

ISSUES ON ORPHANED GRANDCHILDREN'S  
RIGHTS OF INHERITANCE

BY

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A thesis submitted in fulfilment of the requirement for  
the degree of Doctor of Philosophy (Law)

Ahmad Ibrahim Kulliyyah of Laws  
International Islamic University Malaysia

AUGUST 2009

## ABSTRACT

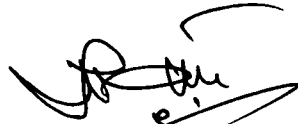
This thesis seeks to examine legal principles governing orphaned grandchildren under various disciplines in the Islamic law and the law as applicable in Malaysia. In Malaysia so far, only the States of Selangor, Negeri Sembilan and Malacca have provided the legal protection of orphaned grandchildren through the promulgation of *waṣiyyah wājibah* respectively in the Muslim Wills (Selangor) Enactment 1999, Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (Malacca) Enactment 2005. Unlike the provisions in the Middle Eastern Countries in which the doctrine originates, the provisions in the above enactments are very brief and their applications remain unclear. To date, not a single case has ever been reported illustrating those provisions. Therefore, the research is undertaken based on the premise that, the present law governing the orphaned grandchildren in Malaysia remains very general and vague. The absence of sufficient guidelines may lead to inefficiency and non-uniformity in its application between the syariah courts in these States. The study on Islamic law as applied in other Muslim countries aims to examine on how far Malaysia can learn from them both in theory and practice for the improvement of legal protection of the orphaned grandchildren. The research includes an analysis of the relevant laws in Islamic law of inheritance (*farā'id*), bequest (*waṣiyyah*), gift (*hibah*) and other modern instruments like obligatory bequest (*waṣiyyah wājibah*) as applicable in the Middle Eastern Countries, doctrine of representation (doctrine of *tanzīl*) as applicable in Pakistan and *zakāh* distribution in the State of Selangor. Focus shall be given on the effectiveness of the above instruments to protect the interest of the orphaned grandchildren. The study also reveals that that the legal provision on the protection of orphaned grandchildren still requires reforms relating to the application of the law substantively and procedurally.

## ملخص البحث

تهدف الرسالة إلى دراسة المبادئ القانونية التي تحكم أحوال فروع الوارث الذي توفي في حياة مورثه (يتامى الأحماد) في كل من الشريعة الإسلامية بمختلف تخصصاتها والقانون المطبق في ماليزيا. وفي هذه الدولة المكونة من عدة ولايات توجد ولايتان فقط التان ينص قانونهما على حماية "فرع الوارث" إحداهما ولاية سلنجرور بإدراج الوصية الواجبة في قانون وصية للمسلمين لسنة 1999 ، والأخرى ولاية نجرى سمبيلان من خلال قانون الوصية للمسلمين لسنة 2004 وولاية ملاك من خلال قانون الوصية للمسلمين لسنة 2005. على الرغم من أن القانونين المذكورين استلهمتا من نظائرها في دول الشرق الأوسط إلا أن معالجتها لأحكام الوصية الواجبة تبدو غاية الاختصار ويكتنفهما الغموض. وعلاوة على ذلك فإنه ليس هناك قضية قضائية فصلت بموجب البنود المتعلقة بالوصية الواجبة. وتعتقد هذه الدراسة انطلاقا من أن القانون المنظم لأحوال يتامى الأحماد في ماليزيا يتسم بشدة العموم وعدم الدقة مما قد يؤدي إلى عدم الكفاءة والاتساق عند تطبيقه في المحاكم الشرعية. هذا ، ويشمل البحث دراسة الشريعة الإسلامية المطبقة في الدول الإسلامية الأخرى ليعرف مدى إمكانية استفادة ماليزيا من تجربة هذه الدول نظريا وممارسة من أجل تحسين الحماية القانونية لیتامى الأحماد. ويحتوى البحث أيضا على تحليل القوانين وثيقة الصلة بأحكام الميراث والوصية والهبة وغيرها من الوسائل الحديثة مثل الوصية الواجبة كما هي المعمول بها في دول الشرق الأوسط إضافة إلى نظرية التزويل المطبق في دولة باكستان . وأثناء تحليل هذه القوانين يتم التركيز على فعالية الوسائل المذكورة في حماية مصالح هؤلاء الأحماد. وتكشف الدراسة أن المواد القانونية بشأن حماية يتامى الأحماد في حاجة إلى إصلاحات وتعديلات التي تتعلق بتطبيق القانون من الناحية الموضوعية والإجرائية.


## APPROVAL PAGE

The thesis of Tajul Aris bin Ahmad Bustami has been examined and is approved by the following:



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Ismail Mohd @ Abu Hassan  
Supervisor



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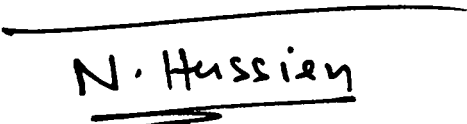
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## DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Tajul Aris bin Ahmad Bustami

Signature.....

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## ACKNOWLEDGEMENTS

In the Name of Allah Most Gracious Most Merciful. Alhamdulillah, praise be to Allah s.w.t. without whose Blessings and Mercy, this study would not have been possible.

It is a great pleasure to express my profound gratitude to my respected supervisor, Assistant Professor Dr. Ismail bin Mohd @ Abu Hassan, for his reading of the thesis, critical ideas, invaluable suggestions and advice which contribute significantly to the completion of this thesis. I am also thankful to Datuk Sheikh Ghazali Abdul Rahman, former Ketua Pengarah Jabatan Kehakiman Syariah Malaysia, for his support of the thesis writing and Tuan Haji Dr Mohd Naim Mokhtar, former Kuala Lumpur syariah court judge, for his ideas and comments especially during the early preparation of the thesis.

I wish to record my appreciation to the Dean of the Ahmad Ibrahim Kulliyah of Laws, IIUM, Professor Dato' Dr Zaleha Kamaruddin and its former Dean, Professor Dr. Nik Ahmad Kamal Nik Mahmud for their continuous support. My deepest appreciation also goes to and the Head of the Islamic Law Department, Associate Professor Dr Najibah Mohd Zin and former Head, Dr Ahmad Azam Othman, who have tended considerable help in providing me with all the facilities necessary for the successful completion of my research.

I am grateful to Dr Naşr Farīd Muḥammad Wāşil Professor at University of al-Azhar and a former Grand Mufti of Eqypt, Dr Aḥmad Muḥammad al-‘Asāl, former Deputy Rector of International Islamic University Islamabad and Ustāz Jamāluddīn ‘Aṭiyyah, Founder Editor, Majallat al-Muslim al-Mu‘aşşir for their ideas and encouragement during the interviews in which all were conducted in Cairo Egypt in 2005. I am thankful also for the help that I received from Yang Arif Ustaz Abu Bakar, the Syariah High Court Judge, Shah Alam, Selangor and the staff of the Majlis Agama Islam Selangor especially its Legal Advisor Puan Nurhani Salwa Jamaluddin for the opportunity to interview them.

I record that I could not have completed this research without access to the facilities of the libraries of the International Islamic University Malaysia, University of Malaya, National University of Malaysia and Jabatan Kehakiman Syariah Malaysia.

My deepest appreciation and gratitude goes to my father, Tuan Haji Ahmad Bustami Haji Mohd Yusof and my mother, Puan Hajjah Mariam Haji Zakaria, without whom and whose prayers would not have led me this far. Gratitude is also due to my parents in law, Allahyarham Tuan Haji Ahmad Sichik and Puan Zaleha Abdul Kadir and to all my family for the endless support.

I am greatly indebted to my wife, Madehah Ahmad for her endless support, understanding, patience and assistance personally and academically which had contributed significantly to the completion of this thesis. To her I convey my love and utmost gratitude also to our children, Aiman, Irdina, Adli, Hannah and Husna who had to bear my absence.

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(unreported)

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Wills Act 1959 (Act 346).

## LIST OF ABBREVIATIONS

All ER	All England Report
Ch	Chancery Report
CLQ	The International and Comparative Law Quarterly
d.	died
Ed.	Edition or Editor
edit	Editor
e.g.	<i>(Exempligratia)</i> ; for example
etc	et cetra (and so forth)
f.n.	foot note
Ibid	Ibidem (same as above)
IUM	International Islamic University Malaysia
IKIM	Institute Kefahaman Islam Malaysia
ins.	Inside
JAKIM	Jabatan Kebajikan Islam Malaysia
JAI Sel.	Jabatan Agama Islam Selangor
JH	Jurnal Hukum
JKSM	Jabatan Kehakiman Syariah Malaysia
LPZ	Lembaga Pungutan Zakat
MAIS	Majlis Agama Islam Selangor
MLJ	Malayan Law Journal
n.d.	No date
n.p.	No place of publication
No.	Number
Ors	Others
p.	page
para	paragraph
pp.	pages
PPZ Selangor	Pusat Pungutan Zakat Selangor
P.U.(A)	Pemberitahuan Umum (A)
Trans.	Translation/translated by
Vol.	Volume

## TRANSLITERATION TABLE

ا a	ز z	ق q
ب b	س s	ك k
ت t	ش sh	ل l
ث th	ص ṣ	م m
ج j	ض ḍ	ن n
ح ḥ	ط ṭ	ه h
خ kh	ظ ṭ̤	و w
د d	ع ʿ	ء ʾ
ذ dh	غ gh	ي y
ر r	ف f	

### short vowels

ـَ a

ـِ i

ـُ u

### long vowels

ـَـ ā

ـِـ ī

ـُـ ū

ى ⑦

### diphthongs

ـَو aw

ـِـي ay

### doubled

ـَوـ aww

ـِـيـ ayy

ـَوـ uww

ـِـيـ iyy



# CHAPTER ONE

## INTRODUCTION

### BACKGROUND OF THE RESEARCH

Under the traditional Islamic law of inheritance, the orphaned grandchildren<sup>1</sup> of a predeceased son or daughter are not entitled to inherit the property of the deceased grandparent in the presence of any surviving son of the praepositus. This rule is known as *al-Ḥajb*, which means exclusion of inheritance due to the existence of nearer relatives to the praepositus.<sup>2</sup> The presence of any surviving son of the praepositus excludes the orphaned grandchildren from the inheritance of their deceased grandparent<sup>3</sup> even though their dead parents might have contributed to the growth of the grandparent's wealth.

Muslim jurists had not critically discussed the position and rights of such grandchildren in the medieval period. It was only in the 20<sup>th</sup> century that Muslim jurists, especially in the Middle East, have discussed in great length the problem that may arise because of the exclusion of the orphaned grandchildren in the Islamic law of succession. Eventually, the system of obligatory bequest (*waṣīyyah wājibah*) was introduced and applied in some Muslim countries like Egypt,<sup>4</sup> Morocco,<sup>5</sup> Tunisia,<sup>6</sup> Syria,<sup>7</sup> Jordan<sup>8</sup> and Kuwait.<sup>9</sup> The system provides, *inter alia*, that if a grandfather fails

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<sup>1</sup> "Orphaned grandchildren" generally refers to grandchildren whose parental link with the praepositus predeceased the praepositus.

<sup>2</sup> Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhū*, Damsyiq: Dār al-Fikr, 1989, vol. 8, at 346.

<sup>3</sup> *Ibid*, at 122.

<sup>4</sup> See The Egyptian Law of Testamentary Disposition 1946.

<sup>5</sup> See The Moroccan Code of Personal Status 1958.

<sup>6</sup> See The Tunisian Law of Personal Status and Supplement Thereto 1959.

<sup>7</sup> See The Syrian Law of Personal Status 1953.

<sup>8</sup> See The Jordanian Code of Personal Status 1976.

<sup>9</sup> See The Kuwaiti Law on Obligatory Bequest 1971.

to make a bequest in favour of his orphaned grandchildren, the court will act as if he had, and such an implied or obligatory bequest will have priority over any voluntary bequest which the praepositus may have actually provided for in his will.<sup>10</sup>

Pakistan, on the other hand, adopts a system of inheritance by right or doctrine of representation (*tanzīl*).<sup>11</sup> This system enables the orphaned grandchildren to inherit the estate of their deceased grandparent as legal heir by way of representation. This system allows such grandchildren to take the shares of their predeceased father and mother respectively *per stirpes* from the property left by the praepositus.

In Malaysia, the Wills Act 1959, which is not applicable to Muslim, provides that the issues of a predeceased child shall still enjoy any gift in his grandparent's bequest regardless of the fact that it is meant for his predeceased parent.<sup>12</sup> He or she would take the share which his or her parents would have inherited should they survive the testator. This is a departure from a general rule that a gift would lapse if the beneficiary predeceases the testator.<sup>13</sup>

However, except in Selangor, Negeri Sembilan and Malacca, there is no specific legislation for Muslim in other States in Malaysia regarding their right of succession,<sup>14</sup> in general, and the position of orphaned grandchildren, in particular. As a result, when an issue relating to orphaned grandchildren arises in these States, it is hard to determine what the approach of the syariah court would be. In States where

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<sup>10</sup> See for example section 76 of the Egyptian Law of Testamentary Disposition 1946. See also comments by Kemal Feruki, "Orphaned Grandchildren in Islamic Law", *Islamic Studies*, 4 (1965), at 257.

<sup>11</sup> See section 4 of The Pakistan Muslim Family Laws Ordinance (Ordinance VIII of 1961).

<sup>12</sup> See section 25.

<sup>13</sup> The general rule is if a beneficiary is no longer alive at the date of the testator's death, the beneficiary's estate will not in general take any benefit under the will. The gift in the will is of no effect. Section 25 is an exception to this rule. See also *Re Leach* [1948] Ch 232, [1948] 1 All ER 383 and *Stevens v King* [1904] 2 Ch 30.

<sup>14</sup> The courts in these States rely solely on the general provision of bequest and inheritance in their respective Administration Enactments. See for example section 46 of the Administration of Islamic Law (Federal Territories) Act 1993.

there is no express provision on the orphaned grandchildren, the court most probably would refer this matter to *ḥukm sharā'* in general. Since the *waṣiyyah wājibah* has no basis either in al-Qur'ān nor in *al-Sunnah* and it is not surprisingly if the court rules that there is no *waṣiyyah wājibah* in Islām. If the courts, despite the absence of the express provision, rule that the *waṣiyyah wājibah* is to be applied in a particular case, the courts would inevitably encounter with various interpretations and approaches of the Muslim countries' courts regarding this matter. It is hard to determine that which interpretation and approach would be preferable by the Malaysian syariah courts.

In fact, because of the generality of the relevant legal provisions in the States of Selangor, Negeri Sembilan and Malacca, the syariah courts in these States are not exempted from having difficulties in implementing the *waṣiyyah wājibah*. The courts in these States would also encounter with different methodologies as being used in other Muslim countries. The main problem faced by the syariah courts in these States is that there is no guideline whatsoever from the relevant authorities on the application of this doctrine. The complication can be seen when different judges in Selangor propose different solutions in resolving one particular case involving orphaned grandchildren.<sup>15</sup> In Negeri Sembilan, the absence of adequate guidelines prompts the syariah court judges to 'unofficially' abandon temporarily the application of *waṣiyyah wājibah* despite of the existence of the express legal provisions on this matter in the state enactment.<sup>16</sup> Consequently, non-uniformity of legal decisions of the syariah courts in cases involving orphaned grandchildren matter cannot be avoided..

The Muslim Wills (Selangor) Enactment 1999, as the first legislation on Muslim Wills in Malaysia, does not provide exhaustive provisions regarding this

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<sup>15</sup> See the details in Chapter Six below.

<sup>16</sup> Y. A. Ustaz Abdul Razak Nayan, Registrar of the Syariah Court of Appeal, Seremban, Negeri Sembilan and former Syariah Subordinate Court Judge Seremban and Registrar of Syariah High Court Seremban, personal interview by thesis writer, Gombak, 8<sup>th</sup> January 2008.

matter. It only provides the application of obligatory bequest in cases involving orphaned grandchildren in a very general manner.<sup>17</sup> Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (State of Malacca) Enactment 2005 which were wholly adopted from the provisions in the Selangor Enactment also failed to address the issue exhaustively. Hence, there is a need for a more comprehensive provisions or administrative guidelines to be referred to by the syariah courts in Malaysia in implementing the obligatory bequest.

The purpose of this study is to analyse the different definitions of orphaned grandchildren in the Muslim countries, its application and how far the interest of such grandchildren and other legal heirs are protected through the application of doctrine of obligatory bequest. This research would also try to propose an alternative resolution for the protection of the orphaned grandchildren should the obligatory bequest as provided in the law, by one reason or another, suffers a legal hiccup. This effort, hopefully, may enrich Islamic law jurisprudence in Malaysia and provide a guideline on the best and proper approach that should be taken by our legislature in drafting the relevant laws and our syariah courts in interpreting and enforcing the laws relating to this matter.

## **OBJECTIVE OF THE RESEARCH**

The objectives of this study are:

Firstly, to investigate the position of the orphaned grandchildren in the Islamic legal system in Malaysia;

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<sup>17</sup> See section 27.

Secondly, to examine the necessity for the extra legal protection to the orphaned grandchildren in the law of succession;

Thirdly, to study competing issues relating to the implementation of the obligatory bequest;

Fourthly, to study the existing restrictions on such implementation in Malaysia; and

Fifthly, to analyse the approaches of the courts in dealing with this issue and to propose appropriate measures for the betterment of the system.

## **STATEMENT OF PROBLEMS**

The present governing law relating to the obligatory bequest in Malaysia and its application in the syariah courts are not adequately effective in protecting the interest of the orphaned grandchildren.

## **HYPOTHESIS**

The followings are the hypotheses that this research seeks to prove:

Firstly, as the legal protection in the form of the obligatory bequest in Malaysia are not supported by adequate legal provisions, the objective for the introduction of this protection would not be achieved.

Secondly, if syariah courts' judges fail to consider the local needs, customs and values in deciding relevant cases, then the instrument of obligatory bequest will be a mere illusory.

## LITERATURE REVIEW

Initially, according to *Jumhūr*, executing a bequest prior to the death of a praepositus is only optional. They contended that the verse of al-Baqarah 2:180 was abrogated by the revelation of the verses of *al-mawārīth*.<sup>18</sup> Despite the unanimous agreement among the four Sunni schools that making a will is desirable, Ibn Ḥazm al-Zāhirī, Al-Ṭabarī and Abū Bakr ‘Abd al-‘Azīz viewed that making a will in favour of relatives who are not the legal heirs is obliged upon a Muslim.<sup>19</sup> Ibn Ḥazm in his *al-Muḥallā*, has discussed in detail on the obligation of a Muslim to leave a bequest before he dies.<sup>20</sup> However, the concept of obligatory bequest as proposed by this research is a bequest through a process of court to the orphaned grandchildren and not on the obligation to leave a bequest as advocated by the above jurists.

The purpose of this research is to analyse the strength and weaknesses of both the practice of obligatory bequest and the doctrine of representation. Since these doctrines were only introduced in the 20<sup>th</sup> century, there are quite limited writings discussing this topic. With due respect to the writings, there is no specific research which examines and compares both systems comprehensively and systematically. Among the earliest English writings are “The Problem of Representation in the Muslim Law of Inheritance” by A.B.M., Sultanul Alam Chowdry,<sup>21</sup> “Orphaned Grandchildren in Islamic Succession Law” by Kemal Faruki<sup>22</sup> and *Succession in the Muslim Family* by N.J. Coulson.<sup>23</sup> The writers either discussed one particular system only or compared them in a very brief manner. However, many issues were left

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<sup>18</sup> Al-Shawarbi, Abdul Hamid, *Ahkām al-Tarikāt fī dai al-Fiqh wa al-Qaḍā’*, Iskandariyyah: Al-Nāshir Manshaati al-Ma‘ārif, 1990, at 79.

<sup>19</sup> Imāmāy Muwaffiquddīn Ibn Qudāmā wa Syamsuddīn Ibn Qudāmā al-Maqdasī, *al-Mughnī wa al-Syarḥ al-Kabīr*, Beirut: Dārul al-Fikr, 1985, vol. 6, at 415.

<sup>20</sup> Ibn Hazm, Abū Muḥammad ‘Alī bin Aḥmad bin Sa‘īd al-Andalūsi, *Al-Muḥallā bi al-Āthār*, Cairo: Matba‘ah al-Imām, n.d., vol. 6, at 419.

<sup>21</sup> (1964) *Islamic Studies*, vol. 3, at 375-391.

<sup>22</sup> (1965) *Islamic Studies*, vol 4(3), at 253-274.

<sup>23</sup> Cambridge University Press, London, 1971, at 143-157.

unanswered for example whether this doctrine was based on right or need? The application of the law was also not addressed by the writers. The most important thing is that they had discussed this topic based on the context of the society during that time.

Perhaps the best available article on doctrine of representation was “Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan” written by Lucy Carroll.<sup>24</sup> The writer examined the development of the system from the early promulgation of Muslim Family Law Ordinance 1961 until 1998. However, no post 1998 development has been written on this topic particularly on the attempt of some parties recently to challenge section 4 to be contrary to Islamic injunction.

Arabic writings such as by Dr. Zakiyy al-Dīn Sha‘bān and Dr. Aḥmad Al-Ghandūr in *Aḥkām al-Wasiyyah wa al-Mīrāth wa al-Waqf fī al-Syari‘ah al-Islāmiyyah*,<sup>25</sup> Dr. Wahbah al-Zuhaylī in *al-Fiqh al-Islāmī wa Adillātuhū*<sup>26</sup> and ‘Abd al-Hamīd al-Shawarbī in *Aḥkam al-Tarikāt fī dai al-fiqh wa al-Qaḍā*<sup>27</sup> have managed to discuss, theoretically, the doctrine of obligatory bequest. However, too limited attention was given by the authors to the practical side of the law and the effect of its implementation. For example, there was no reported case law discussed. The rationale of the implementation of this system was also not comprehensively examined.

Early local writings namely Razali Nawawi in “Towards A Muslim Law of Wills in Malaysia”<sup>28</sup> and Abdul Monir Yaacob in “Wasiat: Konsep dan perundangan”<sup>29</sup> mentioned the need of the system of obligatory bequest to be adopted

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<sup>24</sup> (1998) *Islamic Law and Society*, vol 5(3), at 407-447.

<sup>25</sup> Kuwait: Maktabah al-Falāh, 1983.

<sup>26</sup> Damsyiq: Dār al-Fikr, 1989, vol. 8, at 121-125.

<sup>27</sup> Iskandariyyah: Al-Nāshir Manshaati al-Ma‘ārif, 1990, pp. 79-83.

<sup>28</sup> (1989) *IU Law Journal*, vol. 1 (1), pp. 165-177.

<sup>29</sup> Working Paper presented at *Seminar Pentadbiran Harta Menurut Islam*, IKIM, Kuala Lumpur, 16-17 November 2001, at. 11-13.

by Malaysia law and to be enforced by the Syariah courts.<sup>30</sup> After the specific legal provisions were enacted, Mohd Zamro Muda & Mohd Syukri Jusoh<sup>31</sup> and Saharuddin Selamat<sup>32</sup> commented on the Muslim Wills (Selangor) Enactment 1999 by focusing on the issues surrounding the recipients and amount of the obligatory bequest. However, no emphasis is given on the implementation of the law particularly on how the estate to be distributed. No writing is published so far on the Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (State of Malacca) Enactment 2005.

In implementing this system, the early writings and past experience of Muslim countries in this matter will be our valued guidelines and references. The issue now, should we accept any system in *toto* or should we modify the system mainly to suit our local custom and value?

## **SCOPE AND LIMITATION OF THE STUDY**

This research shall deal particularly with the orphaned grandchildren in Islamic law and the law as applicable in Malaysia. As a comparative analysis, the law in other Muslim countries particularly Egypt, as a pioneer of a modern device for orphaned grandchildren, will be discussed. The legal provisions in other Muslim countries shall be referred to should there be differences with the Egyptian law.

With regard to Islamic law as applicable in Malaysia, reference is made to the Muslim Wills (Selangor) Enactment 1999 so as represent Muslim Wills (Negeri

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<sup>30</sup> These writings were published before the Muslim Wills (Selangor) Enactment 1999.

<sup>31</sup> See Mohd Zamro Muda & Mohd Syukri Jusoh, "Kajian Mengenai Peruntukan Undang-Undang Wasiat Wajibah di Selangor" in Ahmad Sunawari Long *et al.*, *Islam: Past, Present And Future*, Bangi: Universiti Kebangsaan Malaysia, 2004 at 68.

<sup>32</sup> See Saharuddin Selamat, "Kedudukan Wasiat Wajibah dalam Islam dan Perlaksanaannya di dalam Enakmen Wasiat Orang Islam (Selangor) 1999". [2005] 9 (2) IKIM Law Journal 1.