

THE CONTEMPORARY APPLICATION OF WASIYAH (MUSLIM WILL) IN MALAYSIA

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Abstract

This study was aimed to find the rate of success of the alternative tools for the transfer of properties from one generation to the next, among which Muslim wills (*wasiyah*) were examined. The theoretical concept of wills in Islamic law was used to assess the applied instruments of wills. Opinions of practitioners were sought for the determination of the rate of success of wills among Muslim citizens of Malaysia. The study finds that there is a steady increase in the number of new will document being drafted and executed. However, the number is still small compare to the majority of Muslims among the 30 million Malaysians. This was attributed to the mindset of Muslims and the lack of education about the benefits of wills.

Keywords: *Wasiyah, Muslim wills, Faraid, Testamentary documents.*

1.0 INTRODUCTION

The number of unclaimed estates especially those involving lands and building has reached alarming level (Fazira *et al.*, 2014; Rozaid and Mohd, 2010). It was found that the majority of these lands and properties belong to Muslims who are in the habit of leaving their properties intestate and not transferring titles to the landed properties from the deceased's name to that of beneficiaries for decades. Considering this and the complexity of law, involving two different legal systems and various agencies to administer the estates (Halim, 2012; Halim, 2012b), alternative tools of transferring titles under Islamic law were considered. These included chiefly the declaration of *hibah* (gift inter vivos), bequests and a hybrid of gift inter vivos, *wisayah*, and *wasiyah*. The proponents and beneficiary of this initiative were the business community including banks and organisations championing feminist ideals.

Time after the introduction of those estates planning products demands an assessment of them. This paper is in response of such a

demand. The study is one of its kinds focusing on the success and failure of the abovementioned products and tools. Basic goal for a field research were set targeting the type of products and their success. This paper focuses only on one of them. To complete the study, interview sessions were held with officers of estate planning agencies, and some records of their activities were obtained. Based on such information and the concept of Muslim wills as mentioned in the old corpus of Islamic law, the paper is divided into the definition of Muslim wills, their components, the advantages of Muslim wills, the efficiency of the legal process and the response of the public to the above new alternative products.

2.0 DEFINING WASIYAH

Wasiyah or *wasiat* refers to a will made by a Muslim (hereafter referred to as Muslim will or *wasiyah* interchangeably), whereby the donor of a property conveys his last wish in writing or

verbally how some of his property shall be distributed. This is made so that those who are not eligible under the fara'id laws could also receive the property. It means that if the donor intends to give his property to non-Muslim relative or outsider such as foster children, he may choose to create will (preferably through formal document or instrument). It is different from *hibah* agreement as under *wasayah* a person donates property, voluntarily, to other person without delivering possession of it to the donee during his lifetime. *Wasayah* is also a tool to give property to those heirs who deserve more than what could be given under fara'id. Under *wasayah*, however, there is limit on the quantum of entitlement. If the owner of a property wants his property to be distributed equally among his children after his demise, he has to obtain the consent of his heirs. Or if he wishes to make gift of his property more than one third of the entire estate (computed at the time of death) to a non-heir the consent of the lawful heirs is required. Similar to *hibah*, *wasayah* is a gift of property but it transfers ownership to the donee after the death of the donor.

The above position of *wasayah* in State laws of Malaysia can be observed. Section 2(1) of Muslim Wills (Selangor) Enactment, 1999 defined *wasayah* as follow: "will is the pledge of a person that is made when he or she is alive onto his or her wealth or benefits to completing a welfare or anything that is permitted by the *syarak* after his or her death." The same definition is given in section 2(1) of Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (Malacca) Enactment 2005 in which it is referred to as "*iqrar* or pledge that is made by someone during his life about his property or benefits of his property in order to be completed by *khairat* meaning or anything that is permitted in accordance with Islamic law, after his death." Eleven territories in Malaysia do not have such laws.

Wasayah is equal to will but not trusts under common laws or *wisayah* of Islamic law. *Wasayah* deals with a declaration of gift or a fixed portion of estate to be given to the donees once the donor passes away. It does not include the appointment of trustee. In Islamic law, some

jurists used the word *wisayah* in cases where one intends to authorize someone with the management of the estate for the benefit of a minor or a person with mental disability. The *wasayah* form of al Salihin is a good example of it (available online). Under the concept of *wisayah* a guardian is appointed who is entrusted to look after the property of the minor or unsounded person. For instance, a minor may get his share in the estate through the fara'id system, or through *wasayah*. Under *wisayah* the executor is given the power to deal in property provided it attracts maximum benefit to the beneficiary and avoid losses to the disadvantage of the beneficiary. Unlike the duties of executors in common law systems, the Muslim will does not impose them. They are however derived from *wisayah* documents and rules implying duties of trustees in general.

3.0 THE FUNDAMENTAL ELEMENTS OF VALID WILL

A will is constituted when there is testator (*al musi*), beneficiary (*al muso lahu*), the subject matter of the will (*al muso bihi*), and a declaration or the deed of *wasayah* (*sighah*). The details of elements of *wasiah* are given in Latif (1986), Muda (2008) and the effect of such contract in Muda (2003). These four pillars are important, as they will determine the validity of a will in Islamic law. In other words, where these four pillars exist in a disputed instrument the court has to declare the instrument valid, and distribute the estate of the deceased accordingly. Generally these pillars of *wasayah* will make the existing instruments drafted by several agencies either good or disputable depending on the clarity of the instrument of *wasayah*. Where the instrument is clear, there could be no room for dispute and therefore the given agency will find it easy to execute the wishes of the deceased according *wasayah* instrument.

All pillars of a *wasayah* could be said to exist if all preconditions for their existences are found. They are: A testator must have attained the age of majority, and considered of sound mind that is he/she is not insane. He or she must be free person, and has acted with free consent and is

not under legal restraint that is he or she is not prohibited from managing his own property. On the hand, the beneficiary must be a person who does not inherit the estate of the testator. Nevertheless, if the testator would like to bequeath the properties to the heirs, the testator must have the consent of all beneficiaries. The subject matter of *wasiyah* or the subject property should have value in the eyes of Islamic law, and is beneficial to the beneficiary. The subject property shall not consist of all estate of the deceased. In other words, *wasiyah* can be affected only up to the one third of the whole estate of the deceased. For example if the deceased has requited one million Ringgit Malaysia, but at the time of the death the deceased own only one million, only one third of the million would be given to the beneficiary named in the *wasiyah* document.

4.0 THE PERCEIVED ADVANTAGES AND DISADVANTAGES OF WASIYAH

For its benefits, recent authors such as Rahman (2006) and Ibrahim (2009a; 2009b) have focused on promotion of estates planning through *wasiyah*. The benefits of *wasiyah* in comparison to fixed system of estate distribution (*fara'id*) are listed below according to the opinions of the practitioners.

1. The hiring of *wasi* in order to make the *wasiyah* being executed.
2. The *wasi* acts as the implementer, administrator and manager of the donated property.
3. Valid *wasiyah* also lessens disputes among the heirs, as they need to respect the will and wish of the donor.
4. The safekeeping of all executed documents by the executor can enable him to manage the remaining properties without any problem and also reduce the burden of the heirs to find the remaining properties. This is because the donor will submit the inventory of all properties he has.
5. The writing of the will also does not need the signature of every inheritor.
6. In the making of the will, neither donee nor witnesses need to know what is inside the

will. Only the donor and the *wasi* will know what is included in the *wasiyah* because the *wasiyah* instruments are highly private and confidential.

7. This system also makes it easier for the donor to plan and manage his inheritance without any intervention of the heirs.

There are also few weaknesses contributed by *wasiyah* that affect the efficient distribution of estates. They are as follow:

1. The division of property takes a longer time when the assets of the estate are not fully determined or when there is conflict of documents, indicating the intention of the donor differently, or difference of the assets owned by the donor, as evidenced by *wasiyah* instruments.
2. The absence of hired *wasi* may compel the heirs to have delayed division of estate, as only the appointed executor can do so. This will prevent heirs to manage the estate.
3. Problem of excessive donation to beneficiaries: The Amanah Raya document is problematic in term of giving inheritance to the heirs of the donor. According to Islamic law, incontestable will can only be made in favour of non-heirs of one third of the estate, except when other heirs agree to an exceeding amount of the estate. The document provided by Amanah Raya, does not facilitate for such an agreement of heirs in case the amount forming the subject of the will is more than the one third as stated under Islamic law. This may contribute to dispute among the heir later, and thus may cause delay of distribution of the estate.
4. The deceased may leave his property to some of his/her heirs. There were a few faraid cases in which the deceased had not included a few of his heirs, because it was found that the deceased had practiced polygamy without the knowledge of his heir. This resulted in disputes among the heirs.
5. There was no central authority in charge of registration of *wasiyah* and *hibah* documents. Not all owners of properties were safekeeping these documents in one place.

5.0 EFFICIENCY OF DISTRIBUTION PROCESS OF THE MUSLIM WILLS (WASIYAH) IN MALAYSIA

The efficiency of wills was empirically studied by Muhamad (2012) and Ngadiman (2012), the summary of which is further expanded in next sections.

It is often said that *wasiyah* is better than leaving estate intestate. This may be true in cases where one intends to give his property to one who is not qualified to receive it under *fara'id* system. Otherwise and in terms of legal process, the by-product of contemporary procedural systems, one has to consider the legal complexity in Malaysia, which may also be true in some other countries where common law is applicable to Muslims along with their personal law. The distribution process therefore may be long and costly and hence inefficient.

Unlike in unwritten Islamic law, a will cannot be automatically executed in common law jurisdictions. The courts have to formalize the powers of executors derived from the will. Logically one court should have the power of formalization of the authority of the executors and the determination of validity of wills. However, in case of Malaysia, Muslim wills (*wasiyah*) are subject to the procedural provisions of Rules of the Courts 2012, Probate and Administration Act 1959 (Act 97), Small Estate (Distribution) Act 1955 (Act 98) and Public Trust Corporation Act 1995 (Act 532) as well as the States' statutory provisions applicable in Shariah Courts. A grant of probate or letters of administration with will attached (the latter applies where there is no appointment by the deceased, or the appointed executor is unavailable) issued by civil High Court is needed. Such may only be seen necessary if the executor is needed i.e. under *wisayah* (Halim, 2012a; Halim, 2012b), but not *wasiyah* as the latter contains mere expression of wishes not grant of authority. This order may take short time if the validity of the *wasiyah* is not contested and an executor is appointed and available. This can be between 6 months to two years. Otherwise, it may take years as it passes through pigeonholes of several courts of a

particular hierarchical order. In Malaysia, this is more complicated by the lack of jurisdiction of civil courts over the validity of *wasiyah*. The determination of validity of *wasiyah* is under powers of Shariah courts. This may further lengthen the process and hence the time for distribution of the estate, for obvious reason that two court systems have to be exhausted. Furthermore in Malaysia the role of Land Office and Public Trustee complicate the matters. A *wasiyah* with letters of administration attached issued by civil Court may also come within jurisdiction of Land Office and Public Trustee. Where cash is left and does not exceed RM600,000 or an estate comprising land and cash and its value is not more than RM2 million the public trustee and Land Office have jurisdiction over the estate respectively. Even a longer time is needed.

The practitioners involved in the estate planning of Muslim tell their clients that process of application and grant of probate by the civil High Court is fast and efficient. The executor of the will can obtain probate within a month when other persons do not contest it. Soon after obtaining the probate the executor of the will would be able to distribute the estate within six months to two years. Presuming the will was drafted by knowledgeable legally trained individual in civil and Islamic law, and the settlor (*musi*) has expressed his wishes in light of all needed details, instrument of *wasiyah* could make the task of the executor easy, for the property and the list of the beneficiaries would be clearly listed by the testator, and has obtained the consent of his heirs in case the property is given to outsider more than one third or to one of the heirs. All he has to do is to get the High Court grant him/her probate and start the distribution of the estate among the beneficiaries according to the wishes of the testator (*musi*).

The above are different from the administration of estate through *fara'id* law when the deceased has not left any *hibah* or will when he or she was alive. This takes a longer time of at least two and more years for the inheritance of the deceased to be distributed, when it includes houses, lands, orchards and others. Before it can be distributed the beneficiaries of the estate have

to find and collect all the documents related to the deceased's property, identify the other heirs, and appoint administrator for the estate in order to facilitate the distribution of the estate. Figure 1 below highlights the differences and benefits of the testate and intestate estate processes.

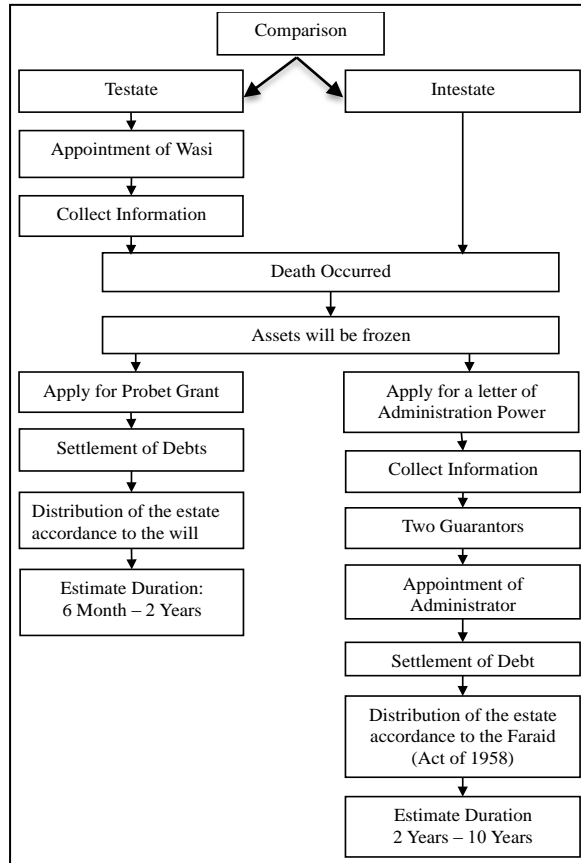


Figure 1: Process involving testate and intestate estates

Source: Amanah Raya Berhad

The estimated time in Figure 1 may be correct if the process is not contentious. In the case of contentious actions, the exhausting two courts systems process have taken longer than what the practitioners above have alleged. It has reached to two or more decades. The new reforms of court system after 2010 are not yet fully tested to confirm the veracity of above statements.

The efficiency of the *wasiyah* process also has to be evaluated on the costs of the process. These costs should involve that inside and outside the court. The outside court expenses are paid to

estate planning agencies, which are mentioned below.

For any *wasiyah* document, it needs to be drafted, signed, registered and executed after the death of the donor. Fees for Drafting, execution of *wasiyah* instruments and their registration may be charged. *wasiyah* documents have their own process of record and registration. For *wasiyah*, registration fees will be charged only when the donor signs the document of *wasiyah*. As-Salihin, an estate planning company, provides the will writing service and the appointment of the executor. It provides two packages of *wasiyah* services, which are for life and basic. The first package is based on the needs, conditions and services that are required by the living beneficiary, which may require amendment of the will or *hibah* document to avoid conflicts and uncertainties. This company charge fees for such subsequent services. The basic package is one time service available to one who intends one document of *wasiyah* being registered with the company. The said document cannot be amended later for the same fee. Financial institutions like Bank Islam Malaysia Berhad and Bank Muamalat Malaysia Berhad are drafting, executing and registering *wasiyah* documents only. This is because they do not provide more services after the instrument of *hibah* or *wasiyah* is signed. After signing the instrument of *hibah* or *wasiyah*, the donor has to deal with Amanah Raya for further needed services. Amanah Raya provides the will writing service, storage of wills, and the execution of *wasiyah* or implementation of the will.

Considering the above difference of service the cost may vary too. Table 1 lists the total cost for registration and processing of *hibah* and *wasiyah* documents.

After signing the will documents, the testator needs to pay the fee to the estate planning agencies. This may be an issue for Muslims due to their economic status. The official from the Wasiyyah Shoppe Agency in Johor Bahru stated that fees were higher but the officer in Amanah Raya disagreed considering the fees affordable as it was only RM350 for a lifetime and free for one time *wasiyah* without amendment. This may

be so for well-to-do settlers, but not for low-income earners, to which official from As Salihin agreed. This may mean the current practice is not fit for low-income earners. And if so, the high fees may make some Muslims hesitate to create *wasiyah* documents. Therefore, fees set by a given agency may need to be viewed objectively considering the willingness of landowners, the sustainability of the given agency, the real cost of transaction to the agency in this age of internet and e-services, and the interest of public i.e. the number of properties that are not given to the right heirs for an extended period of time. Attention may also be paid to the location of properties in urban and rural centers. Only after good study, one may suggest whether or not the current rate of fees should be maintained, and if so whether or not subsidy of these fees by government, in case of low-income earners, could be considered.

Table 1: Cost of registration of wills by estate agencies

Product Agency	Amanah Raya	As-Salihin	Bank Islam	Bank Muamalat
Wasiyah	RM350 (for life)	RM1280 (for life), RM580 (regular package)	RM200 (for credit card BIMO holder), RM350 (regular)	RM350 (for Muslim), RM650 (for non-Muslim)
	Free (first time) RM50 (every amendment)	None	Free (first time) RM50 (every amendment)	Free (first time) RM50 (every amendment)

It is important to note that *wasiyah* though it is highly encouraged in Islam and even if declared by the donor in a formal manner, one may not be guaranteed to receive its benefit fast and cheaper. The efficient distribution of the estate of the deceased depends on the sound draft and execution of *wasiyah* instruments. Only if they are done correctly and in accordance with the requirements of Islamic law, the possibility of disputes over the distribution of estate can be minimum. No one could be certain about the

lack of dispute after the donor passes away. The lack of dispute and the existence of *wasiyah* instrument may make the distribution of estate effective and efficient. Thus, it is advised that the donor and his/her lawyer have to pay attention to the constituents of *wasiyah*, and the rules of evidence in Islamic and civil law. When these two prerequisites are met the possibility is that future disputes could be avoided.

To avoid disputes among heirs all conditions for validity of instrument of *wasiyah* have to be fulfilled first. These conditions of validity are mentioned in Table 2.

Table 2: Pillars of Wasiyah in Islamic law

	CONSTITUENTS OF WASIYAH
Donor	Above age of minority Sane and sober Free man without duress Property Owner
Donee (Beneficiary)	Any natural person: mukallaf or not (an insane, minor or unborn need trustee) Know the wish of the giver (except charity) Ability to own property Not an inheritor unless consent given by the heirs Alive during the death of donor
Gift (the Subject Property)	All halal properties or benefits Have value in the eyes of Islamic law Belongs to the donor Does not have to exist during the time of declaration of will, but must exist at the time of death of the donor The donee takes delivery of possession after the death of the donor Not exceeding 1/3 of the inheritance
Declaration/ Instrument (Sighah)	Offer be clear but acceptance may be made after the death of the donor or later Acceptance / rejection by the receiver during the life of will's giver is not accepted Does not need acceptance if the will is in the form of general/charity has to have acceptance / agreement from the receiver that is made particular as a prove of acceptance (if the receiver reject, then the will is cancelled) The will's giver can put requirements in his will as long as it does not violate Shari'ah If the receiver dies after the will's giver without acceptance acknowledgement, then the inheritors can receive the will/ reject it

The precondition for the existence and validity of *wasiyah* are related to the capacity of the donor (*musi*) the capacity of the donee (*mawsu lahu*) and the type of the property. As far as the

property is concerned, it should be specific, identifiable and divisible and be delivered to the donee or shall exist at the time of the death of the deceased, and should be delivered only after the death of the donor. The declaration of *wasiyah* needs to clearly imply its constituents. All requirement of Islamic law for purpose of evidential value of the instrument of declaration, consent of both parties should be complied with. The agencies in charge of estate planning and the donors both must have taken the constituents of *wasiyah* seriously during the early stage of drafting the declaration or instrument and its execution. These agencies have to educate the donors about the validity of the instrument before signing them and potential dispute that may arise about the validity of these instruments.

As the estate planning agencies encourage the making of *wasiyah* document for reason of their effect on the heirs and beneficiaries of the estate, questions have to be asked whether or not such claims could be proven empirically. To examine the veracity of such claims two issues are discussed in the following sections: are the instruments of *wasiyah* drafted soundly and evidenced according to law? If the answer to both aspects is in affirmative, then, did such instrument help the beneficiaries receive their share in the estate of the deceased in the target time and with fewer costs? The answers are provided below.

6.0 VALIDITY OF INSTRUMENT OF WASIYAH

Currently few issues are related to the instrument of *wasiyah* as drafted by estate planning agencies.

There is lack of uniformity. At present Amanah Raya and As Salihin have their own forms or instruments for making *wasiyah*. These documents are not the same. The document from as Salihin is relatively complete compared to the one provided by Amanah Raya. This can affect the efficiency and effectiveness of estate planning. Lack of uniformity of instruments may prevent the beneficiaries from getting their

share, if the donor has jumped between several agencies.

Estate planning agencies also do not pay attention to the unity of session (Majlis). At the end of drafting and filling a *wasiyah* document, the testator has to sign the document in front of two witnesses that are not related to the testator. The problem is that this takes long time to do, because the parties lack time for signing the document. This may contribute to the document being not signed by the testator or the witnesses, which may cast serious doubt on the validity of the document of *wasiyah* later. Additionally, the validity of the documents may be questioned based on lack of unity of Majlis as required by some jurists.

There may exist the lack of knowledge of testator about *wasiyah*. the knowledge of donor about *wasiyah* is important. He should have some idea about its rules, i.e. its objective, concept and pillars of *wasiyah* so that it is valid under Islamic law. The problem is that many are reluctant to seek knowledge about it.

Accordingly, the review of the existing instruments and process of claiming the estate and its distribution is needed by the relevant agencies. They also have to create among the members of public to correctly draft the instrument of *wasiyah* lodged with Federal and State Religious Councils, and others. Additionally, the estate planning agencies may need to review their working hours to counter the time constrains.

7.0 THE RESPONSE OF PUBLIC

The number of *wasiyah* transactions by Malaysian Muslims is still small. Amanah Raya Berhad thus far has seven hundred thousand (700,000) individuals who have declared *wasiyah* until April 2012. In 2007 they were less than three hundred thousand (300,000) individuals. This shows relative increase in the number but overall it is clear that very few in the society have opted for *wasiyah*. According to Amanah Rayah officers the number of *wasiyah* increased from two per cent (2%) in 2009 to two

point forty seven per cent (2.47%) in 2012. The number of *wasiyah* in As Salihin also improved, considering the 1000 people who have made their *wasiyah* until 2011, compare to 800 people early. While there is some increase, it is clear that the growth of *wasiyah* is moderate. It may point to the efforts made by relevant agencies in promoting the benefits of *hibah* or that wills are not effective enough to encourage Muslims to plan their inheritance.

The rate of successful process and execution of *wasiyah* is considered to be at ninety per cent (90%) of the total wills registered in Amanah Raya Berhad. Only ten per cent (10%) of wills are cancelled or failed during the process and execution. Wills are treated cancelled or failed because the deceased had made a new will with a new *wasi* or other agency without informing the earlier *wasi* or agency. This makes the original wills to be treated cancelled automatically, as it is not possible for more than one *wasi* to act for the same property. Besides, there are cases where donors have spent their wealth or have left a mountain of debts until their property could not be inherited. There are also cases where the heirs do not know the existence of will until the death of the deceased, and they do not agree with provisions of the existing will. A small number of cases involve delayed documents submission by the heirs and lack of cooperation among the heirs, which make the execution of the will not to be on time.

8.0 CONCLUSION

Wasiyah or the Muslim wills are the expression of wish by the testator about the entitlement of the beneficiary to his estate after he passes away. Muslim wills generally give authority to anyone to execute the will without the power of disposal and dealings. It is just a matter of announcement of entitlement. The power of executor to deal with the estate in the form of a trust is coming through a different type of declaration called *wisayah* where the executor can be referred to as *wasi* fulfilling the function of a trustee and guardian both in term of welfare of the beneficiary and his/her property.

The advantages of Muslim will is to enable the weak of the family members have increased share in the estate with the consent of other members. Similarly, outsiders may have share in the estate through will without consent of the family members if the entitlement is limited to one third of the estate, but with the consent of the heirs if the entitlement is for more than one third of the estate. This is to mitigate the rigidity of the fixed share system of inheritance under Islamic law (*Fara'id*). Under traditional Islamic societal set up the diffidence between will and *fara'id* does not exist in non-contentious circumstance provided the heirs know the assets of the estate. Otherwise wills may have advantage over *fara'id* because they may have an inventory of the assets of the estate, which enables the heirs to distribute the assets in a shorter period of time. Only if dispute arises they will be subjected to mediation and litigation. It would delay the distribution of estates and vesting in the beneficiaries. The complex laws of a country such as Malaysia may further prolong distribution and vesting of estate in the beneficiaries. If this is the case then wills are not a good alternative to the non-efficiency of *fara'id* system. They may prove to be worse in terms of efficiency of the legal process. Considering the time related inefficiency of legal process for execution of wills the cost of wills may be also higher when a will becomes contentious. The costs of efforts involving the drafting, executing a will by an estate-planning agency will be added to the legal costs.

Despite the effort of the Malaysian government to introduce various alternatives including the making of wills by Muslims in order to avoid the inefficiency of *fara'id* may not be considered to be well received by the public. Though there is some increase, the researcher did not find the actual reason for such increase. It may be due to the effort of the agency or the willingness of the Muslim to accept the initiative of government. Either way only time will prove which of them is the case.

To conclude, the benefit of Muslim will is the inclusion of non-heirs in the list of entitled persons to the estate of decease. Procedural

efficiency is not the inherent weakness of the faraid law of Islam. Only if positive legal systems could be made simpler and unitary, wills would have less added benefit.

Yet, in societies where individuals are more self-centered, family economic solidarity through sense of responsibility and compassion is minimum, wasiyah might be a good alternative to faraid system.

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