

THE CONCEPT OF *AL-WIṢĀYAH*
WITH SPECIAL REFERENCE TO
THE ADMINISTRATION OF A MINOR'S
PROPERTY UNDER ISLAMIC LAW AND THE
ENACTED ISLAMIC LAW IN MALAYSIA

BY

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ABSTRACT

This study examines rules governing *al-wisāyah* in Islamic law with emphasis on the management of a minor's property. This is to demonstrate that the element of trust exists in *al-wisāyah* of a minor's property, and the role of *wasī mukhtār* with respect to a minor's property as guardian is also as trustee. This study may contribute to the application of the rules relating to the above element in present time. The statutory provisions of Islamic law in Malaysia on the subject will also be examined to ascertain whether such legislation is adequate as compared to, and in line with Islamic law as propounded by Muslim jurists. This study is mainly a library study. It will discuss the views of the Muslim jurists of the four well-known *sunnī* schools of law, and contemporary Muslim scholars. The study primarily examines the concept of *al-wisāyah* in general and the nature of the minor, his legal capacity particularly in respect of disposition of property. It analyses the four essential elements of *al-wisāyah* in a minor's property: testator, *wasī*, subject matter and formation. It also examines the function of *wasī* in the administration of a minor's property especially his duties, powers, rights and liabilities; the issue of the control on *wasī* in his dealing with a minor's property and his removal; the issue of the termination of *al-wisāyah* and *wasī*'s duty after its termination. The study predicated that *al-wisāyah* of a minor's property is also a type of trust where the *wasī mukhtār* plays a significant role in administering the minor's property under his control. Islamic law in general has provided comprehensive rules regarding to the subject and the statutory provisions of Islamic law in Malaysia, it is suggested, will have to be read in light of Islamic law in general.

ملخص البحث

هذه الرسالة تبحث في أحكام الوصاية أو الايضاء في الشريعة الإسلامية مع التركيز على قضية ادارة مال القاصر. وقد برهنت هذه الدراسة على وجود عنصر الأمانة في الوصاية وأظهرت أن دور الوصى المختار في تعامله مع أموال القاصر التي تحت ولايته هو تعامل الأمين. وهذه الدراسة أن تساهم بنتائجها في تأصيل أحكام الوصاية على مال القاصر في عصرنا الحاضر في ضوء أحكام الشريعة الإسلامية. وقد قامت هذه الدراسة أيضا بمراجعة نصوص القانون الإسلامي المتعلق بالوصاية على مال القاصر في ماليزيا على ضوء موافقة هذا القانون مع الشريعة الإسلامية وتكامله في التطبيق في وقتنا الحاضر.

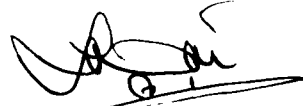
وهذا البحث في أساسه هو بحث أكاديمي واهتم بمناقشة آراء الفقهاء في المذاهب السنية الأربعة وآراء العلماء المعاصرين مستندا في ذلك الى القرآن والسنة وعمل الصحابة والأدلة الأخرى المعتمدة. وقد تناولت الدراسة ببحث المفهوم العام للوصاية وطبيعة القاصر من ناحية أهليته وحقه في التصرف في أمواله. ثم حلت الدراسة أهم أركان الوصاية الأربعة وهي شخصية الموصى الذي يتعهد شخصا آخر ثم شخصية الوصى الذي يتعهد بادارة أموال القاصر ثم محل الوصاية وصيغة الوصاية. وتبحث هذه الدراسة أيضا دور الوصى في ادارة أموال القاصر فيما يتعلق بواجبه وصلاحيته وحقه ومسؤوليته. وناقش كذلك قضية مراقبة الوصى في تصرفاته في أموال القاصرووسائل المراقبة وقضية اقالة الوصى من منصبه وقضية انتهاء الوصاية ومسؤوليات الوصى بعدانتهائها.

من أهم النتائج التي ابرزتها هذه الدراسة أن الوصاية على مال القاصر هي أيضا نوع من أنواع الأمانة في مفهومها حيث أن الوصى المختار يلعب دورا هاما في ادارة اموال القاصر التي تحت

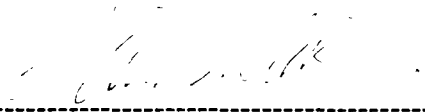
ولايته. وهذا فان الشريعة الاسلامية قد فصلت احكام الوصاية بالتفصيل الشامل. وقد برهنت هذه الدراسة بوضوح على أن القانون الاسلامى المتعلق بالوصاية على مال القاصر فى ماليزيا ناقص فى مواده وأن هناك فراغا كبيرا قابل للتحسين. و لذا فانه من الضرورى أن يعدل ويصيغ نصوص القانون على ضوء الشريعة الاسلامية الغراء.

APPROVAL PAGE

The thesis of Badruddin Bin Hj Ibrahim has been examined and is approved by the following;



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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and bibliography is appended.

Name: Badruddin Bin Hj Ibrahim

Signature 

Date 3/2/2006

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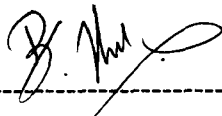
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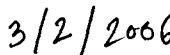
**THE CONCEPT OF *AL-WIṢĀYAH*
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PROPERTY UNDER ISLAMIC LAW AND THE ENACTED ISLAMIC LAW
IN MALAYSIA**

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Dedicated to...

My beloved late grandfather and grandmother...

Hj Ibrahim Harun & Siti Aminah

My beloved and caring father and mother...

Hj Ibrahim Hj Wan Din & Ramlah Hj Ibrahim

My dear and beloved wife...

Azizah Mohd

And my beloved children...

" Ammār Asnawī Amnān Hanānī Ahmad Munīr Safwan

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Islamic Family Law Enactment, Malacca, 2002 (No. 12)
Islamic Family Law Enactment (Negeri Sembilan) Enactment, 1983 (No. 7) as amended by Enactment No. 4 of 1991
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The Islamic Family Law Enactment, Kedah, 1979 (No. 1 of 1984)
The Islamic Family Law Enactment, Kelantan, 2002 (No. 6)

LIST OF ABBREVIATIONS

A.D.	Anno Domini (the Christian era)
art./arts.	article/articles
Cap.	Chapter
Chap.	chapter
ed.	editor, edited by
etc.	(<i>et cetera</i>): and so forth
d.	died
f.n.	footnote
ibid.	(<i>ibidem</i>): in the same place
i.e.	that is
IFLA	Islamic Family Law (Federal Territories) Act 1984
IUI	International Islamic University Islamabad
IUM	International Islamic University Malaysia
IUMLJ	International Islamic University Law Journal
IKIM	Institut Kefahaman Islam Malaysia (Institute of Islamic Understanding Malaysia)
IKIMLJ	Institut Kefahaman Islam Malaysia Law Journal
Ins.	Inside
JKSM	Jabatan Kehakiman Syariah Malaysia (Department of Syariah Judiciary Malaysia)
JSAIS	Journal of Shāriah and Islamic Study
Ltd.	Limited
H	<i>Hijrah</i> year
MAA	<i>Majallat al-Ahkām al-Adliyyah</i> (The Ottoman Civil Code)
MABPW/H/T	May Allāh be pleased with him/her/them
n.d.	no date
n.p.	no publisher
n.pp.	no place of publication
no./nos.	number/numbers
PBUH	Peace Be Upon Him
p./pp.	page/pages
s.	section
Sdn. Bhd.	Sendirian Berhad (private limited)
sing.	singular
S.W.T.	<i>Subhānahu wa Taāla</i> (Praise be to Allāh and the Most High)
trans.	translator/translated by
UKM	Universiti Kebangsaan Malaysia (National University of Malaysia)
Vol.	volume

CHAPTER ONE

INTRODUCTION

1.0 Background of the study

Property is one of the basic necessities of life which is indispensable for human being.¹ It is an important means of exchange and obtaining the necessities of life from dwelling places, clothing, foodstuffs, medicines and so on.² Indeed, the property is one of the ornaments (*zīnah*) of life³ as the *Qur'ān* clearly states, “Wealth and sons are the allurements of the life of this world.”⁴

Legally, property refers to everything that can be possessed and benefited as according to the *Sharī'ah* principle.⁵ It includes all types of corporeal matters (*al-ayān*) and according to the majority of Muslim jurists, it also includes the usufructs (*al-manāfi'*) and all rights that relating to property (*al-ḥuqūq al-muta'allaqah bi al-māl*) such as right of tenant over the rented property, right of passage (*ḥaq al-murūr*) etc.⁶

¹ See Muḥammad Muṣṭafā Shalabī, *al-Madkhal fī al-ta'rif bi al-fiqh al-Islāmī wa qawā'id al-milkiyyah wa al-ḥuqūd fīhi*, Dār al-Nahḍah al-'Arabīyyah, Beirut, 1403/1983, p. 329. ; Yūsuf Hāmid al-'Ālim, *al-Maqāṣid al-āmmah li al-Sharī'ah al-Islāmiyyah*, 3rd Edition, Dār al-Ḥadīth, Cairo, 1417/1997, p. 467. ; Rushdī Shahātah Abū Zayd, *Shurūṭ thubūt ḥaq al-ḥaḍānah fī al-fiqh al-Islāmī wa qānūn al-aḥwāl al-shakhṣiyyah: Dirāsah muqāranah*, Dār al-Fikr al-'Arabī, Cairo, 1419/1999, p. 145.

² Abū Zayd, p. 145.

³ Shalabī, *al-Madkhal*, p. 329. ; al-'Ālim, p. 467. ; Abū Zayd, p. 145.

⁴ Al-Qur'ān, Sūrah al-Kahf :46

⁵ 'Alī al-Khafif, *Aḥkām al-mu'āmalāt al-Shar'iyyah*, 3rd Edition, Dār al-Fikr al-'Arabī, n.pp, n.d., p. 25.

⁶ However, according to Ḥanafī jurists the usufruct and right relating to property are not considered as property since they cannot be actually possessed. See al-Khafif, *Aḥkām al-mu'āmalāt al-Shar'iyyah*, pp. 25-30. ; See also Shalabī, *al-Madkhal*, pp. 331-332. ; And see also 'Abd al-Karīm Zaydān, *al-*

In principle, the owner of the property has full legal authority to utilize and dispose his property as he wishes within the limit prescribed by the *Sharī'ah*.⁷ Except where there are legal hindrances that prevent its owner from carrying out the disposition such as the deficiency in legal capacity as in the case of minors or insane persons and other disabilities.⁸

A minor is one of the persons with limited capacity.⁹ This is of course due to age and its concomitant: physical weakness and mental immaturity. Accordingly, a minor who owns property is not allowed to dispose the property since he is incapable of managing it properly and cannot protect his own interest.¹⁰ In other words, a minor is legally considered as an interdicted person (*maḥjūr*).¹¹ As such, it is necessary to have someone else to act for him. Originally, the person who has legal authority (*wilāyah*) over a minor's property is his father who is known in Islamic legal terminology as

Madkhal li dirāsāt al-Sharī'ah al-Islāmiyyah, 11th Edition, Mu'assasat al-Risālah, Beirut, 1410/1989, pp. 184-186.

⁷ Zaydān, *al-Madkhal*, p. 206. ; Shalabī, *al-Madkhal*, p. 373.

⁸ Muṣṭafá Aḥmad al-Zarqā', *al-Fiqh al-Islāmī fī thawbihi al-jadīd*, 10th Edition, Dār al-Fikr, Damascus, 1387/1968, Vol. 1, p. 241. ; al-Khafīf, *Aḥkām al-mu'āmalāt al-Shar'īyyah*, pp. 37-38. ; Shalabī, *al-Madkhal*, p. 339.

⁹ For further detail see below pp. 89-91.

¹⁰ See 'Alā' al-Dīn Abī Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' al-ṣanā'i' fī tartīb al-Sharā'i'*, 2nd Edition, Dār al-Kutub al-'Ilmiyyah, Beirut, 1406/1986, Vol. 7, p. 169. ; Qutub Saydī Aḥmad al-Dardīr, *al-Sharḥ al-ṣaghīr* on the margin of *Bulghat al-sālik*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1415/1995, Vol. 3, p. 240. ; Muḥammad al-Shirbīnī al-Khaṭīb, *Mughnī al-muḥṭāj*, Muṣṭafá al-Bābī al-Ḥalabī, Egypt, 1352/1933, Vol. 2, p. 165. ; Maṣṣūr ibn Yūnus ibn Idrīs al-Bahūtī, *Kashshāf al-qinā' 'an matn al-iqnā'*, Dār al-Fikr, Beirut, 1402/1982, Vol. 3, p. 442. ; See also Art. 957 of MAA.

¹¹ See Art. 941 of MAA. The same Art. defines interdiction as to restrain a particular person from dealing with his own property.

guardian (*walī*).¹² He is fully responsible for matters relating to the property of his minor children.

However, a father may die before his children attained the age of puberty and are mature enough to act on their own behalf. He may also leave behind some property to his children. This fear is also addressed in the *Qur'ān*, “ Let those (disposing of an estate) have the same fear in their minds as they would have for their own if they had left a helpless family behind.”¹³ As such, Islam enjoins that a father should think about and provide for his children by appointing person -the *waṣī mukhtār*- who can be entrusted with the protection and administration of his minor children's property till they are able to protect and manage it themselves.

1.1.The objective of the study

This study investigates and analyses rules governing the concept of *al-wiṣāyah* of Islamic law with special reference to *al-wiṣāyah* of a minor's property (*al-wiṣāyah 'alā māl al-qāṣir*). Such *wiṣāyah* mainly deals with the entrustment by a person to another person (hereinafter called *waṣī mukhtār*) with the administration of property of his minor children after his death.

The main objective of this study is to highlight this type of trust under Islamic law. The study also demonstrates that the concept of trust under Islamic law is not confined to charitable endowment (*waqf*) only, and similarly, the concept of guardianship of

¹² Al-Kāsānī, *Badā'i' al-ṣanā'i' fī tartīb al-Sharā'i'*, Vol. 5, p. 155. ; al-Dardīr, *al-Sharḥ al-ṣaghīr*, Vol. 3, p. 245. ; al-Shirbīnī, *Mughnī al-muḥtāj*, Vol. 2, p. 173. ; al-Bahūtī, *Kashshāf al-qinā' 'an matn al-iqnā'*, Vol. 3, p. 446.

¹³ Al-Qur'ān, Sūrah al-Nisā' : 9

property does not only mean the protection of property of the persons who are without full legal capacity or incapable of managing their own property. In addition, the study is undertaken to examine the statutory provisions of Islamic law in Malaysia to consider their adequacy and the need, if any, for improvement. Lastly, it is as a response to the suggestion that has been made lately for the drafting of legislation relating to the Islamic law of trust other than charitable endowment (*waqf*).¹⁴ It is hoped this study may contribute to that endeavour.

1.2. Statement of problem

The study examines and expounds the existence of the element of trust in *al-wiṣāyah* of a minor's property. The question is whether the concept of guardianship of property in Islamic law particularly *al-wiṣāyah* of a minor's property to be understood merely as a facility for protecting the interest or right of those who are without full legal capacity and incapable of managing their own affairs or it also to be understood as specialized trust within the general concept of trust. And consequentially, whether *waṣī mukhtār* is to be considered as a trustee.

In Malaysia, there are statutory provisions of Islamic law with regard to the guardianship of a minor's property but the law is general and does not deal specially with the guardianship of *waṣī* which is not very helpful. Some of the provisions merely lay down the general outline of the law which requires further interpretation and substantiation. As may be expected the legislation is also silent on many

¹⁴ See Abdul Hamid bin Haji Mohammad, Bidang kuasa mahkamah sivil dalam pentadbiran harta amanah di Malaysia, Paper presented at Seminar Pentadbiran harta amanah orang-orang Islam di Malaysia organized by Jabatan Syariah dan Undang-undang, Akademi Pengajian Islam Universiti Malaya at Universiti Malaya Kuala Lumpur, 10 November 2001, p. 12.

important issues: like the formation of *wiṣāyah*; the duty of *waṣī*; the scope of the power of *waṣī*; right of *waṣī* to remuneration; his liability and others.

Thus, it is felt necessary to attempt a comprehensive compilation of law governing *al-wiṣāyah* of a minor's property, so that, it will be more clear and compatible with the present age, while offering solutions to certain problems relating to the subject in Malaysia.

1.3. Hypothesis

This study is based on the hypothesis that *al-wiṣāyah* of a minor's property is one of the means of creating a specific form of trust under Islamic law, and with the adequate written law provisions, Malaysia may provide a means to safeguarding the property or interest of minor children.

1.4. Literature review

The available literature on the law relating to *al-wiṣāyah* is numerous particularly the writings of classical Muslim jurists from different schools of law starting from the third century *hijrah* till the thirteenth century *hijrah*.

Al-wiṣāyah of a minor's property is one of the topics contained in volumes of *fiqh* treatises. The subject has been discussed mainly under the book of wills (*waṣāyā*). However, some of the issues relating to minor are discussed under the book of interdiction (*al-ḥajr*) and scattered throughout the volumes.

The classical texts written by the Ḥanafī jurists for example, *al-Mabsūṭ* by al-Sarakhsī (d.490H/1097A.D.), *al-Hidāyah* by al-Marghīnānī¹⁵ (d.593H/1197A.D.), *Tabyīn al-Ḥaqā'iq* by al-Zayla'ī¹⁶ (d.743H/1343A.D.), *Majma' al-Anhar* by Dāmād Afandī¹⁷ (d.1078H/1667A.D.) and *Radd al-Mukhtār* by Ibn 'Ābidīn¹⁸ (d.1252H/1836A.D.) discuss many important issues relating to *al-wiṣāyah* under the chapter of *waṣī* in the book of will. The books discuss the formation of *al-wiṣāyah* and other issues including the condition of *waṣī*, the entrustment to more than one *waṣī*, the removal of *waṣī* and some of the powers of *waṣī* with respect the disposition of minor's property. The issue of minor, his disposition of property and the ending of the guardianship over his property have been discussed under the book of interdiction. The texts, however, do not explicitly provide the definition and the proof of the legality of *al-wiṣāyah*. They also do not outline in detail many important rules relating to the subject matter of entrustment and its condition, a person who can make an entrustment and his competency, the essential duty of *waṣī* and the detailed power of *waṣī*. Besides that, the issue of the right of *waṣī* to remuneration and his liability were not highlighted except in the writing of Ibn 'Ābidīn where he also discusses some other issues relating

¹⁵ *Al-Hidāyah* is the commentary of *Bidāyat al-Mubtadī* of the same author. There are many commentaries on *al-Hidāyah* such as, *al-Banāyah* of Muḥammad Maḥmūd ibn Aḥmad Badr al-Dīn al-'Aynī died 855H/1451A.D. ; *Sharḥ Faṭḥ al-Qadīr* of Kamāl al-Dīn Muḥammad ibn 'Abd al-Wāhid al-Siwāsī ibn al-Humām died 861H/1457A.D. and its complement (*takmilah*) *Natā'ij al-Afkār fī Kashf al-Rumūz wa al-Asrār* of Shams al-Dīn Aḥmad ibn Qūdir Qādī Zādah Afandī died 988H/1580A.D.

¹⁶ The book is the commentary of *Kanz al-Daqā'iq* of Imām Abī al-Barakāt Ḥāfiz al-Dīn 'Abd Allāh ibn Ahmad al-Nasafī died 710 H/1310A.D.

¹⁷ This book is the commentary of *Multaqā al-Abḥār* of Ibrāhīm ibn Muḥammad ibn Ibrāhīm al-Ḥalabī died 956H/1549A.D.

¹⁸ The book is the commentary of *al-Durr al-Mukhtār* of 'Alā' al-Dīn al-Ḥaṣkafī died 1088H/1677A.D. and *al-Durr al-Mukhtār* is the commentary of *Tanwīr al-Abṣār wa Jāmi' al-Biḥār* of Muḥammad ibn 'Abd Allāh ibn Aḥmad al-Tumurtāshī died 1004H/1596A.D. See Aḥmad ibn Muḥammad Naṣīr al-Dīn al-Naqīb, *al-Madḥhab al-Ḥanafī*, Maktabat al-Rushd, al-Riyāḍ, 1422/2001, Vol. 2, pp. 493-494 & 580.

to the role of the supervisor and the issue of dispute between *waṣī* and the ward or his family after the termination of *al-wiṣāyah* relating to the disposition of *waṣī*.

An important treatise of the Ḥanafī school is the famous “*al-Fatāwá al-Ālamgīriyyah*”¹⁹ which is compiled by al-Shaykh Niẓām and some of Muslim jurists of India in the early seventeenth century A.D.²⁰ The treatise outlined many crucial rules on *al-wiṣāyah*. Besides the abovementioned issues, it also discusses specification of *al-wiṣāyah*, some of the essential duty of *waṣī* and the role of *waṣī* in administering minor’s property. Nevertheless, as similar to the above treatises, it does not provide the definition of *al-wiṣāyah* and the proof of its legality.

The other treatise of the Ḥanafī jurists on the subject is the work of al-Ustrūshaná (632H/1235 A.D.) with the title “*Aḥkām al-Ṣighār*” where he has written exclusively on the issue of minor including *al-wiṣāyah*. The text outlines many important issues on *al-wiṣāyah* such as, the condition of *waṣī*, the formation of *al-wiṣāyah*, scope of the power of *waṣī* and the issue of the supervision by the court of the *waṣī* in the disposition. However, the treatise does not provide detailed rules relating to the essential duty of *waṣī* and the termination of *al-wiṣāyah*. Similarly, the definition of *al-wiṣāyah* and the proof of its legality were not provided.

Another important treatise of the Ḥanafī jurist on the subject is written by al-Jamālī (921H/1515 A.D.) which entitles “*Ādāb al-Awṣiyā*’ ”. The text wrote exclusively on the subject of *al-wiṣāyah*. It emphasizes the role of *waṣī* in administering a minor’s

¹⁹ It is also known as “*al-Fatāwá al-Hindiyyah*”.

²⁰ See Syed Hasan Amin, *Islamic law in contemporary world: Introduction, glossary & bibliography*, Royston Limited, Glasgow, 1985, p. 98.