

Reform of Islamic Inheritance Law: The Influence of Customary Law on the Institution of Mandatory Bequest in Islamic Law

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Abstract

This research aims to investigate the status of the deceased's close relatives, including adopted children, illegitimate children, and children of diverse religions, within the family structure and their legitimate legal standing, thereby establishing their entitlement to inherit the decedent's property. Nonetheless, the viewpoint of the inheritance legal framework in Indonesia about the status of these immediate relatives is markedly distinct. The employed methodology is normative or doctrinal legal study utilizing a legislative approach and analysis. Wasiat wajibah is an institution in Islamic law in Indonesia to address the problem of differing paradigms between customary law, which recognizes all positions and rights of adopted children, and Islamic law, which "only" recognizes adoption but does not allow mutual inheritance. The underlying thought of wasiat wajibah in Islamic jurisprudence is intended to provide a sense of justice to adopted children or those close to the heir, but they are religiously barred from inheriting a share of the inheritance. Finally, the mandatory will through Article 209 of the Compilation of Islamic Law (KHI) has filled the ambiguity in Islamic law by granting 1/3 of the inheritance to the adopted child from the property left by the adoptive parents. It is necessary to set standards for the future implementation of mandatory wills in order to ensure that judges' interpretations of these documents do not negatively impact the interests of the principal heirs.

Keywords: *Customs, Islamic Inheritance, Mandatory Bequests*

1. INTRODUCTION

Indonesia is one of the countries that has diversity in every aspect, one of which is the diversity of ethnic groups totaling 1,340 ethnic groups according to the 2010 BPS census. The Javanese are the largest ethnic group in Indonesia, accounting for 40.2 % or 95.2 million people of the total population.¹

The diversity of ethnic groups influences the way of life and beliefs in each of those communities. Thus, although Indonesia officially recognizes 7 religions practiced in the country, in fact, in 2017, the Ministry of Education and Culture recorded that there were 187 belief groups in Indonesia. With the largest num-

1 Christanto Triwibisono and Rio Aurachman, "Budaya Suku Bangsa Di Indonesia Dalam Mendukung Pengelolaan Organisasi (Studi Kasus: Universitas Telkom)," *JISI: Jurnal Integrasi Sistem Industri* 8, no. 1 (2021): 45–53, <https://doi.org/https://doi.org/10.24853/jisi.8.1.45-53>.

ber of belief groups, Central Java has 53 groups.² In addition to that diversity, there is also legal pluralism in Indonesia that regulates the order of community life. In Indonesia, there are 3 (three) orders that regulate social life, namely: first, the transcendental order; second, the social order; and third, the political order.³ Indonesia, as a religious and traditional country, has a very dominant transcendental order and social order in regulating the value system in people's lives. Islamic law from the beginning has become one of the value systems that regulates all aspects of life for the Muslim community. Islamic law, as an inseparable part of Islamic teachings, eventually became part of societal norms since the introduction of Islam in Indonesia, which began in the 1st Hijri century or the 7th-8th AD century. "This religious law came to Indonesia along with the arrival of the religion."⁴ The long history of Islamic law has made it a living law that is applied within society alongside customary law.

From the standpoint of legal sociology, Soerjono Soekanto believes that both customary and Islamic law are social institutions. The main distinction is that customary law comes from society, but Islamic law comes from God the Almighty's instructions.⁵ Customs and traditions are not uncommon in Islamic law. According to Islam, good traditions or practices are part of the creation of rational humans and hence serve as a means for mankind to glorify Allah. The execution of such traditions, as mentioned by the Qur'an Surah Al-A'raf verse (199). As a result, Islamic law recognizes tradition or custom with the term *al-urf* or *al-adah*, which refers to behaviors or statements that have established human habits and continue to endure, making them binding in the social life of the society. Customary law can be enacted through social contact rather than mutual agreement among members of a community. As a result, customary law is neutral and emerges from social processes. This differs from *ijma'* in Islamic law, which is the result of a *mujtahid* consensus.⁶ Adopting someone else's child to raise or treat as one's own is one of the customs that continue to be observed in Indonesian society today.

Adoption is a legal act in all legal systems. As a result, such a legal action will establish a legal link between the adoptive parents and the adopted child. The legal relationship in the framework of Islamic inheritance cannot serve as a foundation for mutual inheritance. Thus, an adopted child can only get a share through a will. However, the primary prerequisite for the execution of a will is a passionate goal stated in the form of a message or precise writing. However, not all heirs leave a specific note for their adopted child prior to death. In this scenario, a required will becomes necessary, even if it is not acknowledged in orthodox Islamic jurisprudence.

The aforementioned obligations will endure as long as the adopted child and adoptive parent are alive. However, when one of them dies, it might cause problems, such as the split of inheritance. Because the child and adoptive parent do not have a blood link, they do not share any inheritance. As a result, adopted children frequently find themselves in a vulnerable position. Especially if he does not have an actual deed proving the adoptive tie. In contrast, it is not uncommon for the adopted kid to have complete authority

2 Moh. Nadlir, "Ada 187 Kelompok Penghayat Kepercayaan Yang Terdaftar Di Pemerintah," 09/11/2017, 2017, <https://nasional.kompas.com/read/2017/11/09/12190141/ada-187-kelompok-penghayat-kepercayaan-yang-terdaftar-di-pemerintah?page=all>.

3 Atmoredjo Sudjito, *Ideologi Hukum Indonesia* (Yogyakarta: Lingkar Media, 2020).

4 Muhsin Aseri, "Politik Hukum Islam Di Indonesia," *Al Qalam: Jurnal Ilmiah Keagamaan Dan Kemasyarakatan*, 2018, <https://doi.org/http://dx.doi.org/10.35931/aq.v0i0.57>.

5 Soerjono Soekanto, "Hubungan Hukum Adat Dengan Hukum Islam," *Jurnal Hukum & Pembangunan* 17, no. 2 (1987): 152–62.

6 Abd al-Wahhab Khallaf, *Ushul Fiqh* (Kairo: Maktabah al-Dakwah al-Islamiyah, 1990).

over the inheritance. Under the pretense that he has made great contributions to his adoptive parents. The two prerequisites mentioned above then lead to inheritance disputes, which come within the exclusive jurisdiction of the Muslim community's Religious Courts. Meanwhile, adoption establishes inheritance relationships in Indonesian regions with a bilateral kinship structure, such as Java, Sulawesi, and parts of Kalimantan, as well as patrilineal communities like Bali. In Javanese customary law, the principle of “ngangsu sumur loro” governs the inheritance of adopted children. The word “ngangsu” implies to seek out or gain. “Sumur” refers to a place to draw water or a well, but “loro” denotes two. That principle suggests that an adopted child inherits from both biological and adoptive parents.⁷ In Islam, property can be transferred after death through a will or inheritance.⁸ The Qur'an Surah (QS) Al-Baqarah verse 180 serves as the foundation for will execution, whereas inheritance is accomplished through QS An-Nisa verses 11, 12, and several other verses.

Islamic law does not acknowledge the institution of adoption with legal ramifications as observed in jahiliyah society or the Dutch civil law framework. A system that detaches the adopted child from the kinship laws of their biological parents and subjects them to the kinship laws of their adoptive parents. Islamic law exclusively acknowledges and promotes adoption as the act of nurturing a child, while maintaining that the status of kinship exists independently of the adopted parents' familial context and consequently bears no legal implications. He retains his status as the offspring and kin of his biological parents, along with the associated legal ramifications. The ban against adoption, in the context of really designating someone as a biological child, is grounded in the Qur'an, Surah Al-Ahzab, verses 4-5. According to the aforementioned verse, Islamic law forbids adoption that: transforms an adopted child into a biological child; terminates the legal relationship between an adopted child and their biological parents; grants an adopted child inheritance rights equivalent to those of a biological child; and designates adoptive parents as guardians of the adopted child. Islamic law acknowledges adoption solely as the transfer of the duty to give daily sustenance, education, and care, within the framework of worshipping Allah SWT.⁹ Islam lacks a system for the direct allocation of inheritance to adopted children or other relatives without a blood connection or those prohibited by Sharia law. Consequently, the inheritance rights of an adopted kid from their adoptive parents are nullified. According to custom, an adopted kid is regarded as having the closest link with the heir and is considered akin to a biological child. In Indonesia, adopted children obtain legitimacy for a portion of the inheritance bequeathed by their adoptive parents via a ruling from the Religious Court. The ruling will inevitably conflict with customary law and Islamic law, which have divergent views on the inheritance rights of adopted children. Therefore, the primary concerns of this research are twofold: the first is the relationship between Islamic inheritance and customary inheritance in Indonesia, particularly in the context of the inheritance rights of adopted children, and the second is the impact of customary law on the reform of wasiat wajibah inheritance in Indonesia. This paper results from normative legal research utilizing a conceptual and analytical approach, with legal materials gathered through document studies derived from secondary sources, including legislation, court rulings, legal theories, and scholarly opinions, analyzed qualitatively. Additional comparative

⁷ A. Rachmad Budiono, *Pembaruan Hukum Kewarisan Islam di Indonesia*, (Bandung: Citra Aditya Bakti, 1999), 189.

⁸ Fatahullah Fatahullah et al., “Analisis Metode Penyelesaian Sengketa Kewarisan Islam Di Indonesia,” *Jurnal Pepadu* 4, no. 3 (2023): 392–401, <https://doi.org/https://doi.org/10.29303/pepadu.v4i3.3613>.

⁹ M. Fauzan Andi Syamsu Alam, *Hukum Pengangkatan Anak Perspektif Hukum Islam* (Jakarta: Kencana, 2008).

analyses in this research encompass the work by Sidik Tono (PSDIH UII) entitled “*Wasiat Wajibah Sebagai Alternatif Mengakomodasi Bagian Ahli Waris Non Muslim Di Indonesia.*” Secondly, Rosalinda Elsina Latumahina (PSDIH Unair) addresses “*The Principle of the Best Interests of the Child in the Legal Protection of Children Born Out of Wedlock.*” Thirdly, Iim Fahimah (PSDIH UIN Raden Intan Lampung) examines “The Practice of Inheritance in Inter-faith Families within a Pluralistic Society in Bengkulu Province from the Perspective of Islamic Law.” The three aforementioned studies exhibit substantial variances, particularly regarding their respective subjects of investigation. Sidik Tono’s research investigates the allocation of inheritance to non-Muslim heirs via a compulsory will in accordance with a Supreme Court decision. Simultaneously, Rosalinda Elsina Latumahina’s dissertation research investigates the state’s initiatives to safeguard the interests of children born out of wedlock subsequent to the Constitutional Court’s ruling No. 46/PUU-VIII/2010, which revised the stipulations in Article 43 of Law No. 1 of 1974. Simultaneously, Iim Fahimah’s dissertation research is on the allocation of inheritance to heirs of various religions. The author’s research investigates the necessary will in Indonesia as a mechanism for safeguarding the civil rights of relatives hindered from acquiring an inheritance. The mandatory will in Indonesia is shaped by the principle of kinship under customary law, especially regarding the relationship between a child and their adoptive parents.

2. RESULTS AND DISCUSSION

Customary Inheritance Law from the Perspective of Islamic Law and Customary Law in Indonesia have had extensive interaction since the advent of Islam among the Indonesian populace. In that interaction, Islamic law may operate concurrently with customary law inside the community (*theory of receptio in complexu*) or may be integrated into customary law (*theory of receptio*). The connection between Islamic law and customary law results in a synthesis that enhances the legal framework. According to Soerjono Soekanto, one method of reconciling Islamic law with customary law is through toleration, which is a sort of accommodation lacking legal endorsement.¹⁰ This occasionally occurs unexpectedly, driven by each party’s psychological inclination to mitigate both existing and potential conflicts to the greatest extent possible. The integration of Islamic law with customary law is inevitable, as Islamic law encompasses the notion of beneficial traditions prevalent in society, known as ‘urf, as indicated in QS. al-A’raf verse 199.¹¹ Wahbah az-Zuhaili said that traditions can be okay as long as they don’t stop people from doing what is legal or let people do what is illegal.¹² When looking at how big they are, traditions can be broken down into two groups: First, there are general customs, or al-urf al-amm, which are habits that everyone does at the same time. Second, there are specific customs (*al-urf al-khas*), which are habits that only happen in certain places.¹³ In the study of ushul fiqh, al-urf is utilized by various scholars from different schools of thought, including Imam Malik and Imam Abu Hanifah. Imam Shafi’i established a precedent by altering his fatwa in response to the variances in locale and temporal context between Baghdad and Egypt. This is referred to as qaul qadiim

¹⁰ Soekanto, “Hubungan Hukum Adat Dengan Hukum Islam.”

¹¹ The term “urf” in this verse is defined as “ma’ruf.” Maruf encompasses the commendable customs of society that align with the principles of Islam. In the Quran, the term ‘maruf’ pertains to significant regulations, including those governing administration.

¹² Wahbah az-Zuhaili, *Ushul Al-Fiqh* (Bairut: Darul Al Fikr, 1990).

¹³ Wahbah az-Zuhaili.

and qaul jadid. Imam Ahmad bin Hambal, while not expressly asserting that customary practices (*urf*) can function as legal proof, shown a preference for social conventions over weak hadiths, suggesting he acknowledged the significance of local traditions.¹⁴

Concerning the application of customary law as a legal methodology, jurists established specific criteria: firstly, the custom must be widely practiced within the community; secondly, the custom must have evolved into a habitual practice over time; thirdly, the custom is deemed null ab initio if it contradicts the Qur'an and Hadith; fourthly, in instances of dispute, the custom will be recognized as a legal source only if all parties involved acquiesce to it.¹⁵ah

The integration of Islamic law into customary law often complicates the distinction between original customary law and that which has been affected by religious law, particularly within Islamic communities. Numerous scholars of customary law, such as Soepomo, assert that customary law is non-statutory (unwritten) law, mostly comprising customary practices with a minor component of Islamic law (religion). Customary law comprises two components: predominantly unwritten indigenous Indonesian law and a minor portion of written religious law.¹⁶ Customary law possesses customary components, hence being transmitted from one generation to another. The distribution of inheritance within the society is predominantly governed by customary procedures that significantly rely on the heirs. Sri Wahyuni's research revealed that most of the community favors their area customary norms above Islamic law for settling inheritance issues, especially concerning inheritance distribution. The research presents an example from the Minang community, which is profoundly anchored in Islamic principles. This community has a matrilineal inheritance distribution structure. In addition to the Minang group, the Sasak Sade community in Central Lombok similarly adheres to the traditional inheritance system within their society.¹⁷

The implementation of Islamic law in Indonesia is dynamic, reflecting cultural circumstances, local expertise, and the evolution of a varied community.¹⁸ Islamic law is not applied in an unequivocal manner; it also accommodates the facts of customary law. The application of customary law is also modified in accordance with Islamic law, ensuring that it does not contravene that religious doctrine. Despite their distinct origins, both Islamic law and customary law ultimately seek to promote the benefit of humanity or society at large. An example is the allocation of inheritance executed through the notion of a bequest gift. This is executed by the puppet master's parents to prevent disputes among their offspring posthumously. The inheritance possessed by an individual is designated by the parents to specify the future owner, and the property will be formally transferred at the parents' demise. Another example is the practice of amicable distribution of inheritance among the heir.

In Indonesian society, customary law and Islamic law do not conflict; rather, the two legal systems can coexist, and their respective roles have been established. In the Minangkabau community, a consensus has been reached between traditional and religious authorities at Bukit Marapalam, referred to as the "Piagam Bukit Marapalam," which

14 Abdurrahman Misno Bambang Prawiro, "Hukum Islam: Antara Statis Dan Dinamis," *Al-Mashlahah Jurnal Hukum Islam Dan Pranata Sosial* 2, no. 03 (2014), <https://doi.org/https://doi.org/10.30868/am.v2i03.120>.

15 Ratno Lukito, *Tradisi Hukum Indonesia* (Yogyakarta : Teras, 2008), 108.

16 Soepomo, *Bab-Bab Tentang Hukum Adat*, Cet.16 (Jakarta: Pradnya Paramitha, 2007).

17 Sri Wahyuni, *Hukum Keluarga Dan Dinamika Sosial, Kajian Adat Masyarakat Samin, Maluku,, Kalimantan, Dan Sasak*. Calpulis (Yogyakarta: Calpulis, 2016). 78

18 Imam Mustofa, Ahmad Syarifudin, and Dri Santoso, "Pemikiran Hukum Islam Abdurrahman Wahid: Harmonisasi Islam Dan Budaya," *Undang: Jurnal Hukum* 4, no. 2 (2021), <https://doi.org/https://doi.org/10.22437/ujh.4.2.507-535>.

articulates, “adat bersendi syara, syara’ mangato, adat memakai.” In other mostly Muslim communities, property transfer occurs by a gift of will, wherein parents allocate their money to their children during their lifetime, although the actual ownership of the property does not transfer to the children until both parents have deceased. Such methods contravene Islamic inheritance law, which stipulates that the distribution of inheritance occurs by the heirs upon the demise of the testator. In Islamic inheritance law, parents lack the right to dictate the distribution of their bequest, as this responsibility is with the heirs.

One of the significant intersections between customary law and Islamic law pertains to the matter of child adoption. Both legal systems acknowledge adoption institutions; nevertheless, their perspectives on the status of adopted children differ significantly. Under customary law, an adopted kid’s status is equivalent to that of a biological child, so ensuring that their rights and obligations within the family are identical to those of a biological child. In certain customary rules, such as those in Javanese society, adoption does not terminate the blood bond between the child and their biological parents; nevertheless, in patrilineal civilizations, adoption can sever this connection. In Islamic law, an adopted kid is seen as lacking a blood tie with their adoptive parents, therefore rendering them ineligible to inherit from them. In civil law, an adopted kid is entitled to daily care and educational expenditures for as long as necessary. The evolution of Islamic law in Indonesia acknowledges the significance of an adopted kid within a family, contributing to familial harmony. Consequently, under the KHI in Article 209 paragraph (2), adopted children are designated as beneficiaries of mandatory wills. The establishment of mandatory wills in Article 209 of the KHI is partially derived from the institution of adoption in customary law. This is due to the fact that Islamic law, from its inception, did not acknowledge compulsory wills, but only acknowledged ordinary wills deemed *sunnah*. Modern mandatory wills in many Muslim nations are employed to distribute inheritance portions to direct descendants (blood relatives) or heirs who are legally restricted due to the existence of other heirs. Consequently, the *wajibah* in Indonesia constitutes a distinctive institution due to the convergence of customary law and Islamic law in safeguarding the civil rights of adopted children. Article 209 of the KHI introduces a novel notion acknowledging that adoption exists within the Islamic society, although without establishing a formal link between the adopted kid and the adoptive parents.

Certain customary inheritance laws in Indonesia permit adopted children to inherit property from their adoptive parents, despite the absence of a biological connection; their status is regarded as equivalent to that of biological offspring. In Javanese society, customary inheritance laws dictate that an adopted child may inherit from their adoptive parents, provided that the inheritance does not surpass the share allocated to biological children, and they are entitled solely to the property contributed by both adoptive parents.¹⁹

Customary inheritance law in Indonesia influences Islamic inheritance law, particularly with the distribution of inheritance to adopted children, as mandated by Article 209 of the Compilation of Islamic Law. The article legitimizes the civil rights of an adopted child by a compulsory will, stipulating that the adopted kid shall not inherit a will

19 Nur Fadhilah, Muhammad Mufti al Anam, and Nuril Farida Maratus, “Contestation and Negotiation on Interfaith Inheritance in Pancasila Village,” *Justicia Islamica* 21, no. 2 (2024): 377–400, <https://doi.org/10.572349/civil-ia.v1i1.167>.

from their adoptive parents and that their inheritance is capped at one-third of the total estate bequeathed by the adoptive parents. This restriction seeks to ensure justice for rightful heirs against any arbitrary actions by the adopted kid or other entities.

According to classical fiqh, an adopted kid is not allowed to inherit property due to the absence of a blood tie with the heir. In certain customary inheritance laws in Indonesia, an adopted child is entitled to inherit property from their adoptive parents. This demonstrates the impact of customary inheritance law on Islamic inheritance law in Indonesia, grounded in the principle of public good. Despite not being classified as an independent legal system, customary law significantly influences the development of Islamic inheritance law in Indonesia.

2.1 Compulsory Bequest as a Paradigm for Reforming Islamic Inheritance in Indonesia

a. Wasiat Wajibah

Islamic inheritance law comprises a framework of principles derived from Islamic religious tenets that govern the distribution of property bequeathed by the deceased to their beneficiaries. Inheritance rules, rooted in Islamic doctrine, include certain qath'i (permanent) regulations drawn from Allah's shariah and the Sunnah of the Prophet Muhammad. Furthermore, Islamic inheritance law possesses dynamic, sensitive, and inventive characteristics that stem from intellectual contemplation. The second part of Islamic inheritance law generates several legal outputs, including fatwas from scholars, rulings from religious courts (qadha), fiqh literature, and legislation in Muslim nations.²⁰ This second element encompasses the interference with other legal frameworks, including customary law or established practices.

Wasiat wajibah is a concept that diverges from the traditional understanding of a will in Islamic law. Wasiat wajibah occupies a position between a will and inheritance in its execution. The testator, before to their demise, failed to clearly or indirectly designate the recipients of their property, which defaults to their heirs. This institution received formal recognition in Islamic law upon its incorporation into the Egyptian Civil Code (Qanun al-Madani) in 1946, which mandated the allocation of a portion of the deceased's estate through a compulsory bequest to the grandchildren of daughters who are excluded from inheritance under Islamic law.

Ibn Hazm asserts that the need to create a will is derived from the directive in QS. Al-Baqarah verse 180: "It is prescribed for you, when death approaches any of you, if he leaves behind wealth, to make a bequest for parents and close relatives in a fair manner." This is an obligation for the virtuous. The obligatory will was initially proposed by Ibn Hazm in Islamic law, which stipulates that the sovereign is mandated to designate a portion of the deceased's estate as a bequest for individuals who have died, even in the absence of a prior will, particularly for relatives who are excluded from inheritance due to their status as slaves, their lack of faith, or other circumstances that preclude them from inheriting, or because they are not eligible for a share of the estate.²¹

Hasbi Ash-Shiddieqy refuted Ibn Hazm's opinion, asserting that Islamic law does not mandate a will to be executed through a judge's decision, as a will is fundamentally an act of tasharruf (disposal) of inherited property conducted posthumously and

²⁰ M. Atho Mudzahar, *Membaca Gelombang Ijtihad: Antara Tradisi Dan Liberasi* (Yogyakarta: Titian Ilahi Press, 1998).

²¹ IBNU HAZM, *AL MUHALLA* 13, ed. ABU FAIQ and FERY (PUSTAKA AZZMA, n.d.).

willingly under any circumstances.²² Moh. Muhibbin asserts that a will is termed a mandatory will for two reasons: Firstly, the testator's element of choice is forfeited, and secondly, an obligation is imposed through legislation or a decree, independent of the testator's consent and the beneficiary's agreement. Secondly, there exists a parallel in the inheritance distribution regulations whereby the male receives double the part of the female.²³

The focus on wasiat wajibah in Indonesia, designed to safeguard the civil rights of adopted children, illegitimate offspring, and children/spouses of diverse religions, distinguishes it significantly from the intent of mandatory wills in other Muslim nations. This indicates that Islamic law in Indonesia has advanced more dynamically by developing fiqh that reflects the nature of the Indonesian country. This also addresses the concerns previously articulated by Hasbi Ash-Shiddieqy regarding the notion that: "The fiqh that has evolved in our society is partially derived from Hijazi fiqh, which is shaped by the customs prevalent in Hijaz, or Mishri fiqh, which is influenced by the traditions and practices of Egypt, or Hindi fiqh, which is based on the 'urf and customs existing in India." To date, we have not demonstrated the capacity for ijtihad and the formulation of fiqh that corresponds with the Indonesian character, which is why we occasionally impose Hijazi, Mishri, or Iraqi fiqh in Indonesia based on taqlid.²⁴

b. Model for the Reform of Islamic Law

Islamic Sharia, as delineated in the Qur'an and the Hadith of the Prophet, should be considered *lex divina*, since it constitutes a revelation from Allah transmitted through the Prophet Muhammad (PBUH) to function as a guiding principle and the paramount rule for Muslims. Under Islamic jurisprudence, the Qur'an is regarded as the paramount source of law, referred to as *summum bonum*.²⁵ The legal source must be interpreted into specific standards for implementation by all legal subjects. The fundamental norm in Islamic sharia is a particular occurrence that acts as the foundational event in the establishment of diverse legal standards.²⁶

Fazlur Rahman asserted that the alteration of Islamic law is an inevitability. A culture that fails to embrace change and just clings to the romanticism of the past will become obsolete and unable to sustain its existence for an extended period.. Nonetheless, the adaptation of Islamic law to societal dynamics is inevitable, given that its sources extend beyond the Qur'an and the Hadith of the Prophet to include the ijtihads of mujtahids relevant to their respective eras.

J.N.D. Anderson asserted that Islamic family law constitutes the essence of Sharia, as this aspect is perceived by Muslims as the gateway to the domain of religion and society.²⁷ Family law, a significant component of Islamic jurisprudence, is subject to reform proposals, similar to other aspects of Islamic law. Furthermore, the reform of Islamic family law has emerged as a worldwide discourse across the Islamic world,

22 Hasbi Ash Shiddieqy, *Fiqh Mawaris* (Indonesia: Jakarta: Pustaka Rizki Putra, 2001), 273.

23 Muchit A Karim, *Problematisa Hukum Kewarisan Islam Kontemporer Di Indonesia*, Edisi I, Cet. 1. (Jakarta: Jakarta: Kementerian Agama RI Badan Litbang dan Diklat Puslitbang Kehidupan Keagamaan, 2012), 267.

24 Nourouzzaman Shiddiqi, *Fiqh Indonesia: Penggagas Dan Gagasan* (Yogyakarta: Pustaka Pelajar, 1997), 231.

25 Jazim Hamidi, Moch Adi Sugiharto, and Muhammad Ihsan, *Membedah Teori-Teori Hukum Kontemporer* (Universitas Brawijaya Press, 2013), 23.

26 Hans Kelsen, *Teori Umum Tentang Hukum Dan Negara* (Bandung: Nusa Media, 2008).

27 J.N.D., Anderson, *Islamic Law in Modern World*, Alih Bahasa Oleh Machnun Husain Dengan Judul: *Hukum Islam Di Dunia Modern* (Surabaya: Amar Press, 1991), 42.

especially in Indonesia. Reforms in Islamic family law in Indonesia are implemented through various rulings by judicial authorities, especially the Religious Courts.

Noel J. Coulson, as cited by Amir Mu'alim and YUSDANI in their work "*Konfigurasi Pemikiran Hukum Islam*," asserts that the reform of Islamic law occurs in four modalities: *Firstly*, the codification approach involves the consolidation of like laws into a singular Islamic law code, subsequently adopted as state legislation, referred to as the doctrine of *siyasah*; *secondly*, the selection method (*takhayyur*) entails the choice of opinions from certain legal schools. The selection relies on the prevailing societal opinions; *third*, the *tatbiq* method involves the application of law to novel occurrences by predicting new legal developments; and *fourth*, the *tajdid* method entails the reinterpretation of legal transformations from the old to the new. The revitalization of Islamic law may also be achieved through a comprehensive interpretative methodology, which entails broadening the interpretative framework by employing logical comparison between historical and contemporary concerns.²⁸ Therefore, in the context of wasiat wajibah, which lacks recognition in Islamic law and older fiqh texts, it signifies a novel legal imperative to tackle modern concerns. Furthermore, the renewal regards living law as a benchmark to harmonize societal justice objectives with legal certainty.

While the explanation of the *fuqaha* in the past addressed the demands of the Muslim community at that time, it is now seen potentially inappropriate in the current setting. Moreover, the contents vary from one another owing to their differing levels of reasoning, yet belonging to the same school of thought. The discontent with its content, stemming from divergent opinions, leads the Muslim community, which lacks comprehension, to adhere to traditional customary law inherited through generations or to the legal frameworks of other religions (Western), which are systematically and clearly codified in a single volume or legislative regulations.²⁹

c. Wasiat wajibah as an innovative legal framework within the Islamic inheritance system in Indonesia

The Indonesian Constitution explicitly declares that Indonesia is a rule of law state, as articulated in Article 1, paragraph (3) of the 1945 Constitution. In a rule of law state, the legal system is established through the systematic organization of political, economic, and social institutions, and is fostered by cultivating a rational and impartial culture of legal awareness within community, national, and state contexts. Consequently, the legal system must be established (legislation) and implemented (law enforcement) effectively, commencing with the constitution as the supreme law.³⁰ In the Indonesian concept, law encompasses not only written laws, but the state also acknowledges customary law and religious law (Islam) as applicable legal systems. The state is governed by a national legal system that is derived from three legal systems: customary law, sharia law (Islam), and written law.³¹ There will always be intersections in the development of these three systems. Consequently, it generates fields that are

28 Arief Budiman, Muhammad Saifullah, and Bahrul Ulum, "Wasiyah Will for Non-Muslim Heirs in Indonesia: A Legal Political Perspective Based on Justice and Welfare," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 24, no. 2 (2024): 223–50.

29 Daud Ali Muhammad, "Hukum Islam: Pengantar Ilmu Hukum Dan Tata Hukum Islam Di Indonesia" (Rajagrafindo, 2007).

30 Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia," in *Makalah Disampaikan Dalam Forum Dialog Perencanaan Pembangunan Hukum Nasional Yang Diselenggarakan Oleh Badan Pembinaan Hukum Nasional Kementerian Hukum Dan*, vol. 1, 2011.

31 Franz von Benda-Beckmann, *Properti Dan Kesenambungan Sosial*, Terjemahan, (Jakarta: Gramedia, 2000), 137.

incorporated into the three systems, as evidenced by Law No. 1 of 1974 on Marriage, which assigns the validation of marriage to religious law. Customs and customary law are merely symbolic components of the marriage process, including the engagement customs prior to the union and other traditions following the union. In Indonesia, the domain of the applicability of “Islamic civil law” is regulated by Law No. 7 of 1989 on Religious Courts. There is an intersection in civil law regarding infant adoption, which is regulated differently in each of the three legal systems, each with its own methods and consequences. The Islamic legal system in Indonesia adheres to the provisions of Article 49 of Law Number 3 of 2006, which pertains to the First Amendment to Law Number 7 of 1989 on Religious Courts. The Islamic political struggle in the field of judiciary and law has culminated in the recognition of the Religious Courts Law, which serves as a tangible acknowledgment of Islamic law in Indonesia.³²

Dedi Supriyadi regards the legal interpretation of Article 209 of the KHI as an innovative framework for equitably distributing Islamic wealth to non-heirs in a *ma'ruf* way. Simultaneously, the involvement of the individual in question is intrinsically linked to the family's integrity, rendering it cruel for that person to be denied income only due to their status as a non-heir. Consequently, the articulation of Article 209 of the KHI is regarded as a reinforcement of public interest values in preserving humanitarian interactions and familial well-being.³³ In all communities that engage in adoption, adoptive parents consistently consider the welfare of their adopted children after their demise. Consequently, it is customary for adopted children to obtain a share of the inheritance from their adoptive parents via gifts (*grants*) that can ensure financial stability. Adopted children possess the entitlement to get their rights from their adoptive parents, as culturally, they are seen as equivalent to biological children within society. Friedman posits that legal culture encompasses the human disposition towards the law, shaped by a framework of beliefs, values, thoughts, and aspirations within the legal system.³⁴

Fiqh KHI interprets Qur'an Surah Al-Baqarah verse (180) as permitting an adopted child to legitimately inherit the estate of their deceased adoptive parents. Furthermore, the Compilation specifies that adoptive parents own the rightful entitlement to receive the mandatory inheritance. KHI posits that the bond between an adopted child and adoptive parents is so intimate that the phrase “close relatives” (*al-aqrabin*) in the inheritance verse may encompass both adopted children and adoptive parents.³⁵ The redefinition of the intimate bond between adopted children and adoptive parents via *wajibah* wills signifies an attempt to reconcile the doctrinal divide between Islamic law and customary law. This indicates that in its execution, both legal systems maintain a harmonious connection within Indonesian society and have the potential to enhance the legal framework in Indonesia moving forward. Accommodation can be defined as a necessary measure to reconcile the disparity between the two legal systems. The requirements and restrictions governing inheritance for adoptive parents and adopted

32 Isharyanto Adi Sulistiyono, *Sistem Peradilan Di Indonesia Dalam Teori Dan Praktek* (Jakarta: Prenadamedia, 2018).

33 Dedi Supriyadi, *Sejarah Hukum Islam Dari Kawasan Jazirah Arab Sampai Indonesia* (Bandung: Pustaka Setia, 2007), 427.

34 Lawrence M. Friedman, *American Law: An Introduction*, Second edition (New York: W.W. Norton & Company, 1998), 20.

35 Sofyan A P Kau and Zulkarnain Suleman, “EKSISTENSI HUKUM ADAT DALAM KOMPILASI HUKUM ISLAM INDONESIA (KHI),” n.d.

children, grounded in the legal framework of compulsory wills, have rendered Islamic inheritance law congruent with contemporary concepts of justice and societal legal awareness.³⁶

The modification of the mandatory will in Article 209 of the KHI, rooted in the realities of Indonesian culture, demonstrates that Islamic law is not solely derived from static doctrine. Indonesia, a multicultural society with a predominantly Muslim population, has varied objectives and viewpoints on issues such as adopted children. The phenomena of customs existing within society and subsequently legitimized by legal instruments has emerged as a primary topic of study in the field of *Sociological Jurisprudence* commenced by Oliver Wendell Holmes (1841-1935) and Eugen Ehrlich (1862-1922). This philosophical perspective swiftly emerged in the United States, articulated by Roscoe Pound (1870-1964), who famously asserted “*law as social engineering*.” This perspective posits that³⁷ the law can be perceived as both codified statutes and practical application. Law in books (*hukum tertulis*) constitutes an independent normative entity comprising a compilation of norms that govern societal relationships, whereas law in action or living law is characterized as a sociological phenomenon involving the interplay between these autonomous norms and social factors within society. In other terms, law in action refers to the legal principles that function inside society, as evidenced by the conduct of its members.³⁸ Ehrlich asserted that “the focal point of legal development over time resides not in legislation, legal scholarship, or judicial rulings, but in society itself.”³⁹ Legislative texts (law in books) should ideally correspond with the practical application of law within society (law in action). Such legislation is more readily embraced by society. Indonesia, significantly shaped by the civil law system, perceives law as an instrument of social engineering in a hierarchical fashion, as articulated by Mochtar Kusuma-Atmadja, indicating that all legal actions or policies must emanate from the government.⁴⁰ Article 209 of the KHI regarding wasiat wajibah for adopted children demonstrates that, in specific instances, Islamic law can accommodate societal norms that have emerged. To confer binding authority upon these customs, the state formalizes them through written regulations.

Islam is a legalistic faith.⁴¹ the language pertaining to Islamic law is vast, encompassing concepts such as sharia, fiqh, and qanun. According to this notion, Islamic law is deemed sufficient for governing all facets of human existence, hence necessitating no amalgamation with other legal systems. N.J. Coulson asserts that “In the Islamic concept, law precedes and shapes society; the structure of state and society must, ideally, conform to its eternally valid dictates.”⁴² In matters of inheritance rights for adopted children, Islamic law adapts to the prevailing society norms. This seeks to provide justice to relatives, including adopted children, who are barred from inheriting from their adoptive parents. In actuality, adopted children are the individuals most proximate to the heir’s existence. The relationship inside a nuclear family resembles

36 Kau and Suleman.

37 Ahmad Syafi’i, “Menggagas Hukum Islam Yang Akomodatif-Transformatif Dalam Konteks Legal Pluralism Di Indonesia,” *Al-Manhaj: Jurnal Hukum Dan Pranata Sosial Islam* 1, no. 1 (2019): 1–25.

38 Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum Dan Jurimetri* (Jakarta: Ghalia Indonesia, 1990), 9–10.

39 John Maurice Kelly, *A Short History of Western Legal Theory*, Eight Edition (Oxford: Clarendon Press, 2005), 362.

40 Widodo Dwi Putro, *Filsafat Hukum*, Edisi Ketiga (Jakarta: Kencana, 2024), 283.

41 Wael B. Ballaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 209.

42 N.J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964), 85.

that of individuals with a familial lineage. The distribution of compulsory wills in KHI markedly differs from that in other Muslim nations. Anthropologists, including Geert, assert that a legal norm is inextricably linked to the context of facts and local knowledge.⁴³ In the context of Islamic jurisprudence, Geert's perspective is consistent with the jurisprudential precept that changes in law are a result of changes in time and place (*la yunkar taghayyur al-ahkam bi taghayyur al-zaman*). It is reasonable to modify Islamic law in response to the influence of societal environments and the passage of time, as a result of this principle.⁴⁴

In the context of societal interests and justice, it is possible to argue that “*Indonesian Islamic law*” may not be in accordance with the “*bunyi*” (*specific legal text*) of sharia (legal specific), but it is in harmony with the “*semangat*” of sharia.⁴⁵ The principle of rahmatan lil alamin, a core concept in Islam, should underpin the formulation of Islamic legislation that delivers genuine justice, rather than simply executing “sharia” protocols devoid of significance. Consequently, Islamic law diverges significantly from the principles that promote human welfare. Law, encompassing Islamic law, encompasses more than just standards that govern commands and prohibitions devoid of aim and purpose. In Islam, the law (sharia) is divinely instituted by Allah with a specific purpose and objective, referred to as maqashid sharia. The essence of sharia cannot engender division and animosity among individuals; rather, it is intended to promote the welfare and harmony of humanity in both this life and the afterlife. This aligns with God's intention in creating humanity, which is to enrich the world with human qualities. The integration of Islamic law with the customary norms or practices prevalent in Indonesian culture exemplifies the vitality of Islamic law in addressing the realities of human existence. Respect for humanitarian ideals is essential and constitutes one of the foundational foundations of Islam. The formulation of new legislation through the reinterpretation of established principles, utilizing methodologies such as istishab, maslahah mursalah, istihsan, and urf, can serve as instruments for addressing contemporary legal issues within society. The application of a public interest-based strategy is not novel. Prophet Muhammad exemplified law-making by referencing the conventions and practices existent in society during his era.⁴⁶ The application of rules beyond the conventional (sharia) laws, such as urf, aims to mitigate social issues within families following the demise of the heir. Inheritance disputes will impede the goals of Islamic law as delineated in maqasid al-syar'iah, which underscores the importance of conflict prevention initiatives.⁴⁷ Inheritance issues pertain to internal familial disputes and should be averted at all costs.

Islam is a faith that emphasizes spiritual principles, specifically the submission to all that Allah SWT has ordained, while concurrently obligating each adherent to defend justice, even towards those who are marginalized. Spirituality and justice are inseparable

43 Jawahir Thontowi, *Pesan Perdamaian Islam*, (Yogyakarta: Madyan Press, 2001), 133 (Yogyakarta: Madyan Press, 2001), 133.

44 Zubaedi Zubaedi, “Membangun Fikih Yang Berorientasi Sosial: Dialektika Fikih Dengan Realitas Empirik Masyarakat,” *Al-Jami'ah: Journal of Islamic Studies* 44, no. 2 (2006): 430–52, <https://doi.org/https://doi.org/10.14421/ajis.2006.442.429-452>.

45 Ahmad Syafi'i, “Menggagas Hukum Islam Yang Akomodatif-Transformatif Dalam Konteks Legal Pluralism Di Indonesia,” *Al-Manhaj: Jurnal Hukum Dan Pranata Sosial Islam* 1, no. 1 (2019): 1–25.

46 Lukito, *Tradisi Hukum Indonesia*.

47 Tarmizi Tarmizi et al., “Inheritance Distribution and Conflict Resolution in Bone Regency: Upholding Women's Rights and Islamic Law Objectives,” *De Jure: Jurnal Hukum Dan Syar'iah* 16, no. 2 (2024): 255–77, <https://doi.org/https://doi.org/10.18860/j-fsh.v16i2.29477>.

and converge into a singular entity. Consequently, the integration of both into social life is an aspect of Islamic spirituality and is seen as an act of worship in Islam.⁴⁸ The primary aim of Islamic law is known as *maqashid syariah*. The fundamental notion of the *wasiat wajibah* in Islamic jurisprudence aims to ensure justice for individuals closely related to the heir, yet legally excluded from inheritance under Sharia law. Ultimately, Article 209 of the Compilation of Islamic Law (KHI) has resolved the issue in Islamic law by allocating one-third of the inheritance to an adopted kid from the estate of the adoptive parents. Similarly, the same principle applies to adoptive parents about the inheritance rights of their adopted children. The gift is conferred not in the role of an heir, but as a beneficiary of a compulsory bequest.

3. CONCLUSION

Islamic law acknowledges tradition or custom through the terms *al-urf* or *al-adah*, denoting actions or statements that have evolved into habitual practices and remain enduringly influential in the social fabric of the community. Islamic Law and Customary Law in Indonesia have had extensive interaction since the integration of Islam into the religious practices of Indonesian society. In that interaction, Islamic law may operate concurrently with customary law inside the community (theory of *receptio in complexu*) or may be integrated into customary law (theory of *receptio*). The interplay between Islamic law and customary law results in an accommodation that introduces a novel aspect to inheritance law. A novel provision in Indonesian law is the obligatory will for the inheritance rights of adopted children as stipulated in Article 209 of the Compilation of Islamic Law. Article 209 of the Compilation of Islamic Law (KHI) introduces a novel concept acknowledging that adoption exists within the Islamic community, despite not establishing a legal relationship between the adopted child and the adoptive parents. *Wasiat wajibah* is a concept that diverges from the traditional understanding of a will in Islamic law. *Wasiat wajibah* occupies a position between a will and inheritance in its execution. The testator, before to their demise, failed to clearly or indirectly designate the recipients of their property, which defaults to their heirs. In practice, the interpretation of Article 209 of the KHI has broadened to encompass not just adopted children but also other relatives who, under Islamic law, are prohibited from inheriting. This expansion of meaning significantly risks diminishing the proportion of primary heirs; thus, it is essential to establish precise criteria for recipients of the mandatory bequest that align with the intent of safeguarding the civil rights of adopted children. The requirements for the legal relationship between an adopted child and adoptive parents might serve as a foundation for establishing an obligatory will excluding adopted children. Furthermore, there exists the requirement of proximity or the absence of hostility between parties.

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⁴⁸ Agus Riwanto and Sukarni Suryaningsih, "Realizing Welfare State and Social Justice: A Perspective on Islamic Law," *Volkgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 2022, 41–51, <https://doi.org/https://doi.org/10.24090/volkgeist.v5i1.6430>.

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The term “urf” in this verse is defined as “ma’ruf.” Maruf encompasses the commendable customs of society that align with the principles of Islam. In the Quran, the term ‘maruf’ pertains to significant regulations, including those governing administration (n.d.).

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