

ANALYSIS OF MAQASIDIYYAH ON THE COMPILATION OF ISLAMIC LAW AND THE EGYPTIAN AL-WASIYAH LAW REGARDING WAJIBAH BEQUEST FROM IBN ASHUR'S PERSPECTIVE

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Received: April 16, 2025	Revised: June 14, 2025	Approved: June 21, 2025

Abstract

Islamic law in Indonesia is developing rapidly, including wasiat wajibah in the KHI, which is the mandatory transfer of property between parents and adopted children through a court decision. This study is normative in nature, employing the maqasid syari'ah approach of Ibn Asyur. The study aims to analyze the concept of wasiat wajibah as stipulated in the KHI, comparing it with the Egyptian Qanun to determine whether it aligns with the objectives of Islamic law. This study found several results: 1) Mandatory wills in the KHI are given to adopted children and adoptive parents, with a maximum of 1/3 of the estate. In the Egyptian Qanun, wills are given to grandchildren whose fathers died while their grandparents were still alive and who are prevented from inheriting. 2) In Indonesia, the concept of mandatory bequests has been expanded through a Supreme Court ruling to include adopted children, adoptive parents, and relatives barred from inheritance such as non-Muslims, stepchildren, and children born out of wedlock. In Egypt, according to a ruling by Darul al-Ifta, mandatory bequests are given to grandchildren if their father dies before their grandfather or grandmother. 3) According to Ibn Asyur's maqasid Syariah, the reformulation of Article 209 of the KHI regarding wasiat wajibah is in line with maqasid syariah because it preserves lineage, regulates inheritance proportionally, and creates clarity and peace between heirs and recipients of wasiat wajibah.

Abstrak

Hukum Islam di Indonesia berkembang pesat, termasuk wasiat wajibah dalam KHI, yaitu pemberian harta secara wajib antara orang tua dan anak angkat melalui putusan pengadilan. Penelitian ini bersifat normatif dengan pendekatan maqasid syari'ah Ibnu Asyur. Penelitian ini bertujuan untuk menganalisis konsep wasiat wajibah yang tercantum dalam KHI yang dibandingkan dengan Qanun negara Mesir sudahkah sesuai dengan tujuan syariat Islam. Penelitian ini menemukan beberapa hasil penelitian 1) Wasiat wajibah dalam KHI diberikan terhadap anak angkat, dan orang tua angkat maksimal 1/3 dari harta peninggalan, Sedangkan dalam Qanun Mesir wasiat diberikan kepada cucu yang ayahnya meninggal dunia sewaktu kakek atau neneknya masih hidup dan cucu tersebut tehalang untuk mendapatkan warisan. 2) Di Indonesia, konsep wasiat wajibah diperluas melalui putusan Mahkamah Agung, mencakup anak angkat, orang tua angkat, serta kerabat terhalang warisan seperti non-Muslim, anak tiri, dan anak hasil zina. Di Mesir, menurut putusan Darul al-Ifta, wasiat wajibah diberikan kepada cucu jika ayahnya meninggal sebelum kakek atau neneknya. 3) Menurut maqasid Syariah Ibnu Asyur, reformulasi Pasal 209 KHI tentang wasiat wajibah selaras dengan maqasid syariah karena menjaga nasab, mengatur warisan secara proporsional, serta menciptakan kejelasan dan kedamaian antara ahli waris dan penerima wasiat wajibah.

Keywords: Wajibah Bequest; KHI; Al-Wasiyah Law; Ibn Ashur.

INTRODUCTION

In Islamic law, inheritance and bequests are interrelated areas of study, both concerning the distribution of assets left behind by a deceased individual.¹ Inheritance is mandatory (*ijbari*), whereas bequests are voluntary (*ikhtiyari*), in line with the majority opinion of Islamic jurists. A bequest is a discretionary act, not required by Shari'ah but rather considered sunnah.² However, Ibn Hazm, in his book *al-Muhalla*, states that bequests are obligatory for relatives who do not inherit, whether due to religious differences, slavery, or legal barriers to inheritance.³ This view is supported by Abu Bakr bin Abdul Aziz, a figure of the Hanbali school, who also declares such bequests obligatory.⁴

Islamic inheritance law in Indonesia is outlined in the Compilation of Islamic Law (KHI), which serves as a guiding reference for judges when addressing inheritance and bequest matters. One particularly noteworthy issue in KHI is the concept of the wajibah bequest, which significantly diverges from the practices of other Muslim-majority countries. According to Article 209, Paragraphs 1 and 2 of KHI, adopted children and adoptive parents are entitled to receive a portion of the inheritance, whether a bequest is made or not, thereby automatically validating the bequest under the law. This provision in KHI represents a radical innovation within Indonesia's legal system, considering the prevailing legal frameworks (classical Islamic law, the Civil Code, and customary law), where the recognition of adopted children or adoptive parents in the process of wajibah bequest is not typically found.⁵

In fact, the implementation of wajibah bequests in Indonesia has expanded beyond the original scope to include not only adopted children and adoptive parents but also spouses, non-Muslim relatives, stepchildren, and, as recommended by the Indonesian Ulama Council (MUI), children born out of wedlock, supported by modern scientific advancements such as DNA testing.⁶ This expansion has led to concerns, prompting the author to explore the legal implications of this concept within the framework of Shari'ah law and *Maqasid Shari'ah* to achieve a deeper understanding of the legal standing of wajibah bequests in Indonesia.

The concept of wajibah bequests in Egypt is addressed in the Al-Wasiyah Law, specifically Law No. 71 of 1946. This law introduces a novel approach to inheritance for orphaned grandchildren, who, under traditional interpretations of Islamic law, would typically be excluded from inheritance due to the presence of a paternal uncle. Egypt's approach to wajibah bequests, however, aims to provide a solution to this issue, even though its development has not been as extensive as in Indonesia.⁷

The analytical framework used in this study is Ibn Ashur's *Maqasid Shari'ah*. Ibn Ashur's *Maqasid Shari'ah* offers a more comprehensive understanding of Islamic law compared to previous Maqasid theories, as it builds upon the works of scholars such as al-Ghazali, al-Qarafi, and al-Syatibi. Ibn Ashur's Maqasid also introduces new dimensions not explored by earlier scholars, such as broader

¹ Amir Syarifudin, *Hukum Kewarisan Islam* (Jakarta: Prenada Media Group, 2004), 208.

² Fatchur Rahman, *Ilmu Waris* (Bandung: PT Al-Maarif, 1975), 64.

³ Ibnu Hazm Al-Andalusi, *al-Muhalla bil Asar* (Beirut: Dar al-Fikr, t.t.), 1503.

⁴ Wahbah Al-Zuhaili, *al-Fiqhu al-Islam wa Adillatuhu*, vol. 8 (Damaskus: Dar al-Fikr, 1985), 122.

⁵ Ahmad Junaidi, *Wasiat Wajibah* (Yogyakarta: Pustaka Pelajar, 2013), 115.

⁶ Zainal Arifin dan Zaenul Mahmudi, "Mandatory Wills for Adultery Children, Analysis of the Compilation of Islamic Law from the Perspective of Maqasid Syariah Al-Syatibi, Najaha," *International Journal Law and Society* 1, no. 1 (2022): 37.

⁷ Mohamah, "نصوص و مواد قانونية," t.t., <https://www.mohamah.net/law/نصوص-و-مواد>.

societal concerns, including general Shari'ah goals like *fitrah* (nature), *samahab* (tolerance), *maslahat* (public interest), universality, equality, substantiality, legal supremacy, and social resilience. His work underscores the broader application of *Maqasid Shari'ah* beyond classical jurisprudence, advocating for its relevance in various societal domains, including economics and family law, making it highly suitable for analyzing contemporary legal challenges.⁸

The Concept of Wajibah Bequest

From an etymological perspective, the term *wasiat* (bequest) has several meanings, such as to make a promise, to show affection, to instruct, or to connect something with something else (الايصال).⁹ According to Wahbah al-Zuhaili *al-wasiat* means making a promise to someone to carry out a matter either during their lifetime or after their death. This definition also applies to the transfer of property to someone else. In terms of Islamic jurisprudence, a bequest is defined as the transfer or giving of ownership by someone upon their death, either in the form of tangible items or benefits, without any compensation.¹⁰

On the other hand, *wajibah* (الواجبة) means obligatory, necessary, and unavoidable.¹¹ Therefore, *wasiat* (bequest) *wajibah* refers to a bequest that is obligatory and must be carried out. In the science of Arabic language rules are called *mudhaf* and *mudhaf ilaih*. Therefore, the obligatory will is a message that is obligatory and must be implemented.

Although there is no formal definition of *wajibah* bequest within Indonesia's Islamic legal system, it is closely related to the general definition of a bequest. The following definitions can be drawn: A bequest, according to the KHI in Book II, Article 170, is “the transfer of an item from the deceased to another individual or institution that takes effect after the death of the deceased.”¹²

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The concept of *wajibah* bequest as outlined in the KHI involves “the transfer of property from the deceased to a non-heir, which is enacted by a judge after the death of the deceased.” Bismar Siregar defines *wajibah* bequest as a bequest made to heirs or relatives who are unable to inherit due to a legal obstacle. Eman Suparman also defines *wajibah* bequest as a bequest whose implementation is not influenced or dependent on the will of the deceased.¹³

The difference between a *wajibah* bequest and a regular bequest lies in the intention of the person making the bequest. A regular bequest is made voluntarily by the testator while they are alive, while a *wajibah* bequest is determined by a judge, regardless of the deceased's consent. A judge may

⁸ Fuat Hasanudin, “Review Buku-Maqashid al-Syariah Ibn ‘Asyur: Rekonstruksi Paradigma Ushul Fikih,” *ABHATS: Jurnal Islam Ulil Albab* 1, no. 1 (2020): 172–187, <https://journal.uui.ac.id/Abhats/article/view/29282>.

⁹ Muhammad Syatha, *Al-Dianah Al-Thalibin* (Surabaya: Hidayah, t.t.), 198.

¹⁰ Al-Zuhaili, *al-Fiqh al-Islam wa Adillatuhu*.

¹¹ Munawwir Ahmad Warson, *Al-Munawwir Arab-Indonesia* (Surabaya: Pustaka Progressif, 1997), 1538.

¹² Kementerian Agama RI, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Kementerian Agama RI, 2018), 73.

¹³ Muhammad Yasir Fauzi, “Wasiat Wajibah Bagi Non Muslim dalam Perspektif Hukum Islam dan Hukum Positif serta Kontribusinya Terhadap Hukum Keluarga di Indonesia” (Universitas Islam Negeri Raden Intan Lampung, 2020), 70, <https://repository.radenintan.ac.id/13497/>.

rule that a wajibah bequest is necessary, for example, if a person does not leave a bequest but has an obligation, such as supporting an adopted child or an adoptive parent in need.¹⁴

Table: Comparison between Regular Bequest and Wajibah Bequest

Nu.	Aspect	Regular Bequest	Wasiat Wajibah
1	Recipient	Any individual other than an heir.	Adopted children who do not receive a regular bequest, grandchildren whose fathers have died before them, or relatives prevented from inheriting.
2	Legal Standing	Sunnah (voluntary)	Mandatory (obligatory)

Wajibah bequest is applied as a way to equalize the inheritance for people who cannot inherit, but these people have a very close inner relationship even though it is not a blood relationship. From here the author will see the similarities and differences between the mandatory will applied in Egypt and the mandatory will applied in Indonesia which is summarized in KHI and court decisions as its application.

Comparison of Wajibah Bequest in KHI and Qanun Al-Wasiyah Egypt

Nu.	Category	KHI	Qanun Al-Wasiyah Egypt
1	Recipients of Wajibah Bequest	Article 209 paragraphs 1 and 2 KHI that adopted children and adoptive parents are entitled to mandatory wills. while grandchildren whose father died first are included in the replacement heirs.	Egyptian Wajibah Bequest Law No. 71 of 1946. Granted to first-degree descendants of sons and daughters, and descendants following in the male line.
2	Blood Relation/ القرابة	Individuals who receive the wajibah bequest do not have a blood relationship.	Individuals who receive the wajibah bequest have a blood relationship.
3	Legal basis	The basis for the wajibah bequest in Egypt is the Egyptian Civil Code on Wills No. 71 of 1946.	The Compilation of Islamic Law (KHI) was drafted and formulated based on a Presidential Instruction to the Minister of Religious Affairs.
4	Amount	The amount of the wajibah bequest in KHI is a maximum of 1/3 of the estate. In practice, however, court	The amount of the wajibah bequest in the Egyptian <i>Qanun Wasiat</i> (Wills Law) is equivalent to the amount of inheritance the recipient's parent would have received had the parent

¹⁴ Misno Misno, “Wasiat Wajibah Untuk Anak Angkat Dalam Khi Dan Fikih,” *ADLIYA: Jurnal Hukum dan Kemanusiaan* 11, no. 1 (2019): 99–118, <https://doi.org/10.15575/adliya.v11i1.4854>.

		rulings may award less than 1/3.	been alive. If this amount is less than 1/3, it is supplemented to reach 1/3 of the estate.
5	Conditions for Wajibah Bequest	In KHI, specific conditions for the wajibah bequest are not explicitly stated, but it generally outlines the conditions for bequests in general terms.	In the <i>Qanun Wasiat</i> of Egypt, the specific conditions for the wajibah bequest are clearly stated: the recipient of the wajibah bequest must not inherit from the deceased and must not receive any other assets from the deceased by other means.

Dasar Legitimasi Wasiat

The legitimacy of the wajibah bequest is derived from both the Qur'an and Hadith.

- a) Qur'an: Surah Al-Baqarah, verse 180:

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدُكُمْ الْمَوْتُ إِنْ تَرَكَ خَيْرًا الْوَصِيَّةُ لِلْوَلَدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

“It is prescribed for you, when death approaches any of you, if he leaves good, to make a bequest for parents and relatives according to what is acceptable—a duty upon the righteous.”¹⁵

- b) Hadith: Prophet Muhammad (peace be upon him) said:

قال رسول الله : (مَا حَقُّ امْرِئٍ مُسْلِمٍ لَهُ شَيْءٌ يُرِيدُ أَنْ يُوصِيَ فِيهِ يَبِيتُ لَيْلَتَيْنِ إِلَّا وَوَصِيَّتُهُ مَكْتُوبَةٌ عِنْدَهُ)

Rasulullah shalallahu ‘alaihi wasallam said, “It is not right for a Muslim who has something to bequeath to stay for two nights without having his will written with him.” (Bukhari and Muslim, juz 3, page 186).¹⁶

Both of these sources provide the foundation for the obligation of bequest, including the wajibah bequest. These sources emphasize the responsibility of making a bequest to fulfill the obligations and ensure fairness in the distribution of the deceased’s property.

In general, this will is also legitimized by ijma'.¹⁷ Although what is meant is the establishment of a will, not a mandatory will, this is also included in it, which provides for its enforcement.

While the legal basis of the will according to the KUHPer (Indonesian Civil Code) is contained in article 874 BW which states that, “all the property of a person who dies belongs to all

¹⁵ Al-Qur'an, Al-Baqarah 2:180, terjemahan Kementerian Agama Republik Indonesia, 27.
¹⁶ Al-Bukhari, Sobeh al-Bukhari, Juz 7 (Libanon Bairut: Dar al-Fiqr, t.t.).
¹⁷ Sayyid Sabiq, Fiqih Sunnah, vol. 3 (Jakarta: Pena Pundi Aksara, 2008), 415.

the heirs according to the provisions of the law just to that with a will has not been taken a valid provision".¹⁸

The law of bequests arises on the basis of the principle that every person is entitled or free to do anything with his property. Likewise, the person is free to will his property to anyone he wants, although there are still limits permitted by law.

Legal Experts' Views on the Wajibah Bequest

According to Fatchur Rahman¹⁹, the source of the law on bequests is rooted in logic, as human nature inherently strives to end one's life with acts of kindness, thereby increasing the good deeds already performed or compensating for the deficiencies in those deeds throughout one's lifetime. To enhance the existing good deeds and cover any shortcomings, there is no alternative other than the bequest.

Bequests are legislated to meet the needs of others. Therefore, if these needs can be fulfilled through a bequest, it is logical that bequests should be permitted under the law. Since a bequest involves the transfer of ownership from one individual to another, as in inheritance, it is appropriate that such transfers be allowed. However, the transfer of ownership through a bequest is limited to one-third of the deceased's estate to prevent harm to the rightful heirs.

According to al-Sayyid Sabiq, the legislation of bequests in Islam is closely aligned with the purpose of waqf (charitable endowment) in Islam. A bequest is a form of charity performed by an individual to draw closer to Allah SWT (as a form of qurban) at the end of their life, increasing their good deeds or compensating for any deficiencies in their past actions. A bequest also serves as an act of kindness towards others, fostering compassion and affection among people.²⁰

Ahmad Rofiq asserts that the presence of the bequest system in Islamic law is of great significance as a means to prevent discord within families. This is because some family members, despite their significant contributions to the accumulation of wealth, are not entitled to inherit. For instance, a poor grandchild may be excluded by a wealthy uncle, or a family member may be excluded due to religious differences. The bequest system, as regulated in Islamic law, provides a solution to such grievances.²¹

In principle, making a bequest is an act of *ikhtiyariyah* (voluntary action), meaning it is performed based on an individual's own will, regardless of the circumstances. Thus, individuals are free to decide whether or not to make a bequest. However, some scholars hold that the freedom to make a bequest applies only to those who are not close relatives.²²

Ahmad bin Hambal, Ibn Hazm, Said Ibnul Musyyab, and Al-Hasanul Bashri argue that a bequest must be made for close relatives who do not inherit. This view is based on Surah Al-Baqarah, verse 180.

Al-Jashshash, in his book *Akhlakul Qur'an*, emphasizes that it is mandatory to make a bequest for family members who do not receive an inheritance. In this context, Ibn Hazm asserts that if a

¹⁸ Republik Indonesia, *Kumpulan Kitab Undang-Undang Hukum (KUH Perdata, KUHP, KUHAP)* (Wipress, 2008), 188.

¹⁹ Rahman, *Ilmu Waris*.

²⁰ Sabiq, *Fiqh Sunnah*.

²¹ Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, Revisi (Jakarta: Rajawali Pers, 2013), 184.

²² Moh. Muhibbin dan Abdul Wahid, *Hukum Kewarisan Islam (Sebagai Pembaruan Hukum di Indonesia)* (Jakarta: Sinar Grafika, 2009), 148.

bequest is not made for close relatives who do not inherit, the judge must act as the heir, granting a portion of the estate to those relatives as a bequest on their behalf.²³

The Development of the Implementation of Wajibah Bequest in the Supreme Court Decision, Dar al-Ifta' Egypt and MUI Fatwa

Initially, the Egyptian Wajibah bequest was given to the grandchildren/grandchildren of the children/children of the testator who died earlier than the testator or given to relatives who were prevented from getting inheritance.²⁴ Along with the times, the implementation of the Wajibah bequest is now given to adopted children, stepchildren, non-Muslim husbands, non-Muslim wives, and even recommended by MUI to be given to children resulting from fornication.

Expansion of the Implementation of Wajibah Bequest in the Supreme Court Decision, Dar al-Ifta' Egypt and MUI Fatwa

No	Classification	Supreme Court Decision	Dar al-Ifta' Egypt Fatwa	MUI Fatwa
1	Recipient of Wajibah Bequest	1. Adopted children 2. Stepchildren 3. Non-Muslim spouses 4. Non-Muslim siblings 5. Grandchildren from male descendants (descendants of the male line) 6. Grandchildren from female descendants (first generation only). 7. Children born out of wedlock, which can be proven with modern scientific evidence.	1. First-degree descendants of sons and daughters, and descendants following the male line. Grandchildren from the male line are called اولاد الظهور. 2. grandchildren from the female line are called اولاد البطون (descendants of the female line) only from the first generation. ²⁵	Adopted children, Stepchildren, Non-Muslim spouses, Non-Muslim siblings, Children born out of wedlock.. ²⁶
2	Amount of Wajibah Bequest	1. Supreme Court Decision No. 489 K/AG/2011: Adopted children	According to Egyptian Wajibah Bequest Law No. 71 of 1946: The	Fatwa MUI No. 11 of 2012 does not specify the exact limit for the wajibah bequest.

²³ Rachmad Budiono, *Pembaruan Hukum Kewarisan Islam di Indonesia* (Bandung: PT. Citra Aditya Bakti, 1999), 9.
²⁴ Nuruddien, “M. Wasiat Wajibah Keadilan Dan Kesejahteraan Keluarga Perspektif Undang-Undang Mesir Dan Kompilasi Hukum Islam,” *Jurnal Reflektika* 17, no. 1 (2022): 29.
²⁵ Dar al-Ifta al-Misriyyah, “ميراث ووصية واجبة,” t.t., <https://www.dar-alifta.org/ar/fatwa/details/12382/ميراث-ووصية-واجبة>.
²⁶ Majelis Ulama Indonesia, “Fatwa Majelis Ulama Indonesia (MUI) Nomor 11 Tahun 2012 tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya” (t.t.).

		and stepchildren each receive 1/5 (7.29%) of the estate. ²⁷	amount of wajibah bequest for male and female grandchildren is the same as the share their parent would have received, not exceeding 1/3. If it is less than 1/3, it can be supplemented to reach 1/3. ²⁹	Instead, it leaves the decision to the government or the Religious Court.
		2. Supreme Court Decision No. 331 K/AG/2018: Non-Muslim spouse receives 1/4 of the estate. Supreme Court Decision No. 16 K/AG/2010: The wife receives 15% of the estate. ²⁸		

IBN ASHUR’S MAQASID SHARI’AH REVIEW ON WAJIBAH BEQUEST IN THE KHI AND EGYPTIAN AL-WASIYAH LAW

Wajibah Bequest in the Perspective of General Maqasid Shari'ah

Wajibah Bequest and Fitrah

Human Fitrah is made up of two things, namely: physical (*Jasadiyah*) instincts and intellectual (*Aqliyah*) instincts. Human physical (*Jasadiyah*) instincts can be seen from the desire for a healthy life, nutritious food, a decent vehicle, a nice house and a job that suits hobbies. However, all of these must have the power to support their realization such as education, order in the family, moral support from parents or adoptive parents to realize their goals, and the capital to realize a decent life. This capital can be obtained from mandatory wills for adopted children, adopted parents, non-Muslim husbands and wives, non-Muslim relatives so that family members or adopted families who have been decided by the judge. Through Wajibah bequest, they can feel a decent and prosperous life thanks to the legal order and orderly distribution of property in accordance with the objectives of the Sharia.

The intellectual (*aqliyah*) instinct can be viewed in terms of the health of the human mind that wants peace, harmony between families, mutual love, help and mutual harmony between families. Everything runs simultaneously accompanied by the awareness of reason and mental maturity to protect each other's rights. In this case, the Wajibah bequest is present as a provision that regulates the family relationship in relation to the distribution of property. It is clear, Wajibah bequest is in accordance with common sense that wants order and peace in family relationships even to indirect relationships such as the relationship between adopted children and adoptive parents. The giving of a compulsory will to a child resulting from adultery is intellectually very feasible because the child

²⁷ Mahkamah Agung RI, *Laporan Tahunan Mahkamah Agung RI Tahun 2018: Era Peradilan Modern Berbasis Teknologi Informasi* (Jakarta: Mahkamah Agung RI, 2019), 227.
²⁸ “Mahkamah Agung RI, Putusan No: 16 K/AG/2010 (2010).” (t.t.).
²⁹ Dar al-Ifta al-Misriyyah, “Fatāwā Dār al-Iftā’ al-Miṣriyyah,” t.t., <https://shamela.ws/book/432/833>.

resulting from adultery basically does not bear the sins of his parents because he is born in a holy state.³⁰

Wajibah Bequest and Samahah

In the context of *samahah* as *maqāṣid Syari'ah 'amah*, every legal *ijtihad* should produce laws that do not cause difficulties but also do not loosen and ignore the agreed rules of *Shari'ah*. As the Prophet said: "Religion is easy. The religion most favored by Allah is straight and easy."³¹ Therefore, the *Wajibah* bequest to adopted children, adoptive parents, non-Muslim husbands and wives, non-Muslim relatives in the Supreme Court's decision, the Egyptian probate law and the MUI does not violate Islamic law. The *Wajibah* bequest actually provides a solution to problems that are not divided in classical *fiqh* so that the granting of this compulsory bequest is a form of tolerance in religion, humanitarian tolerance, not miserly and not frivolous in distributing property, because this bequest has gone through regulations and laws both in Indonesia and abroad.

Wajibah Bequest and Its Public Interest (Maslahat)

In the principles of *maslahat* (public interest), it is understood that any benefit can be pursued as long as it does not conflict with *Shari'ah* law, which refers to the regulations found in the Qur'an and Hadith. In the case of the *wajibah* bequest, this falls within the domain of *muamalah* (social transactions) and is not related to *aqidah* (beliefs). Therefore, there is a public interest in granting a *wajibah* bequest to adopted children and adoptive parents in the event of the death of either party, as well as allowing bequests to non-Muslims, except *kafir harbi* (enemy combatants).

The public interest (*Maslahat*) must be general, not for personal gain. This is done to preserve familial relationships, especially the relationship between adoptive parents and their adopted children, whom they have cared for, nurtured, and educated from childhood to adulthood. The child, in turn, repays this care by looking after the adoptive parent when they are ill. It would be socially unjust for such a child to be excluded from receiving a bequest.

The principle of *Maslahat* is to ease matters, not complicate them. In this regard, Islamic law must be flexible, responsive, and progressive in addressing emerging issues, such as the granting of *wajibah* bequests to adopted children and non-Muslim relatives.

Moreover, the preservation of life is a critical religious goal, which is why a non-Muslim may receive a portion of the bequest. There are several scenarios where this could apply. For example, a non-Muslim may be the only one who cared for the adopted parent during their illness, or there may be no heirs left from the deceased child. Thus, before passing, the deceased may bequeath a portion to their adopted child as an act of affection, not exceeding one-third of the estate.³² This exception does not apply to *kafir harbi*, who are openly hostile.

From a logical standpoint, if an adopted child is the only one raised and cared for by their adoptive parent, it would be illogical for them to be excluded from receiving a bequest. If the estate is distributed to other heirs, excluding the adopted child, it creates an unreasonable situation. Islam is dynamic, tolerant, and wise in addressing legal matters. Besides religion, life and intellect must be

³⁰ M.Choirul Anwar dan Neng Eri Sofiana, "Kawin Hamil Dalam Pernikahan Lotre," *Jurnal Muslim Heritage* 5, no. 1 (2020): 202.

³¹ Umi Zahrotus Sa'adah dan Abd. Gafur, "Hukum Sholat Jum'at Security shift perspektif Ulama Fikih Kontemporer," *Jurnal Muslim Heritage* 9, no. 1 (2024): 81.

³² Zainal Arifin, Tutik Hamidah, dan Noer Yasin, "Telaah Kritis terhadap Pemikiran Maqasid shari'ahal-Shatiby tentang Wasiat *Wajibah*, Al-Qānūn," *Jurnal Pemikiran dan Pembaharuan Hukum Islam* 25, no. 1 (2022): 123.

protected, and lineage must also be preserved. This is why the Prophet Muhammad s.a.w. prohibited inheritance for non-Muslims, as inheritance is meant for direct descendants and close relatives who share a bloodline. However, a solution exists through the *wajibah* bequest, allowing assets to be given to non-direct descendants.

These are the values of *maslahat* embedded in the wisdom of Islam, which seeks justice and emphasizes substantive fairness. On the one hand, it sets core rules, but on the other hand, it offers dispensations or *rukhsah* to non-Muslims (excluding *kafir harbi*) so that they may receive a bequest, as long as they are not enemies of Muslims and do not openly oppose Islam.

From the perspective of *Maqasid al-Shari'ah*, the granting of a bequest to an adopted child or adoptive parent is motivated by humanitarian concerns. This could be due to various factors, such as the person who receives the bequest being the one who cared for and maintained the wealth-holder during their lifetime, or possibly due to familial bonds or the fact that they are a relative who has been excluded from inheritance. As a humanitarian bond, they are granted a *wajibah* bequest, ensuring they receive their share, not exceeding one-third of the estate.

Returning to the objective of *lijalbi mashalih wa li dafi al-mafasid* (seeking benefits and preventing harm), it is clear that a person who has cared for and nurtured the deceased should be considered for a bequest, as they are the closest to the deceased and fully understand their life and needs.

The five principles of *Maqasid al-Shari'ah* must be upheld: the preservation of religion (*hifdzu al-din*), which requires upholding fundamental rules and using *ijtihad* for dispensations such as allowing *wajibah* bequests for adopted children, non-Muslim relatives, and children born out of wedlock; the preservation of life (*hifdzu al-nafs*), ensuring those who have cared for the deceased are not deprived of their rightful bequest; the preservation of intellect (*hifdzu aql*), recognizing the logical reasoning for granting a bequest to adopted children who cared for the deceased; the preservation of lineage (*hifdzu nash*), ensuring justice for adopted children and non-Muslim relatives who may have been deprived of inheritance; and the preservation of wealth (*hifdzu mal*). In the care of property, it aims to manage assets professionally and fairly³³ so that there is a manifestation and legal protection that is used as a guideline so that in this case the will must not be allowed to exceed more than 1/3 of the property left behind.

Wajibah Bequest and the Universality of Law

It has become an *ijma'* (consensus) among Islamic scholars that Islam is a universal religion, and Islamic law is intended for all of humanity across time and space, from the period of prophethood until the end of time. The universality of Islamic law can be understood through the texts of the Qur'an and Sunnah, as well as the approach of the Qur'an and Sunnah in the development of Shari'ah laws.³⁴

To realize this universal concept, there must be an alignment of Shari'ah with the development of time and knowledge. According to Ibn Ashur, this alignment (*shalahiyah*) can be illustrated in two ways: The first method: Laws related to *muamalah* (social transactions) tend to evolve with the progress of time and civilization. However, this development remains grounded in universal Shari'ah

³³ Aflakhal Ula Wardani dan Mahbub Ainur Rofiq, "Fiqh E-Money: Formulation of Legal Protection for E-Toll Card Ownership Maṣlahah Mursalah Perspective," *Jurnal Muslim Heritage* 9, no. 1 (2024): 13.

³⁴ Ibnu Asyur, *مقاصد الشريعة الإسلامية* (Qatar: Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 2020), 98.

principles,³⁵ ensuring that its implementation can be adapted to various situations without causing difficulty or deviation. These universal principles, when interpreted with the inclusion of new evidence, give rise to new interpretations that can be applied to emerging cases in diverse societal contexts.³⁶

Therefore, the concept of bequests, which is regarded as *sunnah* (recommended) according to the majority of scholars, aligns with the development of knowledge and the needs of public welfare, such as the introduction of wajibah bequests for adopted children, adoptive parents, and even relatives who are excluded from inheritance. Wajibah bequests have already been applied in various Muslim-majority countries such as Egypt, Syria, Tunisia, Malaysia, and other Muslim countries, even though these countries apply wajibah bequests to grandchildren whose fathers passed away before their grandparents, thereby preventing them from receiving an inheritance due to the presence of an uncle. Based on this, Indonesian scholars have taken the bold step of allowing wajibah bequests for adopted children and adoptive parents, using universal principles found in the legal precedents of Muslim-majority countries. This is further supported by the provisions of the Indonesian Civil Code (KUHP) regarding child adoption and substitute heirs, which closely resemble the provision of wajibah bequests in the KHI. Additionally, it accommodates customary laws regarding child adoption that allow adopted children to inherit from their adoptive parents, although not in the exact same manner as customary regulations that equate adopted children with biological children in inheritance rights.

The second method: Various conditions of time and nations must be adaptable to the provisions of Islam without causing hardship or difficulty. This adaptability allows Islam to remain aligned with the dynamics of the times, enabling various cultures and societies to accept and adapt to Islamic law, reconstructing their previous values and systems without significant difficulty, yet yielding positive and profound impacts. This approach has allowed societies such as the Arabs (excluding Quraysh), Persians, Copts, Berbers, Turks, and Tatars to integrate Islamic law without abandoning their customs, as they continue to follow the traditions they know.³⁷

In this case, to reconstruct these universal values, the application of wajibah bequests to adopted children, adoptive parents, non-Muslim relatives, and children born out of wedlock can be established through knowledge, including adjustments to universal values without causing difficulties or conflicts with customary law and positive law. After examination, the decision to grant wajibah bequests cannot be separated from the influence of customary law regarding child adoption and the granting of inheritance to them, even though the KHI maintains Islamic principles regarding the granting of wajibah bequests, such as the limitation of bequests to no more than one-third of the estate.

Thus, legislative measures for human society should not be forced upon communities to follow the specific conditions of a particular nation, as seen in the Arab nation at the time of the formulation of laws. Rather, these laws should be aligned with the universal principles of Shari'ah and the legal rationale so that the wisdom or legal rationale can be applied to cases, times, and places different from the original context, without forcing adherence to pre-established legal products without considering the legal context.³⁸ In connection with this case, the granting of wajibah bequests to adopted children and adoptive parents has undergone acculturation with local culture and law, as

³⁵ Ro'fah Setyowati, *Universalitas Hukum Islam* (Semarang: Pustaka Magister, 2018), 16.

³⁶ Asyur, 104.

³⁷ Asyur, 104.

³⁸ Asyur, 105.

in the Middle East, where wajibah bequests are mostly given to grandchildren whose fathers passed away before their grandparents, or who are referred to as substitute heirs in the Civil Code (KUHPer).

U The universality of Islamic law is not problematic because the fundamental principles of Shari'ah, as outlined by Ibn Ashur, are based on wisdom and rationale that are logical, not in opposition to human nature (fitrah), and therefore easily recognizable and accepted by those accountable (mukallaf) across time and space.³⁹ One of the reasons (*illat*) and wisdom behind the granting of wajibah bequests is to create universal and equitable justice, expanding the meaning of justice for adopted children and adoptive parents who may have been of great assistance to one another throughout their lives. This ensures the fulfillment of promises and responsibilities, preventing the abandonment of adopted children, as stipulated in adoption laws.

Wajibah Bequest and Equality

The implementation of wajibah bequests in Indonesia and Egypt represents a form of equality in rights and a dignified life as human beings, without fanaticism regarding lineage, skin color, or the place of birth of adopted children or adoptive parents. Instead, it emphasizes the equitable distribution of responsibility and commitment to educating, empowering, and ensuring that adopted children and non-Muslim relatives live a dignified life in the future, in accordance with the mission of the Prophet PBUH as a bringer of grace, welfare or benefits for mankind widely and evenly.⁴⁰

The principle of equality in wajibah bequests for adopted children, non-Muslim relatives, and children born out of wedlock lies in fulfilling their *ḍarūriyāt* (essential needs) and *ḥājjiyāt* (desirable needs). The fulfillment of *ḍarūriyāt* includes basic human necessities such as food, education, shelter, survival skills, health, and security, both within the family sphere and in broader societal life. Meanwhile, for *ḥājjiyāt*, needs such as a suitable vehicle, proper clothing, and good employment can all be addressed, in part, through the provision of wajibah bequests.

In Ibn Ashur's Maqasid, not all matters and human affairs are treated equally; there are cases that cannot be equated, such as gender and leadership capacity. Therefore, in the distribution of wajibah bequests for adopted children, non-Muslim relatives, and children born out of wedlock, they are not treated the same as legitimate heirs as established in the science of inheritance. Thus, the wajibah bequest is a solution for the equitable distribution of wealth according to each individual's share, in accordance with Shari'ah, and, God willing, without contradicting Islamic principles.

Wajibah Bequest and the Substantiality of Law

Maqasid shari'ah refers to the ultimate objectives of the law, which aim to achieve the welfare of humanity. According to Ibn Ashur, the application of law must be based on the substance of the law itself, not just its outward form. In this regard, the granting of wajibah bequests is grounded in the principles of justice and public interest, particularly for adopted children, non-Muslim relatives, and children born out of wedlock, who share familial relationships and thus have the right to benefit from the inheritance left by the deceased or family members adopted by the government, such as adopted children. These individuals have contributed to the development of the deceased's estate and have even provided care during the deceased's illness. Therefore, substantively, they are fully entitled

³⁹ Asyur, 100.

⁴⁰ Diky Faqih Maulana, "Kedudukan Penyandang Disabilitas Pada Lembaga Keuangan Di Indonesia: Subjek Hukum, Ahliyah Dan Telaah Khes," *Jurnal Muslim Heritage* 8, no. 2 (2023): 208.

to receive the wajibah bequest as a form of gratitude and affection, reinforcing the familial bond and the relationship between adopted children and adoptive parents.

Wajibah Bequest and the Supremacy of Lawasiat

The existence of the law is very necessary to be respected and upheld to protect the interests of the community.⁴¹ According to Ibn Ashur, the Shari'ah's efforts to ensure that the law is respected and upheld in all circumstances can be observed through two distinct approaches, depending on the situation and the conditions faced by the accountable individuals (*mukallaf*):

First: Strictness and high discipline through strong warnings and the threat of sanctions for legal violations.⁴² Therefore, there is a need for legal reform concerning wajibah bequests, which can serve as a reference for judges who are not covered by the Compilation of Islamic Law (KHI), so that society has a definitive guide for resolving their issues. Once legal institutions are established and laws are definitive, peace, prosperity, and harmony will emerge within families, communities, and the nation..

Second: Ease and tolerance within the boundaries that do not violate the *maqāṣid asy-syarī'ah*.⁴³ In this case, granting a wajibah bequest to adopted children and adoptive parents is an expression of Islamic *samahah* (tolerance), providing a portion of the inheritance as a responsibility of adoptive parents and a form of gratitude from the adopted child. The wisdom behind the implementation of wajibah bequests strengthens the familial bond between adopted children and adoptive parents and helps resolve misunderstandings between the adopted child and other heirs, due to the legal certainty in the distribution of the inheritance.

Wajibah Bequest and Social Stability

By emphasizing the status of adulterated children, stepchildren and children of different religions with the testator in inheritance law in Indonesia (KHI) as well as the status of adopted children. It is hoped that justice will be created in the life of society,⁴⁴ as has been described above, that justice in society is justice that accumulates between social justice, moral justice and legal justice. is the existence of legal certainty⁴⁵ One way to realize justice in society is to maintain the implementation of individual rights and obligations in society. Extra-marital children, stepchildren, children of different religions from the testator, and adopted children are individuals who have rights and obligations in the life of the community. Therefore, the protection of their rights needs to be emphasized in regulations (rules). So as not to cause conflicts and long debates regarding their status in inheritance law in Indonesia.

WASIAT WAJIBAH IN IBNU ASYUR'S SPECIAL MAQASID

According to Ibn Ashur in *Maqasib Shari'ah* in particular that the purpose of *Maqasib Shari'ah* which is humanitarian in nature is to take seriously about family order, family stability and even order in family affairs is the foundation for building civilization and the future of the family,⁴⁶ and one of the

⁴¹ Niru Anita Sinaga, "Kode Etik Sebagai Pedoman Pelaksanaan Profesi Hukum Yang Baik," *Jurnal Ilmiah Hukum Dirgantara-Fakultas Hukum Universitas Dirgantara Marsekal Suryadarma* 10, no. 2 (2020): 4.

⁴² Asyur, 137.

⁴³ Asyur, 138.

⁴⁴ Hayat, "Keadilan Sebagai Prinsip Negara Hukum: Tinjauan Teores Dalam Konsep Demokrasi," *Padjadjaran Jurnal Ilmu Hukum* 2, no. 2 (2015): 391.

⁴⁵ Mario Julyano dan Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum," *Jurnal Crepido* 1, no. 1 (2019): 14.

⁴⁶ Asyur, 172-173.

ways to create order in the family is to regulate the distribution of inheritance and justice in its arrangement, when there is one family that does not get inheritance for several reasons such as children whose parents die before their grandfather. This meaning, when there is a family that does not get inheritance for several reasons such as children whose parents died before their grandfather, families that are hindered because of different religions and adopted children who have a commitment to care for and educate them, then it is regulated in the provision of inheritance through mandatory wills so that there is justice in the distribution of property and minimizes family conflict because the provision of mandatory wills has been regulated by law, fatwa and court decisions so that it is more accepted by other family members and will respect each other, respect each other's rights so as to create *Maqasid Shari'ah* to create a family that is *sakinah mawaddah wa rahmah*.

In Ibn Ashur's specific *Maqasid Shari'ah*, he emphasizes that the desired outcomes of *Shari'ah* are for human welfare, whether in personal or social activities.⁴⁷ In the case of *wajibah* bequests for adopted children and adoptive parents in the KHI, along with the proposed amendment to Article 209 of KHI, the bequest is seen as a means of ensuring justice in wealth distribution. This is particularly important to prevent family conflicts, as the bequest system provides clarity and certainty about the rights of both legitimate heirs and those entitled to the bequest.⁴⁸

This approach aligns with the *Maqasid Shari'ah*, as it safeguards the rights of adopted children and non-Muslim relatives while maintaining the familial bond and preventing conflicts over inheritance. The concept of *wajibah* bequests in the KHI, as well as the recommendation for additional provisions to address the needs of non-direct descendants, reflects this broader objective.

CONCLUSION

Based on the description of the discussion in the previous chapter, the research results can be concluded as follows: Compulsory probate in KHI is given to adopted children, and adoptive parents a maximum of 1/3 of the inheritance, while compulsory probate in the Egyptian Qanun will be given to grandchildren whose fathers died while their grandparents were still alive and the grandchildren were prevented from getting inheritance.

The development of compulsory bequest in Indonesia based on the implementation of the Supreme Court's decision, the concept of compulsory bequest is expanded not only for adopted children and adoptive parents but also for relatives who are prevented from getting inheritance such as non-Muslim relatives, stepchildren and adulterous children based on Decision Number 368 K/AG/1999 dated April 17, compulsory bequest is given to adopted children. Supreme Court Decision No. 489 K/AG/2011 dated December 23, 2011, granted to adopted children and stepchildren. Supreme Court Decision No. 331 K/AG/2018 and No. 16K/AG/2010, compulsory testament is given to non-Muslim wife and husband. This is an expansion of the meaning of mandatory wills listed in article 209 KHI. While the implementation of compulsory bequest in Egypt is contained in the Decision of Darul al-Ifta Egypt Number. 133 Year 1980 and the decision of Darul al-Ifta Egypt Number. 2152 Year 2007 for grandchildren whose father died before their grandparents and has not experienced significant developments as in Indonesia.

In terms of Ibn Ashur's *maqasid sharia*, the reformulation of article 209 KHI on mandatory wills is in accordance with general *maqasid sharia* such as *fitrah*, *samahah*, benefit, universality,

⁴⁷ Asyur, 163.

⁴⁸ Risdianto, "Kedudukan Wasiat Wajibah Menurut Hukum Keluarga Islam di Indonesia," *Jurnal Notarius* 3, no. 2 (2017): 110.

equality, substantiality, supremacy of law and social resilience. As well as in accordance with Ibn Ashur's special maqasid sharia in creating order in the family is to maintain lineage and pay attention to the distribution of inheritance and wills in accordance with their respective portions so that there is clarity and peace between the heirs who get the original inheritance and those who are entitled to get a mandatory will.

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