LEGAL AND PROCEDURAL CONSTRAINTS IN THE EXECUTION OF *WAṢIYYAH* (ISLAMIC WILL) IN MALAYSIA

BY

WASRI AHMAD SUJANI

A dissertation submitted in fulfilment of the requirement for the degree of Master of Comparative Law

Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

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ABSTRACT

Islamic law on *waṣiyyah* (will) imposes two principal constraints upon testamentary power namely, the testator is constrained to bequeath in favor of legal heirs and the disposition may not exceed one-third of his net estate. However, the majority of jurists (*Jumhūr*) opine that such a disposition is valid if unanimously agreed by the legal heirs. Although consent, as justified by Muslim jurists, plays a critical role to invalidate such limitations, there exists a great need to clarify its pre-conditions in evading this reservation from being vitiated and abused. Accordingly, the research is undertaken based on the premise that a *waṣiyyah* which goes against the legal constraints or *ultra vires waṣiyyah*, is not absolutely void, but is voidable or *ab initio* valid, and conditional upon the required consent. For this purpose, the research adopts a quantitative and comparative analysis in dealing with the number of *aḥādīth* reported in *Sunan al-Sittah*. The use of textual analysis as a method in tabling *aḥādīth* enables this research to elicit the legitimacy of legal constraints on *waṣiyyah*. This research endeavors to lay down the miscellaneous views of ancient and contemporary Muslim jurists in their literatures pertaining to the position of these legal constraints. In this respect, reported cases are discussed to look into the practical application of the testacy law in Malaysia thus far. The research also consists of an analysis of the law as provided by the applicable statutes that operate as general application to specify the jurisdiction of the several administrative bodies and their scopes. This is an attempt to highlight some of what is seen as obstacles presented by the procedural framework in Malaysia. The research infers that *ultra vires waṣiyyah* is justifiably relevant subject always to the consent of the legal heirs. This can facilitate a comprehensive description on what is exactly the Islamic stance on a bequest to heirs and its allowable portion. The research also reveals the paramount importance of having a codified Islamic law towards achieving uniformity in the law relating to the execution of *waṣiyyah* in Malaysia.

ملخّص البحث

انّ شريعة الاسلامية تختصر اثنان من حق الوصائ لموصي، هما لا وصية لوارث والثلث في التركة. كيفما قد استثناء جمهور الفقهاء هذا المبداء بجزاء الوارث أخر فانّ الوصية للوارث صحيحة إن اجازها الورثة وباطله إن لم يجيزها. لذلك الرضا هو عطاء ولكنه يتعلق على مقاعه. والهدف من ذلك هو البحث عن شروط الرضا من حيث نظافته من ظلم على الوارث اخر وتسخير لدى الموصى له. وبناء على هذه القاعدة، هذه الطريحة تقتصد ان ترفع الرخصة واجازة الوصية لوارث لانها اعترفت اصلًا. من اجل ذلك، ثم هذا البحث سيستعمل منهاج المقارنة واسلوب المقدار حصوصا على كتوب السنة الثتة لتصحيح اباحة الوصية لوارث بالثلث. وبالتالي، سيرجع البحث الى راءي الفقهاء كلهم من كتابهم وسيستقر اختلافهم في هذه القضية. وبالاضافة الى ذلك، يناقش امور العملي لدى المالزي كلهم عن حالة الحقيقة في المحكمة. فقد هذا البحث في اساسه يشتمل بحث العلمي على قوانين المتعددة التي تتحكم مسلم وغير مسلم جماعاً. هكذا هذه الطريحة تستطيع ان تفسر سلطة القضاء لادارة المتنوعة في مالزيا ومسؤليتهم الى مسلمين جمعهم. اذن مشكلة الموجدة من نطام العدالة الملزي فصارت واضحة. ومع ذلك، من اهم النتائج التي ابرزها البحث ان هناك توجد الاباحة في وصية للوارث لكنها تعتمد على صدق الوارث اخر الذين يتحقق في تركة الموصي شرعاً.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws

…….....
Akmal Hidayah Halim
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

…...…….....
Wan Noraini Mohd Salim
Examiner

This dissertation was submitted to the Department of Islamic Law and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

…….....
Mohd Hisham Mohd Kamal
Head, Department of Islamic Law

This dissertation was submitted to Ahmad Ibrahim Kulliyyah of Laws and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

…….....
Hunud Abia Kadouf
Dean, Ahmad Ibrahim Kulliyyah of Laws

DECLARATION

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

Wasri Ahmad Sujani

Signature ……..……..… Date …...…….

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Affirmed by Wasri Ahmad Sujani

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Signature Date

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LIST OF ABBREVIATIONS

A. I. K. O. L.	Ahmad Ibrahim Kulliyyah of Laws
A. M. R.	All Malaysian Report
A. R. B	Amanah Raya Berhad
C. L. J.	Current Law Journal
ed./eds.	Edition/ editions; editor, edited by
e.g	(*exempligratia*); for example
E. P. F.	Employment Provident Fund
et al.	(*et alia*); and others
etc	(et cetera); and so forth pages that follow
F. M. S. L. R.	Federated Malay States Law Reports
J. H.	Jurnal Hukum
Ibid.	(*ibidem*) in the same place
i.e.,	that is
I. I. U. M.	International Islamic University Malaysia
I. K. I. M.	Institut Kefahaman Islam Malaysia
J.A.K.I.M	Jabatan Kemajuan Islam Malaysia
J. K. S. M.	Jabatan Kehakiman Islam Malaysia
N. G. O	Non-governmental Organization
J. I. C. L.	Journal of Islamic and Comparative Law
Ky.	Khsye's Reports
M. L. J.	Malayan Law Journal
n. d.	No date
n. p.	No place: no publisher
P. B. U. H.	Peace be upon him
S. L. R.	Singapore Law Reports
Sh. L. R.	Shariah Law Reports
Subḥānahu Wa Taᶜālā	(Praise be to Allah and the Most High)
vol./ vols.	Volume/ volumes
vs.	versus, against

TRANSLITERATION

ء	’	خ	Kh	ش	Sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	ه	H
ت	T	ذ	Z	ض	ḍ	ق	Q	و	W
ث	Th	ر	R	ط	ṭ	ك	K	ي	Y
ج	J	ز	Z	ظ	ẓ	ل	L		
ح	ḥ	س	S	ع	ᶜ	م	M		

Short Vowels	
ـَ	a
ـِ	i
ـُ	u

Long Vowels	
ـَ + ا	ā
ـِ + ي ْ	ī
ـُ + و ْ	ū

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF STUDY

Mal or property is one of the most necessary elements of livelihood from which a human being cannot be detached. Human relationships in social life are multifarious, intertwined and complicated, and this is truer particularly in various types of legal transactions. These transactions as a whole involve, closely or tangentially, the individuals themselves or their properties (*amwāl*). Mal is naturally the subject matter of numerous civil transactions such as sale and purchase, bequest, gift, charity, succession and so on.

The position of property in Islam is indeed, very significant. Therefore it needs to be preserved, managed and administered wisely. Furthermore, property is placed as one of the crucial elements that need to be taken care based on the utmost objective (*Maqāṣid al- Sharīᶜah*). According to Imam al-Ghazzālī, the objective of the Sharīᶜah is to promote the well-being of all mankind, which lies in safeguarding their faith (*dīn*), their human self (*nafs*), their intellect (*ᶜaql*), their posterity (*nasl*) and their wealth (*māl*). Whatever ensures the safeguard of these five, serves public interest and is desirable.

As has been laid down in Qur'an, the preservation of *al-māl* is significant not only in consuming and maximising its benefit, but also on how one may dispose it after the death especially to ensure the prosperous on his descendents. Creating a Will (*waṣiyyah*), is one of the mechanisms in disposing our wealth as laid down in many verses of holy Qur'an and countless number of ḥadīth.

Wasiyyah is the important instrument in wealth planning according to Islamic law. Such an instrument is a gift of property that occurs after the death of a testator and verily encouraged in Islam, as if done properly and in accordance with the requirements of Shara^{c}, can prevent disputes and property squabble. Will as a term refers to a gift or contribution by a person to another person or another party after his death whether the will is done verbally or otherwise.

English and Islamic laws comparatively, have adopted different approaches to the power of a testator to dispose of his property by will, and a comparison and contrast of the two systems of law reveals fundamental differences, as well as some similarities between the two systems. Under English law the basic principle is that a testator may dispose of his entirety of his property in any way he wishes by will, whereas in Islamic law he may in general only dispose of a portion of it.

Under Islamic law, when a person dies, his property devolves on his legal or Qur'anic heirs. One is permitted to freely select the beneficiaries and confer upon them rights to his estate effectively upon his death but such a right is not absolute, subject to limitation. The position of Islamic law is in sharp contrast. It might be said that the purpose of Islamic law of succession is to secure the deceased's property for surviving dependents and relatives and to maintain family ties and other relations and reflects the structure of the extended family and accepted social responsibilities within the community. The Islamic law is firmly based on the explicit commands of God in the Qur'an which lays down specific rules for the distribution of the estate.

Islamic law of will (*waṣiyyah*) imposes two principal restrictions upon testamentary power. The first rule is the testator cannot bequeath in favour of his legal heirs. One of the sources, *Sunan Ibn Mājah* in *Kitāb al-waṣāyā* (chapter of will)

says: "*Allah has already given to each entitled relative his proper entitlement, therefore no bequest in favour of legal heirs*."

Besides, testamentary dispositions may not exceed one-third of the entire estate after payment of the testator's debt. It is said this rule based on the hadīth relates to Sa^{c}ad ibn Abī Waqās, "… *bequeath one-third and one-third is already too much for if you leave your heirs free from want is better than that they should be begging from other people*". A gratuitous bequest is operative only up to one-third of the testator's estate in the event of having heir, irrespective of the bequest being made in illness or good health. As per consensus, any excess over one-third requires the permission of the heirs.

1.2 SUMMARY OF THE DISSERTATION

The distribution of a dead person's property differ greatly between western law and Islamic. The system of which derived from the Qur'an and *Sunnah* itself, and is therefore strongly believed to be of divine inspiration, and not man-made. The interpretation of the Prophet's sayings by the variety of schools of law which has considerably grown up creates a better understanding towards the application of Islam in this world nowadays. This central idea will be touched in chapter two.

The research then starts to be tabling some substantive law of several restrictions of *waṣiyyah* in chapter three. This topic seeks to academically make an appraisal on the issue of legal constraint in the law of *waṣiyyah*. At the end of this chapter, such restrictions will be harmonized with several other authoritative ḥadīth.

Lack of consciousness among property's owner could be a result of ambiguous understanding towards a concise way to dispose their assets. Chapter four

is trying to visualize the process of administering testate estate, in the sense such a property involving separate agencies as been laid down in statutes. It should be stressed that when writing a will one should ensure that the will complies with Islamic law as well as the law of the country of residence.

The law of testate estate for Muslim in Malaysia is not governed by the Syariah court but the Civil High court. Recent codifications have not necessarily remained within the classical Muslim scope, instead have introduced further divergences. Last but not least, some justifiable recommendations will be adduced based on the comments given from all chapters.

1.3 STATEMENT OF PROBLEM

The research is undertaken based on the premise that the legal constraints in the making of *waṣiyyah* especially in favor of the legal heirs is not absolute as such a *waṣiyyah* will still be effective once it is consented by the other legal heirs. This is further supported by the existence of many ḥadīth and Qur'anic verses encouraging Muslims to create *waṣiyyah*. As this kind of *waṣiyyah* can be a good estate planning instrument for Muslims, its legal and procedural constraints need to be clarified in order to ensure that it is Sharīᶜah compliance and does not infringe the rights of the legal heirs as provided under the Islamic law of succession.

1.4 OBJECTIVES OF THE PROPOSED DISSERTATION

i. To analyse various interpretations of scholars relating to hadīth on *waṣiyyah* with regard to its encouragement as well as several restriction in the making of a *waṣiyyah*.

ii. To determine the two restrictions and the numerous supportive ḥadīth in the execution of Islamic will.

iii. To examine the position of a *waṣiyyah* as an estate planning instrument by looking into the interest (*maṣlaḥah*) between the need of bequest in favour of heirs nowadays with its restriction.

iv. To examine the procedural constraints in governing law of *waṣiyyah* in Malaysia.

1.5 HYPOTHESIS

i. Islamic law does not totally prohibit the making of a *waṣiyyah* in favour of a legal heir even though such a *waṣiyyah* is inconsistent with the principal restriction upon testamentary power.

ii. The existence of numerous Aḥādīth and Qur'anic verses encouraging Muslim to dedicate *waṣiyyah* implies that this instrument can be a vital mechanism in estate planning.

iii. The procedural constraint in the execution of *waṣiyyah* must be identified for the purpose of further amendment by the Legislative side.

1.6 LITERATURE REVIEW

Research on *waṣiyyah* basically has been given so much attention by various academicians, not only in Malaysia but throughout the world. There are countless numbers of *waṣiyyah* materials in the form of books, articles, paperwork in seminar and convention, journals, thesis, and so on. All these sources have been dealing with *waqf* in many aspects like its general concept, management, legal and procedural perspective, and its development.

Waṣiyyah has been largely discussed together with other Islamic property such as *waqf* (pious endowment), *hibaḥ*, *zakāt* (Islamic taxation), and succession. The authors including Amir Bahari, Ishak Suliaman, Rizalman Muhamad, Sheikh Ghazali Abd Rahman, Pawancheek Marican, Mohd Zamro Muda.[1] All these researches tend to discuss *waṣiyyah* in general perspective in order to compile the variety of disposing wealth instrument. In addition, readers could be able to see differences among several instruments that available in Islamic property. Most of these writings are also incorporating traditional and contemporary views from Shāfiᶜī, Ḥanafī, Ḥanbalī and Malikī school of thought.

Meanwhile, research in term of legal perspective has been so contributive to the law of *waṣiyyah* itself particularly in Malaysia. For instance Akmal Hidayah Halim, Mohd Ridzuan Awang, Hairani Saaban, Ahmad Hidayat Buang, Siti Zalikhah Md Nor, Pawancheek Marican, Mahinder Sigh Sidhu, Abdul Rashid Haji Abdul

[1] See Amir Bahari, "Islamic wills and Faraid in Malaysia," Praxis, (April-June 2011), pp. 30-31. Ishak Suliaman, *Wasiat, Hibah, Mudharabah dan al-Syarikah* (KL: Penerbit UM, 2008). Rizalman Muhamad, *Wasiat dan Hibah* (KL: Penerbit UM, 2007). Sheikh Ghazali Abd Rahman, "Harta Amanah Orang Islam di Malaysia," in *Undang-undang Harta & Amanah*, edited by Akmal Hidayah Halim, Badruddin Ibrahim & Farid Sufian Shuaib (Selangor: Jabatan Undang-Undang Islam AIKOL IIUM, 2008), 136-174. Pawancheek Marican, *Islamic Inheritance Laws in Malaysia* (PJ: Lexis Nexis, 2008). Mohd Zamro Muda, Mohd Ridzuan Awang, Abd Basir Mohamad & Md Yazid Ahmad, *Undang-undang dan Pentadbiran Pusaka, Wasiat dan Wakaf Orang Islam di Malaysia*, (Bangi: Penerbit UKM, 2008).

Latiff and Abd Monir Yaacob.[2] Based on the research observation, all these invaluable discussion, are more focusing on relevant laws, administrative bodies involved, recent application from time to time both in Syariah or Civil court. Furthermore, all decided cases have been discussed either in criticising or supporting the verdicts. Most of the authors interestingly always keep on contributing tremendous ideas at the end of their argument in favour of the development of *waṣiyyah* law itself.

In matter relating to procedure, numerous writings have been done. They are Akmal Hidayah Halim, Al Azifah Mohd Safie, Ahmad Hidayat Buang, and Ismail Yahya.[3] All these writings are basically based on applicable laws in Malaysia, including every administrative body involved, jurisdictional conflict, and those writers would have critically evaluated every single section in particular statutes.

Besides, law of *waṣiyyah* has been positively well developed in Malaysia. Sources relating to its historical perspective have been well done by some contemporary scholars like Abu Ḥanīfah Mohd Abdullah, Mohd Ridzuan Awang,

[2] See Akmal Hidayah Halim, "Administration of Testate Estate: A Malaysian Identity", paper presented at 9th *Asian Law Institute Conference* (31 May & 1 June 2012, Singapore) 1-8. Ridzuan Awang, "Pemakaian undang-undang wasiat orang Islam di Malaysia," paper presented at *Seminar Antarabangsa Agama dan Pembangunan Malaysia-Indonesia* (10-11 Jun 2010, Alauddin Makassar, Indonesia) 414-423. Hairani Saaban, "Letter of wishes and consent in the Muslim estate: the validation process," <http: //www.lawgazette.comsg/2007-6/feature1.htm> (accessed January 21, 2013). Ahmad Hidayat Buang, "Prinsip dan Pelaksanaan Wasiat," in *Undang-undang Islam di Malaysia: prinsip dan amalan*, edited by Ahmad Hidayat Buang (KL: Penerbit Universiti Malaya, 2007), 269-294. Siti Zalikhah Md. Nor, "Ke arah melaksanakan undang-undang wasiat di negeri-negeri," paper presented at *Konvensyen Baitulmal Kebangsaan* (24-25 Jun 2009: Kuala Lumpur), 225-233. Pawancheek Marican, "Penentuan Bidangkuasa Amanah Kontemporari: Mahkamah Syariah atau Mahkamah Sivil" in *Undang-undang Harta & Amanah*, edited by Akmal Hidayah Halim, Badruddin Ibrahim & Farid Sufian Shuaib (Selangor: Jabatan Undang-Undang Islam AIKOL IIUM, 2008), 204-210. Mahinder Sing Sidhu, *The Law of Wills Probate Administration and Succession in Malaysia and Singapore with Cases and Commentaries*, (KL: International Law Book Services, 1998). Abd Rashid Abd Latif, *Wasiat dalam Islam: Pengertian dan Kedudukannya di Malaysia*, (Bangi: Penerbit UKM, 1986). Abd Monir Yaacob, "Wasiat: Konsep dan Perundangan," in *Pentadbiran Harta Menurut Islam*, edited by Abd Monir Yaacob (KL: IKIM, 1999).

[3] See Akmal Hidayah Halim, *Administration of Estates in Malaysia: Law and Procedure*, (PJ: Sweet & Maxwell, 2012). Al-Azifah Mohd Safie, "Penderafan dokumen wasiat Islam di ARB: Analisis Menurut Perspektif Islam," (Master thesis, UM, 2010). Ahmad Hidayat Buang, *Bagaimana Membuat Wasiat*? (KL: Jabatan Syariah & Undang-Undang UM, 2002). Ismail Yahya, "Pelaksanaan Wasiat di Mahkamah: Teori & Praktis," *Jurnal Hukum*, vol. 17 (2004): 1-8.

Ahmad Hidayat Buang, Sheikh Ghazali Abd Rahman, and Tajul Aris Ahmad Bustami.[4] All these authors have systematically divided their writings by adducing how and when the law of *waṣiyyah* changes from post-colonial period until the recent time. This evolution according to them shows how Malaysia adapts its sovereignty with the reception of Common law England. Also, there are some authors such as Saharuddin Haji Selamat and Wan Abdul Fattah Wan Ismail tried to discuss *waṣiyyah* in specific issues.[5] The authors have pointed out the issue of obligatory bequest (*waṣiyyah al-wājibah*) as being controversially enacted in *waṣiyyah* enactment.

Akmal Hidayah Halim and Mohamad Asmadi Abdullah in 2008 have written an article indirectly relating to limitation of testamentary power (*waṣiyyah*) but the topic was on the issue of rights of spouse in unregistered marriage in *waṣiyyah*.[6] Besides, Pawancheek Marican in 2005 wrote an article pertaining to two principal

[4] See Abu Haniffa Mohd Abdullah, "Islamic law of bequests in Malaysia: the two principal restrictions Malaysian sovereignty and the reception of English law of inheritance," *Shariah Law Reports*, vol. 3 (2005): 27-32. Mohd Ridzuan Awang, "Analisis penghakiman kes Shaik Abdul Latif & Ors v. Shaik Elias Bux (1915) 1 FMSLR 204 dan hubungannya dengan perkembangan undang-undang wasiat Islam di Malaysia," paper presented at *International Seminar on Fiction and Faction in the Malay World* (11-12 Nov 2010 : Frankfurt, Germany). Ahmad Hidayat Buang, "Perkembangan dan isu-isu undang-undang pusaka dan wasiat di Malaysia," in *Mahkamah Syariah di Malaysia: pencapaian dan cabaran*, edited by Ahmad Hidayat Buang (KL: Penerbit Universiti Malaya, 2005), 139-163. Sheikh Ghazali Abd Rahman, "Pemakaian undang-undang wasiat dan hibah di Malaysia: Perkembangan undang-undang Islam terkini," in *Undang-undang Harta & Amanah*, edited by Akmal Hidayah Halim, Badruddin Ibrahim & Farid Sufian Shuaib (Selangor: Jabatan Undang-Undang Islam AIKOL, IIUM. 2008), 61-78. Tajul Aris Ahmad Bustami, "Undang-undang Wasiat Orang Islam di Malaysia: Sejarah dan Perkembangannya," in *Undang-undang Harta Amanah*, edited by Akmal Hidayah Halim, Badruddin Ibrahim & Farid Sufian Shuaib (Selangor: Jabatan Undang-Undang Islam AIKOL IIUM, 2008), 111-124.

[5] See Saharuddin Haji Selamat, "Kedudukan wasiat wajibah dalam Islam dan pelaksanaannya dalam Enakmen Wasiat Orang Islam Selangor 1999," *Jurnal Hukum*, vol. 20, no. 1 (2005): 21-41. Wan Abdul Fattah Wan Ismail, "Wasiat wajibah: pelaksanaannya menurut Enakmen Wasiat Orang Islam negeri Selangor," paper presented at *Persidangan Undang-Undang* (18-20 April 2007, Sintok Kedah) edited by Khadijah Mohamed organized by Universiti Utara Malaysia.

[6] See Akmal Hidayah Halim & Mohd Asmadi Abdullah, "Women's rights to succession in unregistered marriages: A reference to the instrument of wasiyyah," vol. 16 No.1 (2008) *IIUM Law Journal 125-139.*

restrictions in the execution of *waṣiyyah*.[7] Nevertheless, this article was focusing more on decided cases in Malaysia with regard to these two restrictions without thorough discussion on the Islamic law.

There are 180 aḥādīth dealing with *waṣiyyah* in total. In another perspective, if we are to comparatively analyse between the number of ḥadīth denying "*waṣiyyah li wārith"* and one-third rule, is much less than general hadith recommending to dedicate *waṣiyyah* generally. This striking difference in term of quantity can be seen if we observe at some of the authoritative ḥadīth book like *Sunan al-Sittah*, in which comprising *Ṣaḥīḥ al-Bukhārī, Ṣaḥīḥ al-Muslim, Sunan Abī Dāwud, Sunan al-Tirmidzī, Sunan al-Nasā'ī and Sunan Ibn Mājah*.

In the chapter of will (*kitāb al-waṣāyā*)[8] of *Ṣaḥīḥ Bukhārī*, there are 41 aḥādīth dealing with *waṣiyyah* totally. Out of 41, only one ḥadīth deals with "no bequest in favour of heirs" and two aḥādīth deals with one-third rule.[9] Next In Ṣaḥīḥ Muslim, out of 18 aḥādīth that dealing with *waṣiyyah*, only five relating to one-third rule.[10] In *Sunan Abī Dāwud* as well, out of 23 aḥādīth concerning to *waṣiyyah*, only one ḥadīth restraining *waṣiyyah* in favour of heirs.[11] Out of 9 aḥādīth that dealing with waṣiyyah in *Sunan al-Tirmidzī*, only one ḥadīth about one-third rule and two aḥādīth no bequest to heirs.[12] In *Sunan al-Nasā'ī*, there are 64 aḥādīth in total dealing with *waṣiyyah*, however only 14 aḥādīth concerning one-third rule and no bequest in

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[7] See Pawancheek Marican, "Islamic law of Bequest in Malaysia: The Two Principal Restrictions," vol. 4 (2005) MLJ lxxiv.

[8] See Ishak Suliaman & Rizalman Muhammad, *Wasiat & Hibah* (KL: Percetakan Zafar Sdn. Bhd., 2008), pp. 25-44.

[9] See kitāb al-waṣiyyah bi al-thulūth, and kitāb lā waṣiyyah li wārith, in al-Bukhārī, Abī ᶜAbd Allāh Ismā'īl ibn Ibrāhīm al-Jaᶜfī, *Al-jāmiᶜ al-ṣaḥīḥ al-musnad min ḥadīth Rasūl Allāh sunnatuh wa ayāmuh*, (Riyadh: Dār al-Salam, 1998).

[10] See kitāb al-waṣiyyah bi al-thulūth in Muslim ibn al-Ḥajjāj al-Qushairī al-Naisābūrī, *Ṣaḥīḥ Muslim*, (Riyadh: Dār al-Salam, 1998).

[11] See kitāb mā jā'a fī waṣiyyah li wārith in Abū Dāwud, Sulaymān ibn al-Ashᶜath, *Sunan Abī Dāwud*, (Beirut: Dār al-Fikr, n.d).

[12] See kitab mā ja'ā fī al-thulūth, and kitāb ma ja'alā waṣiyyah li wārith in Al-Tirmizī, Abī ᶜIsā Muḥammad ᶜĪsā, Sunan al-Tirmidzī, *Al-jāmiᶜ al-ṣaḥīḥ or Sunan al-Tirmizī*, (Cairo: Dār al-Ḥadīth, n.d).

favour of heirs.[13] Last but not least, in *Sunan Ibn Mājah*, out of 25 aḥādīth of *waṣiyyah*, only 7 aḥādīth that dealing with one-third rule and no bequest to heirs.[14]

Hence, based on all sources adduced, the topic of legal and procedural constraint in the execution of *waṣiyyah* in Malaysia is justifiable and relevant.

1.7 SCOPE & LIMITATION

The research lists several sources to ensure this research would not go beyond the scope and limitations. The main focus of this study is legal and procedural aspect. There are two constraints that will be highlighted; the one-third rule and the rule of no *waṣiyyah* in favour of heirs. Thus, other restrictions imposed by Islamic law in the execution of *waṣiyyah* would not be covered, for instance the issue of *waṣiyyah* during the death-illness, conditional *waṣiyyah*, and so on.

In collecting available ḥadīth pertaining to *waṣiyyah*, there are some major *Kitāb al-Ḥadīth* with their *Kitāb Sharḥ al-Ḥadīth* that will be extremely focused on. For example, *Sunan al-Sittah* (the six book of ḥadīth ṣaḥīḥ) comprising *Ṣaḥīḥ al-Bukhārī, Ṣaḥīḥ al-Muslim, Sunan Ibn Mājah, Sunan Abī Dāwud, Sunan al-Tirmidzī* and *Sunan al-Nasā'ī*.

Since the study is considering the Malaysian scope, several relevant statutes will be discussed, including Federal constitution of Malaysia, Rules of Court 2012, Small Estates Distribution Act 1955, Probate and Administration Act 1959, Wills Act 1959, Public Trust Corporation Act 1959, Muslim Wills (Selangor) Enactment 1999, and the Administration of Islamic Religious Enactment of states.

[13] See kitāb al-waṣiyyah bi al-thulūth and kitāb ibṭāl al-waṣiyyah li al-wārith, in al-Nasā'ī, Abī ᶜAbd Raḥman Aḥmad ibn Shulayb ibn ᶜAlī, *Sunan al*-Nasā'i, (Beirut: Maktabah al-Maṭbūᶜah al-Islāmiyyah, n.d).

[14] See kitāb al-waṣiyyah bi al-thulūth and kitāb lā waṣiyyah li al-wārith, in Ibn Mājah, Muḥammad ibn Yazīd, *Sunan Ibn Mājah*, (Beirut: Dār al-Ḥadīth, n.d).

With regard to the authoritative reference of cases, there are several common local journals published to be referred to for instance, Malayan Law Journal (MLJ), Current Law Journal (CLJ), Jurnal Hukum (JH), Journal of Malaysian and Comparative Law (JMCL), Shariah Law Reports (ShLR), All Malaysian Report (AMR), Federated Malay States Law Reports (FMSLR).

1.8 METHODOLOGY

The collection and analysis of the data involved various type of investigation adopted in order to produce reliable information. Method of collecting data includes doctrinal analysis and field research. The doctrinal analysis allows the research to examine information regarding the foundation of issues, conceptual and theoretical aspect. This method is also relevant for the research to analyze all succession cases in Malaysia which are reported in various journals. This method also allows the research to examine relevant articles, seminar papers, academic journals, statutes, Arabic writings as well as al-Qur'an and ḥadīth.

Besides, the method of field work is adopted to further strengthen the information obtained by conducting interviews with some related institution in order to examine their operation in administering and implementing the law of wills in Malaysia, for example State Islamic Religious Council, Islamic Judiciary Department of Malaysia (JKSM), Amanah Raya Berhad (ARB), As-Salihin Trustee, Zar Perunding Pusaka, and Wasiyah Shoppe.