

## Syuf'ah in Islamic Laws and its Significance Under the Land Law of Malaysia

**Mohd Marbawi Taha\***

Academy of Contemporary Islamic Studies, Universiti Teknologi MARA, Cawangan Pulau Pinang, 31500 Pulau Pinang, Malaysia

**Mohd Badrol Awang**

Faculty of Law & International Relations, Universiti Sultan Zainal Abidin, Gong Badak, 21300 Terengganu, Malaysia

**Jasni Sulong**

School of Humanities, Universiti Sains Malaysia, 11800 Pulau Pinang, Malaysia

**Zulaipa Ruzulan**

Academy of Contemporary Islamic Studies, Universiti Teknologi MARA, Shah Alam, 40450 Selangor, Malaysia

**Asjad Mohamed**

Academy of Contemporary Islamic Studies, Universiti Teknologi MARA, Shah Alam, 40450 Selangor, Malaysia

**Mohd Kamal Azman Jusoh**

Academy of Contemporary Islamic Studies, Universiti Teknologi MARA, Shah Alam, 40450 Selangor, Malaysia

**Mohd Nasir Ayub**

Academy of Contemporary Islamic Studies, Universiti Teknologi MARA, Cawangan Kedah, 08400 Kedah, Malaysia

### Abstract

In Islamic law, al-syuf'ah affords the co-proprietors of undivided shares in a property the preferential right to purchase the shares of other co-proprietors before the shares can be offered to outsiders. In the context of Malaysian land law, the study on al-syuf'ah has its own significance as it is closely related to the concept of co-proprietorship of land (CPL) under the National Land Code, 1965 (NLC). It is well known that many issues are confronting the CPL. Most of the problems accrue from unhealthy relationships among the owners which then develop into developmental and economical aspects of the land. On the above facts, this study examines the potential of al-syuf'ah in addressing these problems as well as the possibility of employing the rules of al-syuf'ah alongside the country's land law. To undertake the research, the data is collected from the library-based literature which then analysed using inductive, deductive as well as comparative methods. The study finds that there are leeways that allow for the implementation of the rules of al-syuf'ah alongside the existing land law. The rules of al-syuf'ah if implemented would be able to solve some of the existing problems and to prevent the problems from recurring in the future.

**Keywords:** Al-syuf'ah; Co-proprietorship; National land code; Land law.



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### 1. Introduction

This article aims to discuss the concept of al-syuf'ah and its significance in the context of co-proprietorship of land (CPL) under the Malaysian National Land Code, 1965 (NLC). The article begins with discussing the concept of al-syuf'ah in Islamic law which is then followed by discussing the extent of the importance of al-syuf'ah practice in resolving some common problems prevailing amongst co-proprietors of land. Towards examining the potential of al-syuf'ah to operate under the existing land law, this article discusses the opinions of some experts on the issue as well as the likely impediments for the rules of al-syuf'ah to operate.

### 2. Concept of Al-syuf'ah

**Syarbini (1994)**, defined al-syuf'ah is as the co-proprietor's right to acquire the shares that have been sold to a new owner (a third party buyer) with consideration by another co-proprietor. There is a difference of opinions between the majority jurists **Al 'Ulama (1984-2006)** and the Hanafi School regarding the parties who have the right to al-syuf'ah. According to the majority jurists, the right to al-syuf'ah is only available to co-proprietors while according to **Haskafi and Ibrahim (2002)** the Hanafi School extends the right to the neighbour as well. In general, there are three pillars of al-syuf'ah;

- a. Syafi', the co-proprietor who demands the right of al-syuf'ah.
- b. Masyfu' that is the subject matter/property of al-syuf'ah.
- c. Masyfu' bih ie the specific share or portion claimed under al-syuf'ah (Hawawini, n.d).

The law of al-syuf'ah is compulsory based on the tradition of the Prophet (peace and blessings of Allah be upon him) and the consensus of the Muslim jurists (Nawawi, n.d.). There are several hadiths which expressly lay down the provisions relating to the right to al-syuf'ah. One of the hadith was narrated by Jabir r.a. which means:

"The Prophet (peace and blessings of Allah be upon him) made a decision based on the law of al-syuf'ah for the undivided property, be it a house or a garden. It is not permitted for any owner to sell his property except after informing the other co-proprietors. It is up to the co-proprietors whether to take (to buy the property under the right to al-syuf'ah) or to release it. If the property was sold without the co-proprietors being informed (of the transaction), then the owner is more entitled to get it back".

Al-syuf'ah's legality is further reinforced by the consensus of Muslim jurists. Al-Mawardi explains, although the hadiths on al-syuf'ah do not reach the status of mutawatir,<sup>1</sup> but its practice had been widespread so that the narrative has reached the level of mutawatir (Nawawi, n.d.).

Al-syuf'ah's conception is constructively suitable to shared ownership of property which is often associated with various practical problems. Therefore according to Taha (2016), the concept of al-syuf'ah aligns well with the Islamic principle of eliminating harm in one's life as well as in the lives of others. Further, the rule of al-syuf'ah serves as a preliminary step in preventing greater future harm (Zuhayli, n.d.), especially in relation to the enjoyment of land and its facilities such as regarding the access to land, the drainage and irrigation and so on. According to al-Nasur, the rule of al-syuf'ah, if properly observed and applied, would resolve the issues relating to sale of shares of a co-owned property, reduce the involvement of third parties in the ownership of common property and hence the lesser number of owners (Al Nasur, 2010).

Principally, al-syuf'ah is a privilege or right granted to a person who co-owns the property and it is up to him whether to exercise the right or not (Ahmad, 2015). Irrespective of that, from the perspective of Islamic governance, al-syuf'ah forms part of Islamic law (*Syariah*) that must be implemented by the authority in order to safeguard the interests of co-proprietors (Nawawi, n.d.).

At present, there are some Arab countries that have codified the law on al-syuf'ah, such as the Saudi Arabia, Yemen, Libya, Egypt and Iraq with different legal rules depending on the opinions of jurists the country adopts. The majority jurists restrict the right of al-syuf'ah to co-proprietors only whereas the Hanafi School of law extends the right to neighbours as well (Ahmad, 2015; Dar al Ifta, 2007).

Based on Buang (1993) reviews, it was found that in the context of land legislation in Malaysia, the rules of al-syuf'ah which require the seller to offer his shares to the co-proprietors does not exist in the NLC even though the same rules existed in the old Malay customary tenure such as in the Perak Act. Previous studies established that the unrestricted sale of co-proprietors shares has given rise to some implications such as uncertainty in land management, especially when the existing co-proprietors are not in good relationship with the new buyers (Taha, 2016). If CPL is an orchard, the question arises as to the responsibility and involvement of each owner in the management of the orchard (Mamat, 2015). Consequently, these problems could adversely affect the development of the land in the long run. In this case, the rules of al-syuf'ah can play a role in preventing such problems whereby the existing co-proprietors have the right to acquire the shares by exercising the option to buy the shares from the selling co-proprietors or to have the sale and purchase agreement between the selling co-proprietors and the third party buyer rescinded especially when the third party is known to have bad relationship with them.

In addition, the law of al-syuf'ah can also help reduce the addition of new owners of different race and religion in the common ownership of a property. In this country, the unique elements of 'Malay' and 'Islam' are imbued in the proprietorship of land. Under Article 89 of the Federal Constitution, the Malay Reserve Land (MRL) can only be held by the Malays (Baharuddin, 2012). Meanwhile, under Article 160 (2) of the Federal Constitution, among the criteria to be 'Malay' is that the person must profess the religion of Islam. This means the land owned by the Malays is at the same time the land of Muslims. Accordingly, a transfer of land ownership to non-Malays is not an issue for MRL cases. However, problems might arise for non-Malay reserve land where a co-proprietor of the land is free to sell his shares to any individual even if the person is non-Malay. It is in this sense that the land owned by the Malays can legally be transferred to the non-Malays. In the context of CPL, ownership of certain portions of a land which is originally Malay-owned can transfer to other races without the other co-proprietors' knowledge which might create uneasiness to the existing co-proprietors of the land. This potential problem can be avoided if the syuf'ah law is enforced where the seller (the co-proprietor) must offer his shares first to other co-proprietors before he can sell the share to an outsider. It is only where all co-proprietors decided not to buy the shares that the shares can be offered to the outsiders. In the case where the seller sells his shares without offering them first to the other co-proprietors, the co-proprietors are entitled to resort to any appropriate legal action to obtain the impugned shares provided that they have to reimburse the purchase price made by the outsider buyer. In this regard, the practice of al-syuf'ah is indeed capable of providing the Muslim co-proprietors with a kind of protection to avoid the participation of non-Muslims in their ownership of land and indirectly to prevent the transfer of Muslim-owned land to the hands of non-Muslims. It turns out that the law of al-syuf'ah can help maintain Muslim ownership of land in this country (Sulong, 2011).

In addition, al-syuf'ah affords a kind of protection to the ancestral land. It is noted that Malays' appreciation of ancestral inheritance encourages them to maintain and safeguard their family ownership (Aziz, 2009; Taha *et al.*,

<sup>1</sup> Mutawatir Hadith refers to the hadith narrated by an indefinite number of narrators in such a way as to preclude the possibility of their agreement to perpetuate a lie. Mutawatir Hadith must be recognised and accepted without the need to examine the conditions of the narrators (Abu Zahw, 1378H).

2015). In this regard, al-syuf'ah can also be helpful since any transfer of shares to outsiders may be reclaimed by the co-proprietors to ensure the ancestral land remains as family property for generations to come.

Further, al-syuf'ah may help reduce or terminate co-proprietorship of a property if one of the co-proprietors buys the shares offered to him by another co-proprietor (Al Nasur, 2010). This practice is indirectly supportive to the policy of the land authorities especially respecting agricultural lands. Section 205 (3) and 205 (4) of NLC were enacted with the aim of reducing or maintaining the number of existing owners of agricultural land so that the land continues to have agricultural features (Senfteben, 1978; Suman, 2012), and economic value<sup>2</sup> (Kertas Kerja Mengenai Tanah-tanah, 1965).

Looking at the potential of al-syuf'ah which is capable of addressing some of the prevailing problems, it is not surprising that some scholars and experienced researchers in land laws such as Buang (1993), Awang (1994), and Mamat (2015) are supportive for the implementation of the syuf'ah rules. Nevertheless, there has yet to be a complete framework devised by any party on how al-syuf'ah rules can be applied alongside the existing land laws. Respecting this, Salleh Buang suggests al-syuf'ah rights to be recognized as 'caveatable interest' (Buang, 1993), but this proposal does not explain in detail on how al-syuf'ah system can operate under the current legal system. Therefore, it is suggested that, an overall assessment needs to be conducted especially pertaining to the suitability of its implementation under the Torrens System being the system currently applied in Malaysia. The assessment is very important so that al-syuf'ah can be implemented effectively to benefit all stakeholders.

### 3. Methodology of Research

The research methods in the study is using qualitative perspective, which involves collecting and analysing data. Most of the data were collected through library research whereby instead of books, the data also have been selected from scholarly journal, statutes as well as law reports. To strengthen on the discussion, the study also refer to expert interviews. The method of interview is actually essential in qualitative study, that is more powerful in eliciting narrative data that allows researchers to investigate people's views in greater depth (Edwards and Holland, 2013). To add this, interviewing is a noteworthy method for exploring the construction and negotiation of meanings in a natural setting (Alshenqeeti, 2014).

To scrutinize on the above's data, the study have undergone an analysis process which is significant in order to bring informations into a focus direction, structured and bring a meaning to the objektive of the research (Mckinney, 2013). In qualitative data analysis, the process taken as elaborated by Ngulube (2015), is a transformation raw data by means of analytic procedures, into a clear, understandable, insightful, trustworthy and even investigation. The process involves interpretation as well as application of deductive and inductive reasoning to the research (Zalaghi and Khzaie, 2016). In this stage, the method of content analysis have been used to determine the presence of certain words or concepts within texts or sets of texts. As according to Elo *et al.* (2014), the method works on systematic reaction to the research question through what to analyse and what to initiate. At the end, such analysis can be regarded as valid if it adequately represents the concepts and answered the underline objectives (Schreier, 2012).

### 4. Research Question

The main question pertaining to the implementation of al-syuf'ah law in the country is, how possible to apply the rules of al-syuf'ah alongside the current land legislation in Malaysia? How far the welfare of co-proprietors and stakeholders could be preserved? To what extent the willingness of the Malaysian authorities in adapting modifications as well as amendments of the several provisions of national land law in Malaysia? To answer the question, the study needs to explain the principle of 'indefeasibility' which is the cardinal principle of the Torrens System being the system currently enforced in Malaysia.

### 5. Result and Discussions

The study found out that under the Torrens System, the governing principle is 'registration is everything'. The effect of registration is the conferment of indefeasible ownership to the registered owner (Sood and Tee, 1995). The meaning of 'indefeasibility' has been explained by Lord Wilberforce in the case of *Frazer versus Walker* (1967) (1 AC 569), where he observed;

"it is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration."

In other words, the principle of 'indefeasibility' means that the government guarantees the ownership of the registered owner of the property cannot be questioned, challenged, denied or eliminated. It also means conclusiveness of the register (Wong, 1975). According to David Wong, this indefeasibility of title exists immediately upon registration (Buang, 1993).

Based on the above explanation, it is found that al-syuf'ah is difficult to be implemented under the existing land law because a co-proprietor's (syafi') action to recover the shares of the land that have been sold and duly registered under the name of a third party buyer is contrary to the principle of 'indefeasibility of title'. Therefore, it is proposed that the practice of al-syuf'ah be implemented before the registration of the title and not afterwards. By so doing, at

<sup>2</sup> According to Chen the size of a given agricultural land can be considered as economical if it can yield surplus returns that can be spared for saving or maintaining the estates of the farmers and their families after deducting living and production expenses beside leading a good life. (Kertas Kerja Mengenai Tanah-tanah, 1965).

least certain parts of al-syuf'ah rules can be implemented even though not in its full-fledged rules. To understand more clearly, the proposed procedures are as follows:

i) A co-proprietor who intends to sell his undivided shares to outsiders needs to obtain a certificate from the other co-proprietors that they reject the offer to buy the shares. The certificate is obtained through two methods;

a. by obtaining the signature of all co-proprietors by using the specific form provided by the Land Office. The form should contain the price offered so that the co-proprietors can consider whether to buy the shares or to reject. This method is simple and easy where the formal rejection by the co-proprietors will enable the transfer process of the shares to the third party buyer can be done without delay.

b. If the co-proprietors cannot be contacted for some reasons ie having bad personal relationship with the other co-owners or residing out of jurisdiction, the selling co-proprietor may apply for leave to sell his shares by filling up the form provided at the Land Office. The Land Office will notify the other co-proprietors using the registered address in the title document to give them the opportunity to exercise their right under the rules of al-syuf'ah within, let say, one month. If there is no claim within that period, the sale to the external party is allowed. In this regard, a minimum processing fee can be charged on the selling co-proprietor as it involves a sort of operation cost on the agency involved.

ii) Once the certificate is obtained through either of the above methods, the Land Office will issue a letter of authorization allowing the selling co-proprietor and the third party buyer to complete the transfer of the shares using the 14A transfer form as usual.

Notably, the difference between the above proposed procedures and the jurisprudential rules of al-syuf'ah is regarding the point of time within which the right to al-syuf'ah can be exercised. According to the proposed procedures, right to al-syuf'ah is made available prior to registration only while under the original jurisprudential rules; the right to al-syuf'ah can be exercised after the sale transaction takes place which impliedly means even after registration has been completed. Irrespective of the difference between the two, the objective of al-syuf'ah to protect the interests of the co-proprietor is maintained where the co-proprietors still have the right to claim their right to al-syuf'ah provided that they do so before the registration process is completed. In addition, according to the scheme of the proposed procedures, the co-proprietors will be aware of the seller's intention to sell his shares upon being informed by the seller himself or by notification letter from the Land Office. From the seller's perspective, it is believed that the proposed procedures shall not adversely affect him as the one month waiting period is not too long. The move to set a reasonable period to be given to other co-proprietors to make decision whether to buy the shares of the selling co-proprietor or not is in line with the view of Muhammad ibn al-Hasan. He is of the opinion that one month's notice is reasonable so that the buyer would not be prejudiced by the delay. His opinion has been enacted in *Majallah al Ahkam al 'Adliyyah* (Al 'Ulama, 1984-2006). Further, under the proposed procedures, the third party buyer who has purchased the shares needs not worry about his ownership to the shares being deprived of him since the other co-proprietors can only claim their right under the rules of al-syuf'ah before registration is made.

## 6. Conclusion

In conclusion, the practice of al-syuf'ah has the potential of redressing some of the problems in land co-proprietorship in the country. Its practice may help reduce the number of co-proprietors of land, minimize non-Muslim participation in the ownership of Muslim-owned land as well as to safeguard ancestral lands. As such, introduction of the syuf'ah rules to the Malaysian land law is a significant move. The study understands the contradictions between al-syuf'ah rules and the principle of indefeasibility of title which has been the main principle of the Torrens System. In order to circumvent such contradictions, it is proposed that al-syuf'ah be implemented with a slight modification to its original forms whereby claim to the right of al-syuf'ah is permitted before the registration is complete and not otherwise. Through this method, the objective al-syuf'ah to safeguard the welfare and interest of the co-proprietors and stakeholders could be maintained. Admittedly, the success of the implementation of al-syuf'ah depends largely on the commitment of the authorities as it involves modifications to administrative rules as well as amendments to several provisions of national land law.

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