

Legislative provisions for *waṣiyyah wājibah* in Malaysia and Indonesia: to what extent do they differ in practice?

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Wasiyyah wājibah in Malaysia and Indonesia

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Abstract

Purpose – This research aims to examine and compare differences in *waṣiyyah wājibah* (obligatory bequest) (WW) practices in Malaysia and Indonesia.

Design/methodology/approach – This is an exploratory qualitative research, employing a thematic analysis approach. Six Muslim Wills (State) Enactments [Enakmen Wasiat Orang Islam (Negeri)] in Malaysia, Islamic Law Compilation (Kompilasi Hukum Islam) in Indonesia, two fatwas (ruling in religious matters) and one court case from each country are analysed. Data is collected from official government websites and other reliable search engines.

Findings – First, the findings show that the WW practice in both countries is similar regarding the quantum of the beneficiaries' entitlement. However, the practice varies between both countries in terms of the types of beneficiaries and how the bequest is distributed. Second, this study shows the potential of WW as an estate planning instrument to complement the existing instruments in each country, especially when addressing family members who are not entitled to succeed by *farā'id* (Islamic inheritance law).

Practical implications – The provision of relevant laws and regulations regarding WW needs to be formulated to guarantee the well-being of dependants. The differences in practice between the two countries can be a guideline to expand the WW scope and context to other Muslim countries.

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Originality/value – This study is the first attempt to compare WW between two Muslim-majority countries focusing on relevant laws, court cases and regulations.

Keywords Islamic inheritance, Islamic law compilation, Muslim wills (state) enactments, *Wasiyyah wājibah* (WW)

Paper type Research paper

Introduction

Farā'id (Islamic inheritance law) guarantees the rights of beneficiaries to a deceased's estate. However, it has several limitations. Some family members can be excluded from inheritance due to certain barriers, such as being excluded by closer beneficiaries, the absence of blood relationship or difference of religion (non-Muslim beneficiaries) (Nik Hussain and Abdul Razak, 2014; Sulong, 2014a, b). The case of being excluded by closer heirs may arise when the grandparent of children who had previously lost their mother or father (the child of the said grandparent) dies. In this instance, the grandchildren would be excluded from inheriting their grandparent's estate by their parent's siblings, who will completely succeed to all the estate. If the grandchildren do not succeed to any portion of their grandparent's estate through *farā'id*, bequest or *inter vivos*, then there is a likelihood that the grandchildren's lives will be in jeopardy. Therefore, *wasiyyah wājibah* (obligatory bequest) (WW) is growing in importance to preserve the well-being of immediate family members who do not succeed to any such inheritance (Musa, 2017; Setiawan, 2017).

Historically, WW was first introduced in Egypt, followed by Libya, Kuwait, Syria, Yemen, Jordan, Morocco, Pakistan, Tunisia and Indonesia (Muda, 2008). The legal variation in these countries can result in two major practical differences: the proportion of inheritance that will be attained by this type of bequest and the categories of beneficiaries (Hidayati, 2012; Muhamad Asni and Sulong, 2016). In response to the variations in practice, this paper explores the WW practice in two Muslim-majority countries, namely Malaysia and Indonesia, by analysing the relevant laws and regulations in these countries and evaluating the rise in the number of court cases. Furthermore, this paper compares the practices from the viewpoint of the beneficiaries and the proportion approach. An in-depth understanding of this practice is crucial principally to the policymakers to further develop the potential of WW as one of the complements to other well-designed instruments for inheritance planning in their respective countries.

The following section of the paper explores the relevant literature to identify the significant issues in WW. The data collection and analysis of this paper are then presented, followed by a presentation and discussion of the significant findings. Concluding remarks are found in the final section.

Literature review

Overview of wasiyyah

There are potential beneficiaries who will never succeed to the inheritance because they are of a different religion, have no blood relationship or because they murdered the deceased (Wan Harun, 2010). In addition to this, in the *farā'id* distribution context, some beneficiaries may be excluded from succeeding to the estate by the *al-hajb* doctrine. *Al-hajb* (screening) means the obstruction of a particular beneficiary from succeeding to the whole or part of the inheritance due to the presence of other heirs having a stronger claim to the estate (Shesa, 2018). Hence, Muslims may bequeath their wealth during their lifetime to overcome inheritance barriers.

Wasiyyah (bequest) is a form of wealth transfer that will be enforced after the deceased's passing. There are two main limitations to it as agreed in Islamic law. First, the wealth cannot be transferred to beneficiaries entitled to the estate through *farā'id* law. Second, the total

value of the transfer must be less than one-third of the total inheritance. Thus, beneficiaries who have been excluded from succeeding to the estate through *farā'id* distribution are entitled to receive an inheritance through *wasiyyah* with a total value of not more than one-third (Nor Muhamad, 2017; Mohamad Puad *et al.*, 2018; Voyce, 2018; Jamalurus *et al.*, 2019; Rashid *et al.*, 2019; Rasban *et al.*, 2020). A *wasiyyah* is a voluntary act and is encouraged as a practice by Islam (Wan Harun, 2009; Erniwati, 2018; Muhammad Daud and Azahari, 2018, 2022). Some Muslim scholars, such as Sa'īd ibn al-Musayyib, Hasan al-Baṣrī, Imam Aḥmad ibn Hanbal, Dāwūd al-Zāhiri, Is-hāq ibn Rahawiyah, Ibn Jarīr and Ibn Ḥazm, viewed it as compulsory to transfer a deceased's estate through *wasiyyah* to the immediate families who are not entitled to the inheritance (Muhamad Asni and Sulong, 2016).

Wasiyyah wājibah

An explicit provision for WW is not found in Islamic law. Muhamad Asni and Sulong (2016) described two prominent groups of Muslim scholars holding different ideas regarding this practice. Those supporting the WW practice refer to Qur'anic passages (2:180) and (4:8). Those rejecting the practice express a widely held view that these verses regarding *wasiyyah* have been abrogated (*mansūkh*) by the revelation of verses related to *farā'id*, based on Qur'anic passages (4:11–12). There is also the statement of Prophet Muhammad: "There is no *wasiyyah* to the heirs" (Al-Nayṣabūrī and Bin, 2006). Nevertheless, current Muslim scholars have introduced the WW doctrine by incorporating the *wasiyyah* and *farā'id* verses to preserve the share of beneficiaries excluded from receiving any inheritance (Setiawan, 2017; Rahman *et al.*, 2020).

The *wasiyyah* doctrine is broader than WW because *wasiyyah* can be given to anyone other than those qualified to inherit through *farā'id*. Conversely, WW is specific to certain beneficiaries and compulsorily enforced without being subject to the will of the deceased (Shesa, 2018). To be precise, WW has been promulgated to provide for orphaned grandchildren. Without WW, the position was that living sons of a parent who dies would exclude from succession the grandchildren of that parent through a son or daughter who died before the parent. Munir (2018, p. 113) said that the underlying cause of this WW is the "misery of the orphaned grandchildren". Many advocate it based on the presumption that orphaned grandchildren excluded from succession live in miserable conditions.

The necessity to enforce WW in this circumstance can be explained by two perspectives: economic needs and family relationship. This practice is seen to be able to care for the beneficiaries' welfare and benefits as some beneficiaries live in poverty and with health problems. Thus, they would still need support (Setiawan, 2017; Lestari and Wahyuningsih, 2018; Muhammad Daud and Azahari, 2018). In contrast, some beneficiaries live well with support from their immediate families. This is a challenge to the court to justify the need to enforce WW (Mohd Noor *et al.*, 2018). From another perspective, WW is able to maintain and strengthen family relationships. It is important because distant or excluded beneficiaries will also inherit part of the estate. In fact, this is consistent with objectives of Islamic law (*maqāsid al-Sharī'ah*). One of the essential objectives of the law is the preservation of offspring (Hadi, 2017; Lestari and Wahyuningsih, 2018). The enforcement of WW is determined by beneficiaries' needs and court order (Hadi, 2017). In fact, in the order of estate management, the heirs have to discharge WW prior to executing the deceased's charitable *wasiyyah* (Muda and Jusoh, 2005). Conversely, an ordinary *wasiyyah* can only be enforced if the testator leaves a will orally or in writing. Furthermore, there are also recommendations to extend WW beneficiaries to non-Muslim heirs and *dhawul arḥām* (beneficiaries who will never receive an inheritance due to the distance of their blood relationships with the deceased) (Musa, 2017; Setiawan, 2017; Lestari and Wahyuningsih, 2018; Shesa, 2018).

Wasīyyah wājibah practices among Muslim countries

Although there is an understanding among Muslim countries that WW is a means to provide for orphaned grandchildren, the real situations show that it has been practised slightly differently in different countries. Egypt was the first Muslim country to introduce and codify WW. Later, other Muslim countries adopted Egyptian law concerning WW. In Syria, Morocco and Jordan, WW is granted only to the grandchildren, great-grandchildren, etc. of the predeceased father, no matter how many generations there may be between the bequeather and the beneficiary. Egypt, Libya, Kuwait and Yemen additionally include the grandchildren, etc. of the predeceased mother as beneficiaries (Muda, 2008). In Tunisia and Iraq, the beneficiaries of WW are limited to the grandchildren of the predeceased mother or father. There is an inconsistent finding in Hidayati's (2012) study, who also examined the *wājibah* will in some Muslim countries, including Morocco. Unlike Muda's (2008) findings, Hidayati (2012) claimed that the practice in Morocco is similar to Egypt.

In Pakistan, grandchildren losing their parents replace their parents as heirs of their grandfather (Muhammad Daud and Azahari, 2022). This principle is also known as representational succession (Fauzi, 2019). The grandchildren, either male or female, inherit the same share as would have been received by their father or mother (Muhammad Daud and Azahari, 2022). It shows that in Pakistan, the grandchildren will never receive an inheritance in the form of WW. Regarding Malaysia, Muda and Jusoh (2005) carried out a study to comparatively review the legislative provisions for WW practices in Egypt and Selangor (a state in Malaysia). They found that the provision of WW is broader in Egypt than in Selangor. It is because WW in Selangor is limited to the grandchildren of the deceased father only. They opined that Selangor is not able to serve the purpose of protecting orphaned grandchildren efficiently as it excludes grandchildren of the deceased mother from being beneficiaries. Muda (2008) found that WW has been legalised in three states of Malaysia, namely Selangor, Negeri Sembilan and Melaka. The practice in Negeri Sembilan and Melaka is similar to Selangor.

In Indonesia, WW applies to adopted children and adoptive parents, while in other Muslim countries it applies to grandchildren whose parents died before the testator (Syafi'i, 2017). Ilhami (2018) affirmed that the inclusion of the WW principle has been borrowed from the Egyptian Law of Testamentary Dispositions of 1946 and has been transplanted into Article 209 of the Kompilasi Hukum Islam (KHI) in Indonesia. Despite this, WW in Indonesia is intended for adopted children and adoptive parents, not for the orphaned grandchildren as practised in Egypt. Concerning the orphaned grandchildren, Indonesia has adopted the practice of Pakistan. The grandchildren losing their parents in the Indonesian KHI context are considered heir replacements (Fauzi, 2019). However, in Indonesia, the amount to be received by the grandchildren is up to one-third of the estate (Hidayati, 2012). Unlike other countries, WW in Indonesia is also given to non-Muslim heirs, children born out of wedlock from their biological father and stepchildren nurtured since their childhood (Ilhami, 2018).

Even though researchers are very concerned about the extent to which the practices of WW differ across Muslim countries, the comparison between Malaysia and Indonesia is absent in these studies. For instance, Muda and Jusoh (2005) and Muda (2008) did not take into account Indonesia in their studies, while Malaysia was not included in the work of Hidayati (2012). Moreover, most past studies regarding WW in Indonesia did not explicitly compare WW practices between Malaysia and Indonesia. It is true that some who have addressed WW in Indonesia have acknowledged the WW practice in Malaysia; however, they did not discuss why the practice in Indonesia differs from that of Malaysia. In addition, the recent WW development in Malaysia shows that, to date, six states have enacted WW instead of three states, as found in Muda (2008). Thus, any comparison made between both countries needs to consider the latest WW enactments in Malaysia. Apart from that, both countries hold to the Shafi'i School of jurisprudence. Therefore, logically, the WW practice should be

more or less the same. This is, however, not the case, as pointed out in the past studies. In order to obtain in-depth understanding, there is an urgent need to investigate the differences in WW practices in Malaysia and Indonesia by analysing local laws and regulations and court cases. WW is considered a reform of the Islamic family law and remains controversial among Muslim scholars (Hidayati, 2012). By identifying and comparing the similarities and differences in both countries, experts of Islamic family law in Malaysia and Indonesia will be able to re-evaluate whether WW is the best alternative to solve a particular inheritance issue.

Research methodology

Research design

A comparative analysis approach was employed together with thematic document analysis. Comparative analysis of relevant laws and regulations has been practised by Azmi *et al.* (2017), Koops *et al.* (2018) and Ikejiaku and Dayao (2021). According to Engberg (2020), this approach allows access to legal sources from different legal systems. Moreover, it creates connections facilitating research to see a link between different and unfamiliar legal settings.

Data collection

This study analysed two types of documents: local enactments or acts and court cases. The researchers chose Malaysia and Indonesia as both countries have specific laws and cases concerning WW and are understood by the researchers. The relevant documents were obtained from the official websites of relevant institutions. All the documents were in the Malay and Indonesian languages, which were then translated into English by two qualified translators to certify the accuracy and acceptability of the translation (Vaismoradi *et al.*, 2016; Ahmad Ramli *et al.*, 2017). This study also analysed six enactments which shed light on the WW practice as follows:

- (1) Muslim Wills (State of Selangor) Enactment 1999 (Amendment 2016) [*Enakmen Wasiat Orang Islam (Negeri Selangor) 1999 (Pindaan 2016)*] (EWOINS2016)
- (2) Muslim Wills (State of Negeri Sembilan) Enactment 2004 [*Enakmen Wasiat Orang Islam (Negeri Sembilan) 2004*] (EWOINS2004)
- (3) Muslim Wills (State of Malacca) Enactment 2005 [*Enakmen Wasiat Orang Islam (Negeri Melaka) 2005*] (EWOINM2005)
- (4) Muslim Wills (State of Kelantan) Enactment 2009 [*Enakmen Wasiat Orang Islam (Negeri Kelantan) 2009*] (EWOINK2009)
- (5) Muslim Wills (State of Pahang) Enactment 2017 [*Enactment Wasiat Orang Islam (Negeri Pahang) 2017*] (EWOINP2017)
- (6) Muslim Wills (State of Sabah) Enactment 2018 [*Enakmen Wasiat Orang Islam (Negeri Sabah) 2018*] (EWOINS2018)

A fatwa (a ruling in religious matters) issued by the Fatwa Committee of the National Council for Islamic Religious Affairs of Malaysia (*Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia – MKI*) in 2008 and one court case, Re Mustapha bin Ismail [2009] 2 ShLR 118 were also studied. In the Indonesian context, this study explored Article 185 and Article 209, Compilation of Islamic Laws (*KHI*), *Majelis Ulama Indonesia* (MUI) fatwa and one WW court case, notably case number 26/Pdt.G/2015/PTA.Plg.

Data analysis

The documents gathered from websites, i.e. enactments and court cases, were read several times carefully to gain familiarity with the information. Then, initial inductive coding was

carried out, organised and clustered based on similarities. Based on these similarities, this study pooled the codes to identify the emergent overarching themes; that is, small codes were combined to find a broader theme and portray the data accurately. Later, a comprehensive discussion was carried out to refine and reach a consensus on the theme development. When any theme discrepancies were found, a group discussion was conducted to reach a common agreement as practised by MacPhail *et al.* (2016) and Wshah *et al.* (2020). The discussion of the themes was turned into a fundamental comparison of the WW practices in Malaysia and Indonesia.

Results and discussion

This study's analysis classified the WW practice into three groups: the enforcement of WW in Malaysia, the enforcement of WW in Indonesia and a comparison between both countries.

The enforcement of wasiyyah wājibah in Malaysia

The WW practice in Malaysia refers to a part of the inheritance set out by law to be distributed to grandchildren not succeeding to their grandparents' estate because of their parents' death and being excluded by the presence of their parents' siblings. In addition, it also applies in the event of simultaneous deaths (grandparents together with parents), resulting in the grandchildren not succeeding to their grandparents' estate (Wan Harun, 2009). However, this WW is only applicable in six states (instead of 14) with explicit provisions for WW. The provisions of this law are enacted in Muslim Wills Enactments and through the official MKI fatwa issued at the state level (Muhamad Asni and Sulong, 2016).

The six states that have enactments of WW are Selangor, Negeri Sembilan, Melaka, Kelantan, Pahang and Sabah. Furthermore, there is a fatwa issued by the MKI authorising the WW practice [Jabatan Kemajuan Islam Malaysia (JAKIM), 2008]. In contrast, other states do not have any enactments legalising WW. The state enactments only provide for general matters related to the Shariah High Court (*Mahkamah Tinggi Syariah*) in dealing with WW based on Section 46(2)(b)(v), Jurisdiction of Shariah High Court (*Bidang Kuasa Mahkamah Tinggi Syariah*). In addition, these states will refer to Islamic legal sources for WW validation as provided in Section 245(2), Shariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585) (Ibrahim, 2017). This paper compares these six enactments for each state reflecting the WW practice in Malaysia through seven themes, as shown in Table 1.

Themes 1: Section name and section number. With regard to Section name and number, all states provide for WW in Part VIII of their enactments even though the section numbers are different. However, states use different terms to name the section. This study identifies three terms used across the state enactments, namely “*wasiat kepada cucu*”, “*bekues kepada cucu*” and “*wasiyyah wājibah*”. The use of these different terms does not make any significant difference as Alma'amun (2013) indicated that the use of “*wasiat*” and “*bekues*” might have the same meaning, which is to transfer an inheritance after death.

Theme 2: Wasiyyah wājibah beneficiaries. Findings from theme 1 indicate that WW is for grandchildren. However, theme 2 further shows that not all grandchildren are regarded as WW beneficiaries. EWOINS2016, EWOINK2009, EWOINP2017 and MKI recognise grandchildren from both son's or daughter's sides but they limit to those grandchildren. Contrastingly, the MKI endorses grandchildren from the son's or daughter's side as WW beneficiaries howsoever far-removed they may be. EWOINS2004, EWOINSM2005 and EWOINS2018 only recognise grandchildren from the son's side as WW beneficiaries. In other words, these three enactments do not provide for WW for grandchildren from the daughter's side.

Theme 3: Conditions for enforcing wasiyyah wājibah. The conditions for enforcing WW can be categorised into two. The first condition is that the beneficiaries' parents (father or

Themes	EWOINS2016	EWOINS2004	EWOINN2005	EWOINK2009	EWOINP2017	EWAOINS2018	MKI
Section name and section number	Part VIII <i>Wasiat Wājibah</i> <i>Wasiat kepada cucu</i> (Bequest to grandchildren) (27)	Part VIII <i>Wasiat Wājibah</i> <i>Bekues kepada cucu</i> (Bequest to grandchildren) (27)	Part VIII <i>Wasiat Wājibah</i> <i>Bekues kepada cucu</i> (Bequest to grandchildren) (27)	Part VIII <i>Wasiat Wājibah</i> <i>Wasiat kepada cucu</i> (Bequest to grandchildren) (27)	Part VIII <i>Wasiat Wājibah</i> (30)	Part VIII <i>Wasiat Wājibah</i> <i>Wasiat kepada cucu</i> (Bequest to grandchildren) (27)	Not related for both sections
<i>Wasiyyah wājibah</i> beneficiaries	Grandchildren from son's or daughter's side	Grandchildren from son's side	Grandchildren from son's side	Grandsons and granddaughters from son's and daughter's sides	Grandchildren from son's or daughter's side	Grandchildren from son's side	Grandsons and granddaughters from son's and daughter's sides and downwards
Conditions for enforcing <i>wasiyyah wājibah</i>	Father or mother died prior to grandfather or grandmother	Father died prior to grandfather or grandmother	Father died prior to grandfather or grandmother	Father or mother died prior to grandfather or grandmother	Father or mother died prior to grandfather or grandmother	Father died prior to grandfather or grandmother	Father or mother died prior to grandfather or grandmother
	Father or mother dies simultaneously with grandfather or grandmother	Father dies simultaneously with grandfather or grandmother	Father dies simultaneously with grandfather or grandmother	Father or mother dies simultaneously with grandfather or grandmother in similar or dissimilar circumstances	Father or mother dies simultaneously with grandfather or grandmother	Father dies simultaneously with grandfather or grandmother	Father or mother dies simultaneously with grandfather or grandmother
Requirements for <i>wasiyyah wājibah</i>	(a) Not estate beneficiaries (b) Religion	Yes Not specified	Yes Not specified	Yes Beneficiaries are not religiously different from their father or mother	Yes Beneficiaries are not religiously different from their father or mother	Yes Not specified	Yes Beneficiaries are not religiously different from their father or mother

(continued)

Table 1.
Comparison of
wasiyyah wājibah
practices in State
Enactments and MKI

Table 1.

Themes	EWOINS2016	EWOINS2004	EWOINM2005	EWOINK2009	EWOINP2017	EWAOINS2018	MKI
(c) Receiving bequest or <i>inter vivos</i>	Beneficiaries do not receive inheritance by bequest or <i>inter vivos</i> from grandfather or grandmother If the beneficiaries have succeeded to the estate by bequest or <i>inter vivos</i> , they still can receive the <i>uasiyyah wajilabah</i> subject to not being beneficiaries by <i>farā'id</i> , beneficiaries' father or mother is Muslim and not involved in the murder	Beneficiaries do not succeed to the estate by bequest or <i>inter vivos</i> from grandfather or grandmother	Beneficiaries do not succeed to the estate by bequest or <i>inter vivos</i> from grandfather or grandmother	Beneficiaries do not succeed to the estate by bequest or <i>inter vivos</i> from grandfather or grandmother	Beneficiaries do not succeed to the estate by bequest or <i>inter vivos</i> from grandfather or grandmother	Beneficiaries do not succeed to the estate by bequest or <i>inter vivos</i> from grandfather or grandmother	Beneficiaries do not succeed to the estate by bequest, endowment (<i>waqf</i>), or <i>inter vivos</i> from grandfather or grandmother
(d) Not involved in the murder	Beneficiaries are not involved in the murder of grandfather or grandmother	Not specified	Not specified	Beneficiaries are not involved in the murder of father or mother	Beneficiaries are not involved in the murder of father or mother Beneficiaries are not suspiciously involved in the murder of father or mother Beneficiaries are not false witnesses who cause the father or mother to be executed	Not specified	Beneficiaries are not involved in the murder of father or mother
Proportion	Father's or mother's <i>farā'id</i> proportion and less than one-third from total grandfather's or grandmother's estate	Father's <i>farā'id</i> proportion and less than one-third from total grandfather's or grandmother's estate	Father's <i>farā'id</i> proportion and less than one-third from total grandfather's or grandmother's estate	Father's <i>farā'id</i> proportion and less than one-third from total grandfather's or grandmother's estate	Father's <i>farā'id</i> proportion and less than one-third from total grandfather's or grandmother's estate	Father's or mother's <i>farā'id</i> proportion and less than one-third from total grandfather's or grandmother's estate	Father's or mother's <i>farā'id</i> proportion and less than one-third from total grandfather's or grandmother's estate

(continued)

Themes	EWOINS2016	EWOINS2004	EWOINM2005	EWOINK2009	EWOINP2017	EWAOINS2018	MKI
Methods of <i>wasiyyah wājibah</i> distribution among beneficiaries	Single beneficiaries – Succeed to whole <i>wasiyyah wājibah</i> proportion Two or more grandsons or granddaughters – Succeed equally Grandson (single or more) and granddaughter (single or more) – Two parts for grandson and one part for granddaughter	Not specified	Not specified	Not specified	<i>Farā'id</i> – Two parts for grandson and one part for granddaughter	Not specified	<i>Farā'id</i> – Two parts for grandson and one part for granddaughter
<i>Wasiyyah wājibah</i> arrangement	1. Funeral 2. Ordinary bequest 3. Debt	Not specified	Not specified	1. Funeral 2. Ordinary bequest 3. Debt	1. Funeral 2. Ordinary bequest 3. Debt 4. Incomplete worship services (<i>Zakat</i> and pilgrimage representative's payment) 5. <i>Farā'id</i> distribution	Not specified	1. Funeral 2. Ordinary bequest 3. Debt

Source(s): Authors' own

Table 1.

mother) (EWOINS2016, EWOINK2009, EWOINP2017 and MKI) or father (EWOINS2004, EWOINM2005 and EWOINS2018) dies before the grandparents. The second condition is that a parent or father dies simultaneously with the grandparents. Dying simultaneously can happen in two situations – in similar or dissimilar circumstances. EWOINK2009 is the only enactment that clearly mentions this.

Theme 4: Requirements for wasiyyah wājibah. The requirements for WW are divided into four sub-themes as can be seen in Table 1. All state enactments and MKI agree that grandchildren are not the heirs to the grandparents' inheritance and at the same time they do not receive an inheritance in the form of *inter vivos* or bequest [MKI added endowment (waqf)] from the grandparents. However, EWOINS2016 endorses that the beneficiaries can receive the WW despite having been part of *inter vivos* or bequest with three conditions: the beneficiaries are not legal heirs to the grandparents' inheritance, the beneficiaries' parents are Muslims and the beneficiaries are not involved in the murder of the father or mother.

In relation to "Religion", EWOINS2004, EWOINM2005 and EWOINS2018 do not express this requirement. In other enactments, the requirement of "Religion" is expressed differently. EWOINP2017, EWOINK2009 and MKI require that the beneficiaries not be of a different religion than their parents. However, this study argues that the beneficiaries must be Muslims to be recognised as WW beneficiaries. EWOINS2016 does have the "Religion" requirement for the beneficiaries but only requires that the parents be Muslims.

EWOINS2016, EWOINK2009, EWOINP2017 and MKI require that beneficiaries must not have been involved in the murder. Furthermore, EWOINS2016 specifically sets out that the beneficiaries must not have been involved in the murder of the grandparents. In contrast, MKI, EWOINK2009 and EWOINP2017 prohibit WW from being transferred to beneficiaries involved in the murder of their parents. EWOINP2017 also adds that beneficiaries should not be suspiciously involved in the murder of a parent and not be untruthful witnesses whose testimony resulted in the parent's execution.

Theme 5: Proportion. The proportion of WW is based on the *farā'id* proportion of the parent (either father or mother) (EWOINS2016, EWOINK2009, EWOINP2017 and MKI) or father (EWOINS2004 and EWOINM2005) if they were still alive. In addition, the proportion should not exceed one-third of the grandparents' estate. Although EWOINS2018 does not provide for WW based on parents' *farā'id* proportion, the requirement of WW remains that it must not exceed one-third of the grandparents' estate.

Theme 6: Methods of wasiyyah wājibah distribution among beneficiaries. EWOINS2004, EWOINM2005, EWOINK2009 and EWOINS2018 do not specify the WW distribution method among beneficiaries. In contrast, EWOINP2017, EWOINS2016 and MKI stipulate that the WW distribution must be based on the proportion of two parts for sons and one part for daughters, like the *farā'id* distribution method known as *ʿaṣabah bi al-ghayr*. EWOINS2016 describes in detail this method in three situations. The first situation is when there is only a single beneficiary, either grandson or granddaughter; he/she will succeed to the whole WW proportion. The second situation is that they will succeed equally when there are two or more grandsons or granddaughters. Finally, in the third situation, there are grandsons (one or more) and granddaughters (one or more), and they will inherit according to the *farā'id* method, which is two parts for grandson and one part for granddaughter (*ʿaṣabah bi al-ghayr*).

Theme 7: Wasiyyah wājibah arrangement. In the final theme, EWOINS2016, EWOINK2009 and MKI set out that the WW can only be enforced after deducting the deceased's funeral expenses, deceased's ordinary bequest and debt payment. Likewise, EWOINP2017 provides that WW is only performed after deducting ordinary bequests, funeral expenses, debts, worship services and *farā'id* distribution.

The enforcement of wasiyyah wājibah in Indonesia

Compared to the WW practice in Malaysia, the Indonesian context merely refers to the Islamic Law Compilation (KHI), MUI fatwa and the judge's decision based on binding precedent. Thus, this paper concludes with two main themes.

Theme 1: Wasiyyah wājibah beneficiaries and proportion. Referring to the KHI, the WW applies merely to adopted children or adoptive parents. As a result, adopted children will be the beneficiaries of an inheritance from their adoptive parents (Shesa, 2018), as demonstrated in case number 26/Pdt.G/2015/PTA.Plg. Adopted children are not entitled to inherit from their adoptive parents due to the absence of a blood relationship (Erniwati, 2018). This can be understood by Articles 209 (1) and (2) of the KHI (Direktorat Pembinaan Peradilan Agama Islam, 2001). Therefore, WW could assist the adopted children expressly if the adopted children are entirely alone. In addition, this section allows the adopted children to succeed to one-third of an estate through WW. Non-Muslims and children born from adultery are also recognised as WW beneficiaries, as mentioned in the court's decision in case number 16K/AG/2010 and MUI fatwa Articles 1(4) and 2(5)(b).

Theme 2: Main sources. The main sources for Indonesian cases refer to Articles 209(1) and (2) of the KHI, respectively:

Adopted children's inheritance is distributed in accordance with Article 176 to Article 193 as mentioned before, whereas the adoptive parents who do not succeed to any bequest will succeed to at least one-third of adopted children's inheritance as *wasiyyah wājibah*.

Adopted children who are not beneficiaries of any inheritance are required to receive a maximum of one-third from their adoptive parent's estate (KHI di Indonesia, 2001).

However, several cases refer merely to court decisions, as in case number 16K/AG/2010, which acknowledged non-Muslims as beneficiaries. In addition, the MUI fatwa recognised illegitimate children as beneficiaries, as stated in Article 1(4):

Wasiyyah wājibah is in accordance with the policy of the authorities that requires men who cause birth to an adulterous person to bequeath to their illegitimate children after their death (Ilhami, 2018).

Comparison of wasiyyah wājibah practices between Malaysia and Indonesia

Unlike Indonesia, there is no uniformity in the WW practice in Malaysia. Only six states in Malaysia have made specific provisions concerning WW in their state enactments related to Muslim matters. Ironically, even though a fatwa has been issued by the MKI authorising the WW practice, it has not been able to solve the uniformity issue. A plausible explanation for this scenario is that the MKI fatwa is not binding as it has no jurisdiction over any state in Malaysia (Muhamad Asni and Sulong, 2016). Both countries are similar in terms of the amount to be received by the WW beneficiaries. However, the comparative analysis produces two dominant themes indicating that a distinctive difference in both countries can be observed from the perspective of the WW beneficiaries and method of WW distribution as summarised in Table 2.

Theme 1: Wasiyyah wājibah beneficiaries. There are four sub-themes within this theme. In the Malaysian context, the WW is only for grandchildren excluded from succeeding their grandparents' estate due to the death of their father or mother, as asserted in the Muslim Wills (State) Enactments and MKI. Despite that, not all six states in Malaysia give equal treatment to the children of a predeceased son or daughter. In Indonesia, providing the children of the predeceased children (grandchildren) with disposal of the estate employing a WW is not a concern since their inheritance rights are guaranteed because they are considered replacement beneficiaries as provided in Article 185 of the KHI. The WW is allowed in Indonesia for adopted children/parents, as stated in Article 209 of the KHI. Concerning WW

Themes		Malaysia	Indonesia
<i>Waṣiyyah wājibah</i> beneficiaries	<i>Waṣiyyah wājibah</i> for excluded grandchildren <i>Waṣiyyah wājibah</i> for adopted children/parents	Muslim Wills (State) Enactments MKI Not provided in Muslim Wills (State) Enactments and MKI Considered as ordinary <i>waṣiyyah</i>	Not provided in KHI Considered as “replacement beneficiaries” in Article 185, KHI Article 209, KHI
	<i>Waṣiyyah wājibah</i> for non-Muslims	Not provided in Muslim Wills (State) Enactments and MKI Considered as ordinary <i>waṣiyyah</i>	Refer to case number 16 K/AG/2010 2554/Pdt.G/2011/PA 59/K/AG/2001
	<i>Waṣiyyah wājibah</i> for children of adultery	Not provided in Muslim Wills (State) Enactments and MKI Considered as ordinary <i>waṣiyyah</i>	Article 11, MUI fatwa (2012)
Method of <i>waṣiyyah wājibah</i> distribution	Proportion Method of calculation	Less than one-third <i>Munāsakah</i> (layered death)	Less than one-third Enforce <i>waṣiyyah wājibah</i> prior to <i>fara’id</i> distribution (adopted children) or Consider the beneficiaries as <i>fara’id</i> beneficiaries (non-Muslim beneficiaries)

Table 2.
Comparison of *waṣiyyah wājibah* practices in Malaysia and Indonesia

Source(s): Authors’ own

to adopted children and adoptive parents, it is due to the *ijtihad* method used to develop the rulings. The *ijtihad* method considers the custom in the Indonesian society, which practices adoption (Muhammad Daud and Azahari, 2022). In addition, adopted children are made *wājibah* beneficiaries in Indonesia because there is a strong relationship with the adoptive parent. KHI aims to provide justice in that adopted children and parents have strong emotional bonds between them, and it seems unjust for adopted children not to receive any wealth from their adoptive parents (Syafi’i, 2017). Adoption is also a custom in Malaysia. Maeda (1975) proved that Malays frequently practice adoption or fostering. However, WW is never used to provide for adopted children and adoptive parents. This study believes that the provision for adopted children or adoptive parents must be made through *waṣiyyah* and not WW.

Surprisingly, the current practices show that WW is also granted to heirs of faiths other than Islam and illegitimate children, even though there is no provision for these in KHI. The former is observed from the decision in several court cases, such as case numbers K/AG/2010, 2554/Pdt.G/ 2011/PA and 59/K/ AG/2001. Article 11 of an MUI fatwa in 2012 justified the extension of WW to non-Muslim heirs and illegitimate children on the basis of *maslahah mursalah* (public interest). They are barred from the inheritance due to their different religion and having no relationship of *nasab* (lineage) from the father. The exclusion from inheritance could lead to dissatisfaction and argument. Thus, WW is an appropriate instrument to attain justice given the plurality of the Indonesian people (Muhammad Daud and Azahari, 2022). This study agrees with Muhammad Daud and Azahari (2022), who did not agree with the WW practice for non-Muslim heirs in Indonesia. They argue that the difference in religion as a barrier to inheriting wealth has a strong basis in Islamic law sources. Thus, WW for non-Muslim heirs violates Islamic law.

Theme 2: Method of wasiyyah wājibah distribution. There are two sub-themes within this theme. Based on Muslim Wills (State) Enactments and MKI in Malaysia and KHI in Indonesia, there is a similarity in the allowable proportion of one-third or less of the estate. The method of calculation in Malaysia adopts the *munāsakhah* (layered death) approach in which it is presumed that the beneficiaries' father or mother died after the deceased (grandparents). In the Indonesian context, the WW must be enforced for the adopted children before the estate is distributed to *farā'id* beneficiaries. For the non-Muslim beneficiaries, they will succeed to the estate as *farā'id* beneficiaries at one-third of the inheritance or less.

Court cases related to *wasiyyah wājibah*

In Malaysia, according to *Re Mustapha bin Ismail* [2009], the deceased Che Fatimah binti Abdul Razak's estate comprised moveable and immovable assets. Her *farā'id* beneficiaries were five sons and two daughters, as shown in Tables 3 and 4. The deceased had one son, named Kasim bin Ismail, who had died before her. Kassim bin Ismail had one son (Sean Yusof bin Kassim) and three daughters (Maria binti Kassim, Rohani binti Kassim and Nora binti Kassim), who were grandchildren to the deceased. The court ruled that the grandchildren of the son (Kassim bin Ismail) were entitled to succeed to their grandmother's (Che Fatimah binti Abdul Razak) estate through WW. In reference to the original inheritance proportion (*farā'id*), Kassim would not receive any of the deceased's estate since he died before her. As a result, Kassim's children (the deceased's grandchildren) would not succeed to their grandmother's estate as they were excluded by the presence of Kassim's siblings (uncles and aunts). This original proportion is shown in Table 3. In this case, the court ruled that the grandchildren were entitled to receive an inheritance by referring to their father's proportion, 1/7 through WW. The *farā'id* calculation was based on layered death (*munāsakhah*) (Salleh *et al.*, 2017) and applied by assuming that Kassim died after the deceased (grandmother). Then, 1/7 (Kassim's *farā'id* proportion) was divided among his children based on the *ʿaṣabah bi al-ghayr* proportion (two parts for male and one part for female beneficiaries). Thus, the grandson received 2/35 and the granddaughters each received 1/35. In conclusion, as shown in Table 4, the sons, daughters, grandsons and granddaughters of the deceased received 10/70, 5/70, 4/70 and 2/70, respectively. This calculation method differs from the WW practice in Indonesia, requiring a one-third deduction initially; then, the remaining two-thirds is received by other *farā'id* beneficiaries, as discussed in the next section.

In the Indonesian context, the excluded beneficiaries who are grandchildren of the predeceased children are not categorised as WW beneficiaries, as in the Malaysian case. However, there is a provision in Articles 185(1) and (2) of the KHI as given below, consenting

Beneficiaries	Position as beneficiaries	Final proportion
Mohamed Nor Othman	<i>ʿAṣabah bi al-ghayr</i> (two parts for sons and one part for daughters)	2/12
Zainal Abidin		2/12
Mustapha Abdul Rahim		2/12
Zubaidah		1/12
Rokiah		1/12
Kassim	Did not succeed due to death	0
Sean Yusof	Did not succeed as excluded by Kassim's siblings	0
Maria		0
Rohani		0
Nora		0

Source(s): Authors' own

Table 3.
Original calculation in
*Re Mustapha bin
Ismail* [2009]

Beneficiaries	Deceased: Che Fatimah binti Abdul Razak		Deceased: Kassim bin Ismail		Final proportion
	Condition of beneficiaries	<i>Farā'īd</i> proportion	Condition of beneficiaries	<i>Farā'īd</i> proportion	
Mohamed Nor (Son 1)	' <i>Aṣabah bi al-ghayr</i> (Two parts for sons, one part for daughter)	2/14	Did not succeed, being screened by Kassim's sons	0	10/70
Othman (Son 2)		2/14		0	10/70
Zainal Abidin (Son 3)		2/14		0	10/70
Mustapha (Son 4)		2/14		0	10/70
Abdul Rahim (Son 5)		2/14		0	10/70
Zubaidah (Daughter 1)		1/14		0	5/70
Rokiah (Daughter 2)		1/14		0	5/70
Kassim (Son 6)		2/14	Deceased	0	0
Sean Yusof (Kassim's son 1)	Did not succeed, being screened by Kassim's siblings	0	' <i>Aṣabah bi al-ghayr</i> on Kassim's proportion (Two parts for sons, one part for daughters)	2/5	4/70
Maria (Kassim's daughter 1)		0		1/5	2/70
Rohani (Kassim's daughter 2)		0		1/5	2/70
Nora (Kassim's daughter 3)		0		1/5	2/70

Source(s): Authors' own

Table 4.
Inheritance estate distribution in *Re Mustapha bin Ismail* [2009]

to these excluded beneficiaries receiving an inheritance as replacement beneficiaries known as *waris pengganti*.

Beneficiaries who have died before the deceased, thus their position will be replaced by their children, except those mentioned in Article 173.

The replacement beneficiaries' proportion shall not exceed the proportion of original beneficiaries.

In Indonesia, in accordance with Articles 209(1) and (2) of the KHI, two parties are acknowledged as beneficiaries through WW: adoptive parents and adopted children. It is demonstrated by case number 26/Pdt.G/2015/PTA.Plg in which the deceased, Sainuni binti Sodi, had a husband (Sampurno), two brothers (Sukari bin Soidi and Samidi bin Soidi) and one sister (Kasimah binti Soidi). The deceased also had an adopted child, Lusi Lusita. In this case, the applicant applied the WW endorsement for the adopted child. According to Table 5, the original *farā'īd* calculation of the deceased's estate shows that half belongs to the husband

	<i>Farā'īd</i> proportion	Fundamental proportion	Final proportion
Sampurno (Husband)	1/2	10	5/10
Sukari (Brother 1)	' <i>Aṣabah bi al-ghayr</i>		2/10
Samidi (Brother 2)			2/10
Kasimah (Sister 1)			1/10
Lusi Lusita (adopted child)	Did not succeed, being excluded by the absence of blood relationship	0	0

Source(s): Authors' own

Table 5.
Original calculation in case number 26/Pdt.G/2015/PTA.Plg

and the balance is divided among the deceased's siblings by *‘aşabah bi al-ghayr*. Thus, the proportion belonging to the husband is 5/10 while each of the two brothers gets 2/10 and the sister gets 1/10. The adopted child has no privileges to her adoptive parent's estate. Instead, the court verified that the adopted child was eligible to one-third of her adoptive parent's estate, and the remainder (2/3) was distributed in accordance to *farā'id*. Accordingly, the husband got 1/3, each brother got 2/15 and the sister got 1/15, as illustrated in Table 6.

	<i>Wasiyyah wājibah</i>	<i>Farā'id</i> proportion (2/3 of balance)		Fundamental proportion	Final proportion
Sampurno (Husband)	Not entitled to <i>wasiyyah wājibah</i>	$1/2 \times 2/3 = 1/3$	1/3	15	5/15
Sukari (Brother 1)		<i>‘Aşabah bi al-ghayr</i> (2/3) = remaining 1/3	2/15		2/15
Samidi (Brother 2)			2/15		2/15
Kasimah (Sister 1)			1/15		1/15
Lusi Lusita (adopted child)	1/3	Did not succeed, being excluded by the absence of blood relationship	0	0	5/15

Source(s): Authors' own

Table 6.
Inheritance estate distribution in case number 26/Pdt.G/2015/PTA.Plg

Conclusion

WW practices in Malaysia and Indonesia are different in terms of the main sources, WW beneficiaries and their calculation methods. In Malaysia, recent developments in Islamic inheritance have contributed to the enforcement of the Muslim Wills (State) Enactments and produced a specific section for WW. Although at present, the Enactments are not standardised with the MKI fatwa they can still be considered as a positive development towards strengthening WW as part of the Islamic inheritance system. On the other hand, Indonesia seems to have a uniform practice for the whole country. This study may be expanded by comparing the practices of other Muslim-majority countries using the same method applied in this study.

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