practice of property distribution under the *farā'id* system particularly on the rights of not only women as a daughter, but the women as a whole, which includes daughter, sister and mother, and whether it is fair to regard the *farā'id* system as gender bias and finally to examine on its legality according to Malaysian law.

The Nature Of *Farā'id* System

The distribution of property through the Islamic inheritance or the *farā'id* system had been mentioned thoroughly in the Quran, which is the primary source of Islamic Law. The Quran contains an explicit system for the distribution of a descendant's estate among family members. The Quran specifies certain fractional shares of the estate for named heirs of the descendant, who include both male and female relatives.

These heirs are entitled to certain prescribed shares which are intended to effect an equitable distribution of the estate. For instance, males are given two shares of the estate to every share given to his female counterpart because they are expected to assume financial responsibility for the women. In addition, female heirs are allocated a specified portion of the estate (e.g. half or one sixth) which means they will always be entitled to a portion of the estate, regardless how small, while male heirs are often residuary heirs who are only entitled to what is left of the estate after the claims of female heirs have been met. It may happen that a residuary heir is left with nothing or a very tiny portion after claimants with specific shares have been paid off.²

The complete and comprehensive discussion on the *farā'id* system in the Quran impliedly shows that there is no where of the fundamental Islamic ideology of law as the manifestation of the divine will more clearly demonstrated than in the laws of inheritance.

¹ Islamophile, <http://www.islamophile.org/spip/article499.html> article 2004, accessed on 20th October 2007.

² The Law Society of Singapore, <http://www.lawsociety.org.sg/awareness/faraid.htm>, accessed on 23rd October 2007.

From the point of sociology, the laws of inheritance reflect the structure of family ties and the accepted social value and responsibilities within the Islamic community. For in the eyes of the law, rights of inheritance are generally regarded as the consideration for duties of protection and support owed to the deceased during his lifetime; so that the stronger the family bond, the greater the right of inheritance. There is also the particular rule that the duty of a person to maintain his needy collateral relative is dependent upon, and proportionate to, his right to inherit from that relative.³

Sources Of Farā'id System

The sources of farā'id system have been mentioned in the primary source namely Quran through several following āyah:

God (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. (The distribution in all cases after the payment of legacies and debts). Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by God; and God is All-knowing, All-wise.⁴

Besides that, Quran further says,

In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so

³ N.J. Coulson (1971), *Succession in The Muslim Family*, Cambridge: Cambridge University Press, p. 3.

⁴ Al-Nisā': 11.

*that no loss is caused (to any one). Thus is it ordained by God; and God is All-knowing, Most Forbearing.*⁵
*Those are limits set by God: those who obey God and His Prophet will be admitted to Gardens with rivers flowing beneath, to abide therein (for ever) and that will be the supreme achievement.*⁶

In fact, *Quran* did give the formula or rules of *farā'id* system which can be derived from this following ayah:

*They ask thee for a legal decision. Say: God directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman, who left no child, Her brother takes her inheritance: If there are two sisters, they shall have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female. Thus doth God make clear to you (His law), lest ye err. And God hath knowledge of all things.*⁷

Sunnah:

The importance of *ilm farā'id* has been affirmed by the Prophet through the sunnah in which he said that:

*"Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge".*⁸

(Narrated by Ahmad)

From this sunnah, it shows that the importance of the knowledge of *farā'id* system and the people are highly encouraged to learn about it.

Then, the rules of *farā'id* have also been explained in various sunnah of Prophet:

⁵ Al-Nisā': 12.

⁶ Al-Nisā': 13.

⁷ Al-Nisā': 176.

⁸ Abī 'Abdullah Muḥammad bin Yazīd al-Rab'ī Ibn Mājāh al-Quzwaynī (2000), *al-Sunan, Abwāb al-Farā'id*, Bāb al-Hathu 'ala t'alimi al-Farā'id, no. hadīth 2719.

*Narrated Abū Hurayrah: The Prophet said, "I am more closer to the believers than their own selves, so whoever (of them) dies while being in debt and leaves nothing for its repayment, then we are to pay his debts on his behalf and whoever (among the believers) dies leaving some property, then that property is for his heirs".*⁹

(Ṣaḥīḥ al-Bukhārī)

The above sunnah shows that the property that has been left by the deceased must be used to settle all his debts and whatever property lefts, must be distributed to his legal heirs according to farā'id system.

The rule of farā'id was also mentioned in this following hadith:

*Narrated Ibn ʿAbbas: The Prophet said, "Give the Farā'id (the shares of the inheritance that are prescribed in the Quran) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."*¹⁰

(Ṣaḥīḥ al-Bukhārī and Ṣaḥīḥ Muslim)

Besides that, sunnah of prophet also explained the rule in which not clearly spelled out in the Quran, for example a portion for grandmother has been mentioned in the following hadith:

*Narrated Buraydah: "The Prophet (peace be upon him) appointed a sixth to a grandmother if no mother is left to inherit before her."*¹¹

(Sunan Abū-Dawūd)

⁹ Abī 'Abdullah Muḥammad bin Ismā'il bin Ibrāhīm bin al-Mughīrah bin Bardizbah al-Bukhārī (2000), *al-Jāmi' al-Musnad al-Ṣaḥīḥ al-Mukhtaṣar min 'Umuri Rasūlullah S.A.W wa Sunanihi wa Ayyāmihi*, Kitāb al-Farā'id, Bāb Qawl al-Nabī S.A.W Man Taraka Mālan fa li Ahlihi, no. hadith 6731.

¹⁰ Ṣaḥīḥ Bukhārī (2000) *op.cit*, Bāb Mirāth al-Walad min Abīhi wa Ummihi, no. hadith 6732; Abī al-Husayn Muslim bin al-Hajjāj bin Muslim al-Qushayrī al-Nīsābūrī (2000), *al-Musnad al-Ṣaḥīḥ al-Mukhtaṣar min al-Sunan bi Naqli al-'Adli 'an al-'Adli 'an Rasūlullah S.A.W*, Kitāb al-Farā'id, Bāb al-Ḥiquww al-Farā'id bi' Ahliha famā Baqiya fa al-Awla Rajulin Dhakarīn, no. hadith 4141 & 4142.

¹¹ Abī Dāwūd Sulaymān bin al-'Ash'ath bin al-Ishāq al-Azdy al-Sijistānī (2000), *al-Sunan*, Kitāb al-Farā'id, Bāb fī al-Jaddah, no. hadith 2895.

Ijmā':

Some principles on *farā'id* which are based on *Ijmā'* are as follows:

1. The consensus treated the grandson as son, granddaughter as daughter, provided the latter are non-existent.
2. The grandfather is treated as father in his absence.

From the above verses, it is clear that the rules and principles of a distribution of estate in Islam are prescribed in the Quran, Sunnah as well as *Ijmā'*. Nevertheless, for the purpose of this article, the writer will highlight on the principles or rules of *farā'id* which are related to women only.

Rights Of Women As A Daughter

The amount of the Quranic share of a daughter depends upon whether the deceased parent is survived by sons or other daughters.

- i) If the descendant is survived by sons as well as one or more daughters, the daughters and sons share the residue of the estate but each daughter takes one-half of a son's shares. In other words the rule "to the male, a portion equal to that of two females" will be applied in this case. The rationale behind this rule is said that the man is assumed to have the primary economic responsibility for the family.
- ii) If there is no son and the descendant is survived by only one daughter, she takes one-half of the estate. If the deceased leaves also a husband, then the husband gets only a quarter. Therefore, during this time, the woman, in that case, inherits twice as much as the man.
- iii) If there are no sons but more than one daughter, the surviving daughters share two-thirds of the estate equally among themselves.¹²

Then, it is interesting to note that, under this situation if the deceased leaves also a brother, both daughters share two thirds between themselves and the rest goes to their uncle who is the brother of the deceased. So under this situation, each girl inherits more than her uncle.

¹² Mary F. Radford (2000), "The Inheritance Rights of Women Under Jewish and Islamic Law", *Boston College International & Comparative Law Review*, vol. 23, number 2, p. 135-184.

Thus, second and third situations show that the *farā'id* system, indeed do not bias against women because in both situations above, they can inherit or entitle to the property of the deceased more than what the man deserved.

Rights Of Women As A Wife

The rights of women as a wife to inherit under *farā'id* system was clearly put under two situations:

- i) If the husband left agnatic lineal descendants, the widow's share is one-eighth of his estate.
- ii) If there is an absence of lineal descendants her share is one-fourth of the estate. Then if, there is more than one widow, however, the widows must share that amount equally among themselves.

Rights Of Women As A Mother

Mothers are among the legal heirs who are specified in the Quran.

- i) If the descendant dies and is not survived by any children or son's children, and is survived by only one sibling, if any, the descendant's mother's share is one-third of the estate.
- ii) If the descendant in this case is survived by two or more siblings, the mother's share is one-sixth.
- iii) If the descendant is survived by one or more children or son's children, the mother also takes one-sixth of the estate.

The same rule goes to the father namely to take one sixth of the inheritance, without difference of sex between them regardless of the rule "to the male, a portion equal to that of two females". These two shares are explicitly mentioned in the Quran: "For parents, a sixth share of the inheritance to each".

Again, it shows that, the rights of the mother as a woman and the father as a man over the property are equal in the existence of one or more children or son's children of the deceased. Thus, it is again inappropriate to regard *farā'id* system is gender-bias issue.

Other Female Relatives

If the deceased leaves two uterine brothers and sisters and if they are not excluded by a first order heir, then the brother and the sister each take a sixth of the inheritance, without difference of sex between both regardless of the rule “to the male, a portion equal to that of two females”. These two shares are explicitly mentioned in the Quran: “descendants, but has left a brother or a sister, each one of the two gets a sixth”.

Then, if the deceased leaves more than two uterine brothers and more than two sisters, then both these brothers as well as the sisters get one third of the inheritance, with no difference in term of their sex between both groups, and the rule “to the male, a portion equal to that of two females” is no longer applicable under this situation.

It is therefore obvious that the rule “to the male, a portion equal to that of two females” is not, as many people claim, a permanent rule which applies every time a man and a woman share an inheritance. Therefore, to claim the *farā'id* system is bias against women seems inappropriate.

Hibah, (Gift Inter-Vivos)

Besides *farā'id* system, another method of distribution of property to the other people is by way of gift (*hibah*). Among the distinct differences between *hibah* and *farā'id* are *hibah* is executed during the lifetime of the deceased, and the property can be disposed or given to anyone whether the legal heirs or not.

In fact, *hibah* is an Arabic term, derived from the word ‘*habūbah*’, which literally means ‘passing’ or ‘blowing’. In the religious term it means giving one’s wealth to others without the expectation of any replacement or exchange with the transferring effect on the ownership. In Islam, the practice of giving and charity has been recommended based on the following hadith from the prophet (peace be upon him).

“Give each other and love each other”.

Thus it is clear that *hibah* first of all, is recommended to be given to those whom we love and those who are nearer to us.

In this regard, Allah has arranged the most appropriate recipients of *hibah* as mentioned in the Quran that,

“...and do good to parent, kinfolk, orphan, those in need, neighbours who are near, neighbour who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hand possess: Allah does not like such as are proud and boastful.”¹³

According to Islamic law, a man may lawfully make a *hibah* of his property during his lifetime so long as three conditions are fulfilled namely:

- (i) a manifestation of the wish to give on the part of the donor;
- (ii) the express or implied acceptance of the gift by the donee; and
- (iii) the taking of possession of the subject-matter of the gift by the donee either actually or constructively.

That is the view of Ameer Ali which is based on the Hedaya of Al-Marghinani, the standard text and one of the most celebrated treatises in the Hanafi school.¹⁴ Therefore, it is clear that *hibah* is the third dimension in estate planning structure; complementing *farā'id* and *waṣiyyāt* (will). *Hibah* may come into discussion when the rule of *farā'id* does not allow some heirs to get the right of inheritance and *waṣiyyāt* was not made on him when one is facing the death. It is known that the rules of *farā'id* only apply to Muslims; in the case of different religions between the heirs and the deceased, the heirs will not get anything from the inheritance. Thus *hibah* may solve the particular circumstances by giving certain portion of his wealth to the heirs who have different religion and particular blocked heirs (heirs who are not entitled to get inheritance, being blocked by other heirs) before he passed away.¹⁵

Furthermore, in relation to our discussion above namely on *farā'id* system, *hibah* may be appropriate in the case of father who wants to give his son or daughter more than what he or she supposes to get in estate planning, the only choice he has is to execute *hibah*. If he chooses to do it under *waṣiyyāt* (will writing), the son or daughter is only entitled not more than one third of the estate. So if the father feels that the son or daughter is entitled to get more than a third and wants to ensure that he receives it, the only way is executing *hibah* in his lifetime. If this *hibah* is executed in time where he is about to die, it may be in the form of will writing (*waṣiyyāt*). Thus it is

¹³ Al-Nisā': 36

¹⁴ As in the case of Mustak Ahmed Dato' Hj. Abdul Rahim Gulam Rasool Shaik V Abdul Wahid Dato' Hj. Abdul Rahim Gulam Rasool Shaik & Ors. & Another Case (1987) CLJ (Rep), p. 233.

¹⁵ L Yulyadi Arnakim, Hibah, A Gift of Love, <http://islamic-world.net/economics/articles.htm>, accessed on 25th October 2007

recommended to appoint a professional trustee to execute the *hibah*. Even though the *hibah* belongs to the recipient technically, it is the trustee who will manage, maintain or dispose of it.

One can put condition on the trustee that the *hibah* is given to the recipient only upon the death of the settler. By doing this, one not only expedites the process of distribution, as the *hibah* will not be subjected to the laws of *farā'id*, the estate is protected as well. Therefore it will allow the son or daughter to legally own the property. As a result, *waṣiyyāt* and *hibah* are devices that we can use to provide for the distribution of our estate upon our death.¹⁶

In fact Islam recognizes that an adult Muslim in his lifetime may deal with his property without any restraint. He is blessed when he bears in mind that such property is a trust upon him given by God and that he uses and expands it for lawful purposes in accordance with the teachings of God. He may give any of his property by way of charity or by way of gifts. He is bound however to pay part of his property annually on account of the *zakat* which is obligatory.

Revocation Of *Hibah*

Shafiis, Hambalis and a few of Malikis generally view that revocation of *hibah* is allowed as long as it is done before the delivery of the object of *hibah* or before the recipient takes it into his possession. Once the object has been delivered to the recipient, the *hibah* becomes binding, thus, revocation of *hibah* is not allowed except a *hibah* made by parents to their son or daughter.¹⁷ Shafiis further stipulate certain conditions in allowing their parents to revoke their *hibah* to their son or daughter. Among the conditions are:

- i. A son or daughter must not be a slave
- ii. The *hibah* property must be in a form of *'ayn* or a corporeal property, and not in a form of debt
- iii. The *hibah* property must be under the control of the son or daughter
- iv. The son or daughter must be free from any impediment that is due to mismanagement of property
- v. The *hibah* property must not be a kind of perishable item

¹⁶ *Ibid.*

¹⁷ 'Abd al-Raḥmān al-Jaaziri, (2001), *Kitāb al-Fiqh 'Alā al-Madhāhib al-Arba'ah*, v. 3, p. 267-272.

- vi. The *hibah* property must have not been sold by the recipient

Apart from that, Hanafis view that revocation of *hibah* is permissible even after the delivery of the object of *hibah*. They argue that the one who makes the *hibah* entitle to revoke the *hibah* at his discretion. However, they are of the view that revocation of *hibah* is not encouraged or *makrūh*.¹⁸

Nevertheless, Imām Aḥmad and Ṣāḥiri scholars still maintained the views that revocation of *hibah* is not allowed¹⁹ based on a valid and authentic hadith agreed by the scholars, which means:

*“Whoever gave the property to some one and take the hibah property back, he is similar to a dog which licks its vomit”*²⁰

In conclusion, even though apparently the scholars have different opinions on the permissibility of the revocation of *hibah*, they have generally agreed that revocation of *hibah* is allowed if it is done by mutual agreement between the parties. Al-Sanhūrī also takes a similar approach that revocation of *hibah* must be depending on mutual consent of both parties.²¹

Position Of Farā'id Under Malaysian Law

Besides explaining the concept of *farā'id* system as well as *hibah*, this paper will continue to explain the legality of *farā'id* system as well as *hibah* under Malaysian law. Article 8 (2) of the Federal Constitution of Malaysia, which came into force on 28th of September 2001 was said to have a great significance towards women, when it includes the prohibition of gender as one of the prohibited grounds of discrimination to be applied in Malaysia. This was hailed as a progressive move and a commitment by the government to reject any forms of discrimination against women.

However, this Clause 2 must be read together with Clause 5 (a) of Article 8. Indeed, this particular Clause 2 cannot be read in isolation, but must always be subjected to

¹⁸ Ibn 'Ābidīn, (1998), *Ḥāshiyah Radd al Muḥtār*. Beirut: Dār al-Ihya' al-Turath, v. 12, p. 512.

¹⁹ Ibn Rushd, (1996), *Bidāyah al-Mujtahid*, Beirut: Dār al-Kutub al-'Ilmiyyah, v. 5, p. 368.

²⁰ *Ibid.*, p. 428-429.

²¹ Al-Sanhūrī, *Nazariyyāt al-'Aqd*, Beirut: Dār al-Fikr, p. 724.

Clause 5 (a) of Article 8. Clause 5 provides that this Article does not invalidate or prohibit any provision regulating personal law, namely in this discussion is referred to Islamic law.

By virtue of the Ninth Schedule of the Federal Constitution, particularly under State List, List II, the states have a jurisdiction over Islamic matters which among others include Islamic law of inheritance (*farā'id*). Hence, it is clear that the State Legislative Assemblies in each and every state in Malaysia has the power to enact the law relating to *farā'id*. Furthermore, the Federal Constitution provides that the shariah court has exclusive jurisdiction to hear the case of *farā'id* as it is falls under its jurisdiction, through the state law and thus, the civil courts has no power to interfere it.²²

Apart from that, the rationale of the rule “to the male, a portion equal to that of two females” is that the man is assumed to have economic responsibility to maintain his family which among others includes his wife and children. Pursuant to that rule, Islamic Family Law (Federal Territories) Act 1984 (Act 303) provides that the court may order a man to pay maintenance to his wife or former wife.²³ Moreover the court may also make an order for the person liable to pay the maintenance (the man) to vest any property as a security for the maintenance.²⁴ This is to make sure that the income from the property can be utilized to pay the maintenance to the wife and the children. Besides the duty of a man towards his wife, such a duty is also extended to his children, whether they are in his custody or the custody of any other person. That particular maintenance shall include the cost for the accommodation, clothing, food, medical attention, and education.²⁵ Again, the court may make an order for the man to pay the maintenance to his children if he fails to do so.²⁶

Conclusion

Therefore, the rule that “to the male, a portion equal to that of two females” cannot be used to consider the *farā'id* system is bias against women. That particular rule, instead of applicable to the women under the capacity as a children (daughter), does not represent the rights of women in the *farā'id* system as a whole. The definition of women as a whole should also include women as a mother, a sister, and a wife, and

²² Article 121(1A) of the Federal Constitution.

²³ Section 59 of Islamic Family Law (Federal Territories) Act 1984 (Act 303)

²⁴ Section 62 and 74 of Islamic Family Law (Federal Territories) Act 1984 (Act 303)

²⁵ Section 72 of Islamic Family Law (Federal Territories) Act 1984 (Act 303)

²⁶ Section 73 of Islamic Family Law (Federal Territories) Act 1984 (Act 303)

thus should not only limit to a daughter. The share of these heirs does not depend on sex. In some cases, it has been proved that the share of the woman may even be superior to that of the man.

Apart from that, Islam still provides other ways of distribution of property upon the death of a deceased. *Hibah* can be considered to complement the *farā'id* system, particularly in the case of a father feels that his daughters have special needs to his property and he wants to give his son or daughter more than what he or she supposes to get in his estate planning and

Based on the foregoing discussions, it may conclude that to regard the *farā'id* system as a controversy because of gender-based inequalities seems to be inappropriate. Even though the daughter can inherit half of that son based on the rule to “the male, a portion equal to that of two females”, Islam still provides the rationale behind that rule. Male inherits double than female because he financially supports the family and a woman has no financial obligation in Islam. Financial responsibility lies on the shoulder of the man. In fact, it is the duty of the father and brother to look after her financial requirements before a woman is married. But after she is married, it is her husband's or son's duty. Islam holds the man financially responsible for the needs of his family. In order to fulfill the responsibility, the men get double the share of inheritance. Therefore, to regard *farā'id* as gender-bias system seems inappropriate because there is an economic responsibility for the man towards his family which is attached to his right over the property under the *farā'id* system.