The *wajibah* will

Alternative wealth transition for individuals who are prevented from attaining their inheritance

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**Abstract**

**Purpose** – The purpose of this paper is to identify the conditions of the *wajibah* (obligatory) will under compilation of Islamic law (KHI) and the application and rationale of *wajibah* wills in religious justice. The *wajibah* will is a form of judicial wealth transition that can deliver an inheritance to an heir who is not otherwise eligible for it. It is implemented in some Islamic countries, including Indonesia, based on the KHI.

**Design/methodology/approach** – This is a descriptive qualitative study that uses documentation as a data-collection method. This study applies the content-analysis method to the data collected.

**Findings** – The results of study indicate that, under KHI, a *wajibah* will only be given to adopted children. Nevertheless, in the practice of religious justice, the *wajibah* will is also granted to heirs of faiths other than Islam and to illegitimate children. The rationale for the *wajibah* will involves historical factors and public considerations.

**Originality/value** – This paper provides information on the practice of the *wajibah* will in Indonesia in view of the plurality of the Indonesian people. Thus, the *wajibah* will is an appropriate instrument to attain justness in the well-being of the community. This paper also attempts to give a critical review of the practice based on five necessities.

**Keywords** Indonesia, *Wajibah* will, Wealth transition, Compilation of Islamic law (KHI)

**Paper type** General review

**Introduction**

Islam is a religion of blessings for the universe, where all of mankind, whether Muslims or non-Muslims and having blood ties or emotional connections, live together and take pleasure in justice, harmony and peace (*Zuhdi, 2011*). This Islamic affection is applied in all aspects of life, whether religious, economic, social and political. In the economic aspect, for example, there are many statements that explain balanced economic sharing. For example, the principle of *zakat* is presented as an educational exercise because it improves the individual’s responsibility and his obligation to society and tears his sense of selfishness. Besides its appearance compulsory and *wajibah* dictated by Islamic law, *zakat* plays a leading role against the concentration of wealth in the hands of a minority social layer. So, it seeks equilibrium and social peace (*Syafullah, 2013*).

The same applies to the concept of Islamic inheritance. It is a form of equitable well-being for heirs based on proportional justice. The proportional justice is the balance between the shares to be gained and the uses and needs (*Syarifuddin, 2004*). The principle of the
proportional justice does not mean the equal distribution of shares to the heirs, rather it is a fair division based on the responsibilities that the heir has to bear (Hakim, 2016). For example, the sons are entitled to two portions compared to the daughters. This distribution is a form of justice for the reason that sons have greater responsibilities towards their parents and their families compared to daughters.

In the Islamic inheritance law, there are ordainments set by Allah that determine which of the relatives are entitled to inherit and the quantum share entitlement of each heir and those who are denied inheritance. However, in practice, there are differences of opinions on new matters relating to the transfer of inheritance such as the *wajibah* (obligatory) will. Within the Indonesian context, there are three different views on the decree of the *wajibah* will: the Sunni, Shia and Hazairin[1]. The last has the biggest influence in Indonesia (Dewi, 2013).

The *wajibah* will is considered a new finding which is not discussed in classical *fiqh* books. This instrument is not accepted among scholars; thus, only a minority of the clerics consented to it. Nevertheless, the *wajibah* will has been practised by Islamic countries to actualize Islamic jurisprudence in society, especially in the Indonesian pluralist society. In addition, the *wajibah* will is a representation of the nature of Islamic law that provides grace, justice, prosperity and welfare to mankind (Hidayati, 2012; Ilhami, 2015; Nugraheni et al., 2010). This is because of the realities in society, where sometimes there are individuals who are denied inheritance, although they have an emotional connection with the deceased. As a result, such individuals can inherit the estates of the deceased through the *wajibah* will. Thus, prosperity in the transition of the estate can be benefited even by the relatives who are not obligatory heirs. This is the argument as to why the *wajibah* will, which was derived from the views of the minority scholars, is practised by Islamic countries, including Indonesia.

In Indonesia, there are three types of regulation that govern the law of inheritance: The *Burgerlijk Wetboek* (BW) civil law which is known as (KUH) Perdata, the customary inheritances system and Islamic law of inheritances (Ramulyo, 1982; Basyir, 2003). The BW civil law is a legal system imported by Indonesia’s Dutch colonizers. It was in use during the 350-year colonial era and is still the current system for reaching legal judgements in Indonesia.

The customary law of inheritances consists of regulations that govern the transition of material or non-material wealth from one generation to the next. In Indonesia, it comprises three inheritance systems in practice: individual, collective and majority. The individual inheritance system is where wealth is bequeathed to heirs individually and it becomes their individual possession. The individual inheritance system is commonly practised by ethnic groups that have patrilineal customs, such as the Javanese, Batak and Sulawesi. Under the collective inheritance system, wealth is passed to a group of heirs collectively, but that wealth does not become their possession until permission is granted. This collective inheritance system is usually practised by communities with matrilineal customs, such as the Minangkabau people, and even in patrilineal communities such as Ambon. The majority inheritance system is where all or part of the wealth is inherited by only one son. This system is practised in Bali, where the right of the majority falls on the eldest son. However, in Samendo land (Lampung), the right of majority falls on the eldest daughter (Ramulyo, 1982).

The Islamic law of inheritances[2] is a legal system based on the holy Quran and the *ahaadith* and supported by the scholars through their interpretation (Muchsin, 2004). Islamic inheritance law is contained in the compilation of Islamic law (KHI) that was authorized by the presidential law instrument number 1 in 1991. It includes wills and *wajibah* wills.
This paper aims to identify the terms of the wajibah will in KHI, the practice and rationale of the wajibah will in the context of Islamic justice in Indonesia.

**Review of past studies**

A few studies have been conducted on the wajibah will, such as that of Tagoranao (2009) on the practice of the wajibah will in Islamic countries. This study found that in some countries such as Morocco and Malaysia, a wajibah will is only granted to a grandson who has lost his father. This is different from the practice in Egypt, where grants of wajibah will extend to granddaughters. In Pakistan, grandchildren who lose their parents replace their parents as heirs of their grandfather. Tagoranao (2009) concluded that even though the wajibah will is in practice in Islamic countries or even countries having a Muslim minority, there is no uniformity of practice. This finding is consistent with a study by Hidayati (2012) that examines the wajibah will in some Muslim countries.

The above conditions differ from those in Nigeria, where the Islamic community practises the Maliki school of thought which does not approve of the wajibah will. Therefore, if a grandfather passes away and leaves his orphaned grandchildren, they are not eligible for a wajibah will. In this case, two solutions are available: the grandfather can give a gift or a normal will to the orphaned grandchildren before he passes away (Ismael and Oba, 2017). This situation does not occur in Pakistan, where the grandchildren will become heirs by replacing the parents who had predeceased their grandfather. This was also found by Munir (2014) on his study of the pros and contras among scholars in Pakistan on the replacement of heirs.

Meanwhile in Malaysia, the wajibah will has been legalized by several states. Any laws regarding it have been standardized by the national committee meeting of the Islamic rulings board in the 83rd Islamic matter for the year 2008 (Nurul Syafini et al., 2017). Nevertheless, the enactments of wills in the states in Malaysia are not uniform because each state has its own authority to form laws based on Islamic matters (Musa, 2017).

A study on the wajibah will in Malaysia by Musa (2017) found that it is an alternative for granting the distant kindred heir. In this view, Islam does recognize extended family members. With distant kindred, the problem is that the family heir is always blocked from acquiring the inheritance because of the existence of sharers and residuary. According to the Shafie school of thought – which is followed in Malaysia – when there is an excess of wealth and no one to inherit, the wealth will be sent to the Islamic central treasury and not distant kindred. Therefore, the welfare of distant kindred can be realized by the wajibah will.

In Indonesia, unlike in other Muslim countries, many studies have debated the wajibah will; Abu Bakar (2011) and Hidayati (2012) have studied the practice of the wajibah will in the contemporary Muslim countries. Both authors conclude that the practice of wajibah wills in Muslim countries is only granted to orphaned grandchildren where the parents were already deceased. However, the practice in Indonesia was for an heir to replace parents who had died earlier. Karani (2010) compared the concepts of heir replacement in Islamic inheritance law and KUH civil law and found no difference in the concept of heir replacement between the two systems of law as long as the one replacing and the one replaced are both Muslims. However, the amount received is not always the same for the one who replaces in Islamic inheritance law; in KUH civil law, the portion received by the heir is the same as that of the replaced. This is supported by a study by Salam (2013) that analysed the concept of heir replacement in KHI.

Research by Aminuddin (2012) concluded that the concept of heir replacement originated with Hazairin and was later adopted into the compilation of Islamic law as a provision for heir replacement. Hazairin supported this by citing Quran (4:33), in which Allah states that
the heirs are responsible for the inheritance left by their parents, even close relatives. On this basis, KHI has managed to lift the status of grandchildren who are blocked by their uncles from obtaining their inheritance in Islamic wills. They are included in the distant kindred who are supposed not to receive their portion.

Dewi (2013) similarly argued that the diffusion of the concept of heir replacement is a dynamic in Islamic thinking that evolved from sources in the Quran and ahaadith that have been systematically developed by the scholars. According to this author, the guide is the teaching on wills from the Sunni, Shia and Hazairin. They have held that the basis of inheritance in Islam is mandatory but still provides chances for Muslim scholars to do interpretation or independent reasoning by looking at the conditions of today’s world (Dewi, 2013).

Apart from the study on the practice of heir replacement, many Indonesian researchers study the wajibah will for specific situations, such as its practice with adopted children (Afriyanto and Muhamed Said, 2015; Al-Fahmi et al., 2017; Amir, 2016; Muayyanah, 2010; Ramdhani, 2015; Usman, 2013) and for heirs who are not Muslims (Maulana, 2011; Muslimah, 2013; Nugraheni et al., 2010; Sarie, 2005; Tono, 2013).

Wajibah wills for adopted children were examined by Fitria (2010), who compared the inheritance rights of adopted children in Western law, Jambi customary law and Islamic law. Fitria (2010) found that according to Western law or the civil law inheritance system (KUH), the rights of adopted children are the same as biological children. This is consistent with research by Usman (2013) who found that the status of an adopted child in Staatsblad[3] 1917 no 129 is the same as if they were biological children of the adopted family. Adoption results in a family transfer from the biological parent to the adopted parent. Therefore, anything pertaining to an adopted child as heir is considered as if that child is a biological child. This differs from the Malay Jambi tribe that limits inheritance by gono gini (joint treasure) to one-third (Fitria, 2010).

In Islamic law, an adopted child is not recognized as an heir of the adopting parent. Furthermore, adoption sometimes results in the adopted child being no longer recognized as the child of his or her biological parent; thus, the adopted child is unable to inherit wealth from the biological parent. Nevertheless, the compilation of Islamic law and the 39 Phase of Number 23 Law for the year 2002 states that children can be adopted while ensuring recognition of their biological parents. Therefore, adopted children may be heirs of their biological parent.

The above study is consistent with research by Muayyanah (2010) that examined an adopted child’s status in the application of inheritance in the Kendal Department of Justice. The study found that adopted children will always be recognized as children of their biological parents and not their adopted parents. Adopted children cannot become heirs of their adopted family. However, adopted children have the right to inherit through a wajibah will, not in excess of one third of the inheritance. In this field study, a judge in Kendal awarded only one-eighth or one-tenth of the inheritance. This study is consistent with that of Pagar (2004), who found that adopted children may become heirs through the wajibah will but not exceeding one-third of the inheritance. This occurs if the heir has not included the adopted child in his or her will.

The use of the wajibah will for non-Muslim heirs was studied by Tiaraningtiyas (2014). It found that wills contain terms and conditions for Muslims which are a form of legal protection for non-Muslims, to ensure justice and freedom of religion as stated in the Quran and the Indonesian constitution. A Muslim heir must follow that will, and supplements the gap in law not covered by KHI.
The above study is consistent with an analysis by Sahriani (2009) of the September 1999 MA decision on the distribution of wealth to non-Muslim heirs in the same portion as Muslim heirs (MA 51.K/AG/1999 dated 29 September 1999). She supported this based on the Quran (2:180) and the opinion of Ibn Hazm that allows the transfer of *wajibah* will to an heir who is blocked from obtaining his or her portion. This condition is based on public interest or the sake of just religion that gives blessing to the whole universe and implies that Islamic law is not exclusive and strict. This is supported by Sarie (2005) who states that the *wajibah* will solves inheritance problems for non-Muslim heirs. It does not contradict the Quran and *ahaadith* and is even congruent with Islam’s view of the importance of giving love to all humankind.

Apart from the many studies that investigate *wajibah* wills in relation to adopted children and heirs of different religion, other studies consider illegitimate children in inheritance law. Hermawan’s (2012) study on illegitimate children found that there is a right to inheritance in both customary and Islamic justice. This is consistent with Zakiyah’s (2010) study comparing the status of illegitimate children in KHI and BW civil law. It concluded that under KHI, an illegitimate child has the right to inherit from the mother and the mother family, and vice versa. However, the child has no legal connection with the biological father as heir. Meanwhile, the rights of illegitimate children contained in the BW civil law are considered when there is an enquiry from the parental or maternal side. The suitable share of the inheritance has been stipulated in BW 863 phase.

The above study establishes the position of an illegitimate child as a biological child through maternal ancestry with a right to inherit from his or her mother. This is not so on the paternal side, where the child is not entitled to any inheritance, even if the father or the father’s family members are deceased.

The *wajibah* will, based on the study of Muhibbin (2012), can be considered an alternative to a judicial decision so that an inheritance can be granted to an heir or family member who is not otherwise entitled. According to these authors, the granting of a *wajibah* will is consistent with the Islamic principle of providing justice, love and affection to avoid conflict.

**Concept of *wajibah* will**

The *wajibah* will is a new term that has emerged in the twentieth century. It is not found in the classical *fiqh* books (Khairani, 2012). The term “*wajibah* will” consists of two words, “will” and “*wajibah*”. The word “will” (*wasiat*) comes from the root word “*ausa*”, meaning message, advice (Al-Baihaqi, 1985; Al-Suyuty, 1990; Turmudzi, 1974) or legislation (Al-Atsir, 1990; Ibn Faris, 1969; Basyir, 1979; Marbawi, 1990). According to Sayid Sabiq (1989), a will is a written document made by a living individual to be effective after that person’s death. The word “*wajibah*” originates from the word “*wajib*”, meaning compulsory. Therefore, a *wajibah* will is defined as a will that is compulsory. According to jurists (*fuqaha*) a *wajibah* will is a will that must be given to possible heirs who are not otherwise entitled to inherit – as stated by Allah in Quran (2:180) (Al-Shiddieqy, 1987).

According to Usman and Somawinata (1997), a *wajibah* will does not depend on the deceased’s will, but must be implemented either vocally or not. The grant by *wajibah* will is not based on evidence apart from that based on the specific legal reasoning. Ibn Hazm (1983) also suggested that when a will is not implemented for family members and close relatives who are not entitled to the inheritance, a judge must act to grant some of the heir’s wealth to them as a compulsory will for them. The same definition is also found in the Islamic law encyclopaedia, where a *wajibah* will is one that is allocated to heirs or relatives who have not inherited wealth from the deceased because of some barrier in Islamic law. For example, a
grandchild who has not inherited from the grandfather because he is being blocked by their uncle (Dahlan, 1996).

A *wajibah* will is a form of wealth transition by inheritance from the deceased to an heir who was not otherwise entitled to obtain it. It is done by a judge without the agreement of the testator. Among the jurists, the *wajibah* will is controversial: some jurists permit it while some do not. Nevertheless, the *wajibah* will has been practiced in some Islamic countries such as Egypt, Tunisia, Syria, Morocco and Malaysia. In these countries, the *wajibah* will is a form of wealth transition from a grandfather to his grandchild when the father or mother has predeceased him (Abu Bakar, 2011; Hidayati, 2012).

However, the *wajibah* will in KHI (the compilation of Islamic law) is not used for a grandchild whose parent has passed away unless the child is adopted. Meanwhile, grandchildren who have lost their parents in the context of Indonesian KHI are said to be the heir replacements, as mentioned in Clause 185:

- Heirs who have passed away earlier than the testator can be replaced by their children, except those who are mentioned in clause 173[4].
- The portion of the heir replacement cannot exceed the portion of heirs who are on the same level as the replacer.

The concept of heir replacement is also practised in Pakistan through the Moslem Personal Law of Pakistan, 1962, Clause 5, which states that grandchildren, either male or female, inherit the same share as would have been received by their father or mother (Mahmood, 1987).

In both Indonesia and Pakistan, grandchildren who have lost their mother or father before their grandfather will not inherit through the *wajibah* will, except if they replace their predeceased parents. A possible consequence is that the grandchildren may inherit more than the *wajibah* will portion of one third when they replace their parents.

The basis of the *wajibah* will is the same as the basis of the law of wills from Quran (2:180):

> Prescribed for you when death approaches anyone of you if he leaves wealth is that he should make a bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous.

However, in interpreting the above verse regarding wills, scholars have had differing opinions in its legitimisation of the *wajibah* will. Some agree and state that it is compulsory to implement a *wajibah* will. Others disagree and do not regard the *wajibah* will as the practice of the Prophet, or even permissible. Among the scholars that agree with the *wajibah* will are Ibn Jubair, Rabii', Qatadah, Muqatil, Ibn Abbas, al-Hassan, al-Razi, Sayyid Qutb and Abduh, (Usman and Somawinata, 1997). It is also the view of Ibn Hazm. The reason given by these scholars is that the compulsory mandate of Quran (2:180) applies to parents and relatives who are prevented from becoming heirs (Al-Jassas, 1994). This is asserted by Ibn Hazm, who stated that the order to make the will *ayah* is fixed and the law is still compulsory. The order is cancelled only for family that becomes heirs. When a Muslim dies and has not made a will beforehand, preventing the family from inheriting, the heirs have to take out some of the deceased’s wealth[5]. Apart from that, when this duty is not fulfilled, the leader (*ulul amri*) has to litigate the will to fulfil it (Al-Ainain, 1982).

**Research method**

The aim of this study is to determine the appropriate law for the *wajibah* will by using a qualitative and descriptive research design. It focuses on recent and current phenomena that are closely related to the *wajibah* will. Using this design, the researchers can better
understand the phenomenon and conduct further in-depth research (Piaw, 2006). The data sources that will be used in this study are primary, secondary and tertiary data. Primary data are direct sources of data from researchers. In this study, primary data are the sources of law from the Quran and ahaadith, the classical fiqh books, contemporary studies on wills – especially on wajibah wills – the compilation of Islamic law (KHI) and jurisprudence from premier Islamic courts related to the wajibah will.

Secondary data for this study come from sources that explain primary sources. These may be text books, journals, common research output or theses, archives, important notes and other documents that are related to the law and the wajibah will. Researchers also use tertiary sources that reference or explain primary and secondary sources. Examples are an English-Indonesian dictionary, an Arabic-Indonesian law dictionary, an Indonesian language dictionary and an Islamic law encyclopaedia.

The methodology for data collection in this study is the use of documents as data. This recorded the past in the form of writing, pictures and individual work (Sugiyono, 2014). In this study, documents used by the researchers are jurisprudence and court cases related to the wajibah will, regarding the different religion of heirs, adopted children or illegitimate children. The method for analysing this data is content analysis. Suryabrata (1988) revealed that this method only analyses textual data for its content. According to Barcus, content analysis is knowledgeable analysis of the content and specific communication (Muhajir, 2002).

The findings

Determination of wajibah wills in KHI

The determination of wajibah wills in KHI applies only to adopted children, as stated in KHI Chapter V on wills, Clause 209:

- The wealth left by the adopted child is divided into clause 176 to clause 193 as mentioned above, when an adoptive parent has not given the will, is granted with wajibah will to the amount of one third for the adopted child.
- If the adopted child is not granted the will, he/she is granted one-third of the will from the adoptive parent.

This clause explicitly indicates that a wajibah will is only given to adopted children who have lost their adoptive parents, with the share not exceeding one-third. Although the written law states this, in reality wajibah wills are also granted to those other than adopted children and parents. This is based on Supreme Court jurisprudence that granted a wajibah will to an heir who was not Muslim (Supreme Court RI number 368.K/AG/1995). In comparison, the Jakarta religious high justice has determined that a non-Muslim heir (a biological daughter) is entitled to a wajibah will as much as three-quarters of the inheritance. The Supreme Court has changed the share that can be inherited by a non-Muslim biological daughter to the same as that inherited by a Muslim daughter (Nugraheni et al., 2010). Apart from this case, the practice of wajibah wills is also extended to illegitimate children.

From this researchers’ point of view, the conditions of the wajibah will stated in KHI are different to that of other Islamic countries, where the wajibah will is granted to grandchildren who have lost their parents before their grandfather (Abu Bakar, 2011). Thus, when the grandfather passes away, the orphaned grandchild is granted the inheritance of his father so the grandchild is sufficiently cared for.

Nevertheless, some experts argue that the concept of wajibah will contained in KHI is new knowledge that should be duly appreciated (Tono, 2013) in the light of the sociology of the Indonesian community. The current researchers support the view of the majority who
suggests that the *wajibah* will is invalid law. Therefore, in practice there are heirs who have a right to inheritance but are classified as prohibited, for example, children of different religion. The heirs should accept the consequence based on their choice. In the current authors’ view, Islamic inheritance law is something that is ritualistic (Al-Adawi, 1996; Al-Fardiy, 1975; Al-Mardiny Al-Syafi, 1992), which is that all the conditions stated by Allah in the Quran and *ahadith* must be followed.

Practice of the *wajibah* will in Islamic justice and reasoning

*The wajibah will for adopted children.* The *wajibah* will for adopted children is stated in KHI, Book II on the law of wills, Chapter I on the common condition, Clause 171, Part (h):

An adopted child is a child in the care of a parent, the education is borne and the responsibilities are shifted from the biological parent to the adopted parent as decided by the judge (KHI, 1991).

The definition of an adopted child according to Law No 23, Year 2002, on child protection, Clause 1, Point 9 is that:

An adopted child is a child where his or her rights are shifted from the power of the parent, legitimate guardian or other people that are responsible in health, education and child development in the family circle of adoption based on judicial decision (KHI, 1991).

Based on these definitions, it can be concluded that the adoption of children is a transition of responsibility from biological to adoptive parents, and that everything relating to a child’s adoption and upbringing must be based on judicial decision.

In Indonesia, the adoption of children is a public necessity and has become community practice. The aim of adoption is to avoid the destruction of families who might not have children. Therefore, child adoption also has become part of the family law system because it is related to all family members (Usman, 2013).

The conditions stated in KHI regarding child adoption differ from customary law, where the adopted child may be regarded as the biological child of their adopted parent. The child is thereafter regarded as their offspring and the child’s relationship with the biological parent no longer exists. Such customary law is practised in the community on Bali. According to other customs, adoption does not break the relationship with biological parents, and the adopted child becomes a member of the adopted family but does not have the same status as the biological child regarding inheritance from the parents of the adoptive family. This custom is practised by the community in Java (Usman, 2013). There are thus different views in customary law regarding the status of the adopted child that influence whether they become heir to the adoptive parents.

Compared with the condition of adopted child in the civil law, the condition stated by KHI is more accurate. In the civil law (*Staatsblad* 1917 Number 129), the status of an adopted child with the biological parent ceases and his or her relationship is with the adoptive parent. The status of adopted children is equal to that of biological children and the former become heirs of the adoptive parent (Usman, 2013).

In these researchers’ view, the meaning of adopted child under KHI agrees with the terms under Islam, where child adoption regards the transition of responsibilities from biological to adoptive parents but does not sever the relationship between children and biological parents. This condition is explained in detail by Allah in Quran (33:4-5):

*Allah has not made for a man two hearts in his interior. And He has not made your wives whom you declare unlawful your mothers. And He has not made your adopted sons your [true] sons. That is [merely] your saying by your mouths, but Allah says the truth, and He guides to the [right] way (4). Call them by [the names of] their fathers; it is more just in the sight of Allah. But if*
you do not know their fathers - then they are [still] your brothers in religion and those entrusted to you. And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful (5).

The above verses explain that the status of adopted children in Islam is not the same as biological children, and that the relationship of adopted children to the biological parent still exists and is not extinguished by adoption. Islam teaches that an adopted child is not associated with the adoptive parent, but with the biological parent. In the matter of adoption, Islam allows and encourages adoption, but it must be limited to giving care through love, education and fulfilling other needs that cannot be met by the biological parent. According to Usman (2013), adoption is allowed in Islam when it fulfills the following:

- The relationship with the biological family is not broken.
- The adopted child will not be heir to the adoptive parent, and vice versa, but heir to the biological parent.
- An adopted child is not allowed to directly use the adoptive parent’s name.
- An adoptive father cannot be the guardian in the adopted child’s marriage (p. 141).

Along with providing limitations to child adoption, KHI stipulates inheritance law for adopted children in Clause 209, which states that “an adopted child who is not included in a will is granted a wajibah will that cannot exceed one third of the wealth” (KHI, 1991). In other words, the wajibah will in Indonesia is granted to adopted children only because there is a strong relationship with the adoptive parent. The grant of wajibah will occurs when the adoptive parent has not made any will. The conditions under KHI aim to provide justice where adopted children and parents have strong emotional bonds between them: it seems unjust for adopted children to not receive any wealth from their adoptive parents (Nugraheni et al., 2010).

The terms of KHI, Clause 209, are rational and provide justice to all. Nevertheless, from these authors’ perspective, adopted children should not be granted a wajibah will from their adoptive parents for several reasons:

- According to Islamic law, adopted children do not have any law covering them and are regarded as outsiders to the adoptive parent. Adopted children have no blood relationship with their adoptive parents, and it is considered justified when they are not entitled to any wealth when the adoptive parent passes away. What should matter is that the adoptive parent has responsibilities to care for and fulfill the needs of the adopted child, either material or non-material[6].
- Adopted children have been supplied with all necessary needs for life. This is supposed to be enough for adopted children, and it is therefore not compulsory for adoptive parents to include adopted children in their wills. If an adopted child has provided for their parents and are kind to them, this should not be a reason for an adoptive parent to grant the wajibah will to the adopted child as repayment from the adoptive parent.
- When an adopted child is granted a wajibah will, while other family members who are closer are not, this may arouse the jealousy of other family members because the adopted child is from outside the biological family and has no blood relationship, whereas other family members have. Therefore, biological family members are most eligible for the wealth of the deceased. Additionally, giving charity to closer members is preferred over giving it to other people[7].
The wajibah will for heirs of different religion. In KHI, that there is no explicit provision that a wajibah will can be granted to an heir of a religion that is not Islam. However, in practice, there has been a decision by religious judges that granted a wajibah will to heirs of different religion (Decree of the Supreme Court RI, 1999). In this decision, the judge determined that non-Muslim heirs are entitled to the same inheritance as Muslims heirs. This decision has become a precedent for other judges.

In Indonesian society, many families in different regions consist of members of different religions and faith. This is because Indonesia recognizes six religions and there can be no compulsion in choice of religion, even one different from parents. However, from these researchers’ perspective, when a family member dies, an heir of a different religion is not entitled to the inheritance, even though they are entitled by blood relationship. It is agreed by the majority of scholars that one barrier to inheritance is difference in religion (Zahid, 1982; Musa, 1967; Al-Sabuni, 2002; Abd. Hamidi, 2006).

In the case mentioned, the judge decided on matters that are not in KHI and which even contradict the fixed rules of the Quran and ahaadith. Nugraheni et al. (2010) suggested six reasons that guided that judge’s decision. The first is that the prohibition on granting inheritance to non-Muslims arose from circumstances during the war between Muslim and non-believers during the time of the Prophet. Such a prohibition aimed to safeguard the faith and the wealth of the Muslim community from non-Muslims to allow their wealth to assist the Muslims in this conflict. Such conditions do not pertain now, so this condition does not apply. Secondly, the judges considered methods of sociological interpretation in making new law, giving them valid reasoning and authority in discovery of law (Riyanta, 2008).

The third is the use of argument from analogy in the discovery of laws, where the judge used the concept of equality to grant a wajibah will to an heir with a different religion as analogous with an adopted child. Fourthly, inheritance law in Islam is not flexible in comparison with Indonesian national inheritance law, which has prompted the majority of Muslim to not use Islamic law but choose other legal systems for wills. However, the granting of a wajibah will to an heir with a different religion presents a positive picture of Islamic law which is not exclusive and discriminatory and where non-Muslims do not seem under the control of Muslims. A fifth reason is that choice of religion is a human right whereas, explicitly in KHI, difference of religion bars someone from inheritance (KHI, 1991: c.173). Sixth, and lastly, the existence of basic law allows divergences in legal theory.

The findings of this study also are supported by the work of Tono (2013), who highlighted a case of granting a wajibah will to an heir who was non-Muslim. According to the judge, the granting of wajibah wills is new practice in Islamic inheritance law in Indonesia and other Islamic countries. Even Egypt, Syria, Morocco and Tunisia only grant wajibah wills to grandchildren who have lost their parents earlier. He supported the judge’s decision because granting the wajibah will to heirs who are non-Muslim will present Islam as non-discriminatory to other religions. Additionally, the status and practice of Islamic law will be maintained in comparison with other legal systems in Indonesia. Furthermore, Islam does not prevent its believers from doing good and being just towards non-Muslims, as stated in Quran (60: 8): Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes – from being righteous towards them and acting justly towards them. Indeed, Allah loves those who act justly.

An additional consideration, according to Tono (2013), is that when a decision by a judge is analysed by judicial methodology, this is a discovery of law based on a method that means that “law, according to its importance, either exists or not”. This is further supported by another method which states that “the existence of human (community) is a condition for
custom, from which, therefore, law will develop and be diffused with the need of the society”. Plus, there is a foundational method that states “changes in law are due to changes in time and place”.

Although there were many arguments given by the judge on the granting of the *wajibah* will to a non-Muslim heir, these authors do not agree with this view and rather hold that in inheritance law, difference in religion is a barrier to inheriting through the *wajibah* will. These authors support the finding of Nugraheni et al. (2010) that among academics, many reject the granting of *wajibah* wills to heirs of different religion. Firstly, such a difference creates a barrier to receiving wealth according to the conditions in the Quran and *ahaadith*, which are the main legal references in Islam. The evidence that heirs of different religions are blocked from inheritance is stated in Quran (66:6):

> O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones, over which are [appointed] angels, harsh and severe; they do not disobey Allah in what He commands them but do what they are commanded.

This verse has become the foundation for families to protect members from matters that can ruin their faith and belief, directly or indirectly. A Muslim must work hard to protect, preserve and avoid divergence from the faith, either for themselves or other family members. Therefore, difference in religion becomes the principal reason that an individual is blocked from attaining inheritance, even though they are from the same family and have a legitimate blood relationship. This is the practice derived from the above verse. The aim of this prohibition is to prevent Muslims from deviating from Islam.

In addition, the condition concerning different religions becoming a barrier to attaining inheritance is in accordance with Allah’s law. When a Muslim obeys this law, Allah will give the reward of paradise; conversely, when a Muslim disobeys it, the consequence is hellfire, as stated in Quran (4:13-14):

> These are the limits set by Allah, and whoever obeys Allah and His Messenger will be admitted by Him to gardens in Paradise under which rivers flow, abiding eternally therein; and that is the great attainment (13). And whoever disobeys Allah and His Messenger and transgresses His limits – He will put him into the Fire to abide eternally therein, and he will have a humiliating punishment (14).

The legal wording here refers to the conditions on inheritances. This verse emphasizes that a non-Muslim heir should be blocked from receiving the inheritance because he disobeys Allah’s law. This issue is also supported by *ahaadith* as the secondary law in Islam, as narrated by Bukhari and Muslim from Usamah bin Zaid:

> A Muslim should not bequeath to a non-Muslim, and also a non-Muslim shall not inherit from Muslims. (Al-Asqalany, 1998, p. 60)

For the above reasons, the condition of having a religion other than Islam being a barrier to inheriting wealth has a strong basis in Islamic law sources. Therefore, this condition should be followed as stipulated by the law contained in the Quran and *ahaadith*.

Secondly, the aim of Islamic law is to protect five necessities. The aim of Islamic law is to create peace in human life, either in this world or in the hereafter. The next aim is detailed in the specific definition of five necessities. According to this, there are five necessities in Islamic law: to protect religion, life, reason, descendants and wealth (Ali, 1996). The practice of these aims is in sequence: in the previous aim has priority over the succeeding aim. Therefore, to protect religion must be done with all might, life, reason and even wealth. Thus, granting the *wajibah* will to non-Muslim heirs must be referred to the aims of Islamic law in five necessities.
The practice of the first five necessities is to strengthen the prohibition on non-Muslims acquiring inheritance from Muslims. In other words, the aim to protect the faith of a Muslim can thus be attained. Although Islam recognizes and protects the attainment of wealth for individuals, this cannot interfere with faith and belief. Faith is the priority that should be protected in consideration of inheritance. In the Quran, there are many verses that explain that differences of religion among family members can mean that they are actually not like family of blood relationship. For instance, in the story of Prophet Noah, he wanted to save his son from the flood, but Allah did not want him saved because the son was not regarded as Noah’s family (Quran 11:45-46):

And Noah called to his Lord and said, “My Lord, indeed my son is of my family; and indeed, Your promise is true; and You are the most just of judges!”

He said, “O Noah, indeed he is not of your family; indeed, he is [one whose] work was other than righteous, so ask Me not for that about which you have no knowledge. Indeed, I advise you, lest you be among the ignorant”.

The above verse clearly explains that even though human law on earth sees family members of different religion as members of the family owing to blood relationships, Allah’s view is that family members of different religion are no longer regarded as family. Therefore, from the above arguments, the granting of a wajibah will to heirs of a different religion cannot be accepted. Even for judges using basic considerations of justice among family members, this is against the conditions of the Quran and ahaadith.

Thirdly, it is contradicted by the conditions of formal jurisprudence in KHI. When analysed closely, the judgement granting a wajibah will to an heir of a different religion contradicts the formal law in KHI, which states that an heir must be Muslim; this is stipulated by the public term Clause 171, Point c, Chapter I:

An heir is the one who at the moment the testator dies, has blood relationship or marriage with the deceased, is Muslim and does not abstain from the law by becoming the heir”.

This clause clearly shows that family members of different religion are not, in the current researchers’ view, considered the heir, even if they have a blood relationship. However, difference in religion is also not considered as barrier to inheritance under KHI, only factors such as criminal acts are barriers to inheritance. Therefore, bequeathing wealth to non-Muslims is against the terms of the formal law. In these researchers’ view, when a person has a family member of a different religion, and he has not been included that family member in his will, a judge should not grant inheritance through a wajibah will.

Wajibah wills for illegitimate children. In the matter of an illegitimate child, the conditions stated in KHI only devolve on two matters: the definition of a legitimate child, and that of an illegitimate child. A legitimate child according to KHI, Clause 99 on child protection, is a child from a legitimate marriage, or is the product of fertilization outside of the womb that comes from a husband and wife and is delivered by the wife.

The conditions of Clause 99, according to these researchers, are identical to Islamic law. An illegitimate child, on the other hand, is a child of adultery, conceived in a way that contravenes Islamic law (Al-Zuhaily, 1984). According to Makhlufl (1976), an illegitimate child comes from an unlawful relationship between a man and a woman. The meaning of “unlawful relationship” is a relationship between two people that is not bound by marriage, either voluntarily or by rape. It does not matter if the subject is married or not. This view differs from the civil law, which states that an illegitimate child is one conceived outside of
legal marriage and not regarded as a product of adultery (Muhibbin, 2012). According to customary law, there are five definitions of an illegitimate child:

1. a child born before the mother’s marriage;
2. a child born after the parent has been divorced;
3. a child from adultery who is not from the husband;
4. a child of unknown paternity; and
5. a child that was born outside of a legal marriage (Hadikusuma, 1999).

The term of the law on illegitimate child is based on the narration of the prophet (p.b.u.h) as narrated by Bukhari from Musaddad:

Child is for the bed, while for the adulterer is stoning (Al-Asqalany, 1998, p. 45).

This hadith above explained that a legitimate child comes from legitimate marriage, while the punishment for producing an illegitimate child is death by stoning.

Next, KHI covers inheritance regarding a child born outside a legitimate marriage. In Clause 100, a child born outside a legitimate marriage may claim lineage from the mother and her family only (KHI, 1991). Clause 186, Chapter III states that “a child that is born outside the marriage only has a relationship and becomes the heir of the mother and the mother’s family only” (KHI, 1991). This provision explicitly states that an illegitimate child cannot inherit from his/her biological father. However, the Islamic Jurist Council of Indonesia (MUI) has a different view of the status of an illegitimate child regarding the biological father. According to the rulings of the MUI, Number 11, Year 2012, on the status of children from adultery and their treatment:

1. Adultered child has no lineage relationship, no representative in marriage, inheritance and maintenance with the man who caused his/her birth.
2. Adultered child only has lineage relationship, inheritance and maintenance with the mother and mother’s family.
3. Adultered child does not bear the sins of the adultery committed by the one that caused his/her birth.
4. Adultery will be punished for the sake of protecting the lineage.
5. The ruler can decide on punishment of discretion for a man who commits adultery that caused the birth of the child by:
   • fulfilling the child’s life needs; and
   • granting inheritance after his decease through a wajibah will.
6. Punishment based on number (5) is meant to protect the child, not to validate the lineage relationship between the child and the man who caused the birth. (Rulings of MUI, 2012, p. 10).

The aim of the MUI is to protect the rights of the child by adultery, not to giving lineage responsibility to the biological father. Instead, giving discretionary punishment to the biological father fulfils his responsibilities towards the child and bequeaths the wealth through the wajibah will after his decease.

Punishment through discretion for the man who fathered the child outside legal marriage first aims to provide justice and protect the child so that he/she will not suffer discrimination and isolation. Secondly, it makes the biological father responsible for his action that caused
the child’s birth from adultery. Thirdly, it serves as a precaution and reminder to others not to commit adultery.

This MUI ruling granting the *wajibah* will to illegitimate children as a discretionary punishment to the biological father is not consistent with the conditions stated in KHI. Some judges follow the KHI condition while others follow the MUI rulings[11].

However, analysis reveals that the KHI conditions regarding illegitimate children are consistent with Islamic law because the child only becomes the heir of the mother and her family only. This is also the view of the four Islamic schools of thought (Hanafiah, Malikiyah, Shafi’iyah and Hanbaliah), who agree that a child from adultery only receives the lineage of the mother’s side and does not have any relationship with the biological father, either in marriage or inheritance law. Even if the man recognizes the child as his own, this recognition is not valid because the child is the result of an illegitimate marriage. However, a different view from Ibn Taimiyah recognizes the lineage of an illegitimate child as being that of the biological father because the burden of adultery is upon the wrongdoer both in this world and in the hereafter, and not on the child (Al-San’any, 1995). Nevertheless, KHI takes into account that the majority of scholars reference the problem of illegitimate children as stated in its clauses.

In *fiqh* determinations of inheritance law, an illegitimate child cannot become the heir of the biological father, even if the father recognizes the child. In this matter, a child from adultery has the same status as a damned child[12] who can only inherit from the mother’s lineage. Wahbah al-Zuhaily (1984) stated that according to Maliki scholars, adultery is one of the main reasons why a child is unable to become the heir of the father’s lineage. This view is held by the four schools of thought and Shia Imami (Al-Zuhaily, 1984). This is based on the Prophet’s *hadith* (p.b.u.h), narrated by Amr bin Shuaib from Tirmizi (1974):

A man who commits adultery, either free or slave, therefore the child is an adulterous child who cannot become the heir and received the wealth. When a woman conceives the child, the child is under her lineage. (Al-Shaukany, 2005, p. 450).

Thus, Islam strictly states that illegitimate children do not have lineage and do not become heirs of the biological father. The current researchers support the rulings of the MUI that gives discretionary punishment to the biological father who caused the child to be conceived outside of legal marriage. Nevertheless, it should not be in terms of a *wajibah* will but in another form such as a normal will or gift. The aim is for the father to be responsible for the sin he has committed.

**Conclusion**

The *wajibah* will is a form of wealth transition, the implementation of which does not depend on the desire of the deceased but must be implemented either vocally or not. The grant of a *wajibah* will is not based on evidence but on reasoning and certain laws. A *wajibah* will that can be implemented without the knowledge of the deceased and granted to heirs who are not entitled is a new innovation in Islamic heir law, even though this has been debated among scholars. However, the concept of *wajibah* will popularized by Ibn Hazm is practised in some Islamic countries where heirs are blocked from inheritance because they are grandchildren. This study found that the practice of *wajibah* will in Indonesia is not the same as the practice in other Islamic countries where the *wajibah* will is granted to grandchildren whose parents have previously passed away. In Indonesia, as stated in KHI, the *wajibah* will is granted to adopted child because of the emotional bond between the adopted child and the adoptive parent and in fulfilment of justice. This condition is regarded as rational and fulfilling justice; however, examination of Islamic law shows that children
with adoptive parent do not have any lineage relationship, which means that the child cannot become the heir. Apart from that, in fulfilment of justice, family members who have blood relationships with the deceased have more right to inheritance than adopted child who are not related by blood.

However, the condition of *wajibah* will in KHI has been implemented in religious justice. Furthermore, in practice judges have granted the *wajibah* will to heirs of different religion, reasoning that Indonesia is a plural community and this fulfils society’s needs fairly. Indonesia is known to be open to many religions and people are free to choose according to their belief. However, when a person is a Muslim, he or she must abide by every Islamic teaching, including conditions that disallow non-Muslims being heirs of Muslims. This condition should be considered by family who are of different religion and should be considered by individuals when choosing a different religion from their parents. Therefore, family members of non-Islamic religion should not inherit as they are considered forbidden. Even though inheritance is granted through a *wajibah* will. This is done to protect the five necessities, with preservation of religion as the main priority.

Furthermore, in the practice of religious justice, judges sometimes make decisions to grant a *wajibah* will to illegitimate children, although this is not authorized in KHI. In KHI, the only provisions available are for illegitimate children and descendants of a child who is related only to the mother and maternal family. The judge’s decision to grant a *wajibah* will to the said child was based on the MUI rulings that prescribed discretionary to a man for committing adultery, in the form of a *wajibah* will to the illegitimate child. This practice is to provide protection to the child who should not bear the sins of the parent. The provisions of KHI regarding the status of illegitimate children under Islam agree with the majority of scholars. The form of discretionality that should be given by the biological father to the child needs not be in the form of a *wajibah* will; it can be in another form, such as *gift* or a normal will. These forms can represent Islam is a religion of mercy for the universe without violating to the command of Allah.

In relation to this issue, universal economic justice in Islam is contained in the provisions in the Islamic inheritance law itself, where there is no *wajibah* will to the heirs who are blocked from inheritance. If the testator wants to give his wealth to the heirs who are blocked from inheritance, then he can give it through ordinary grants or wills. This is caused Islamic inheritance law is predetermined law that is definitive, based on the Quranic verses and the *ahadith*, without accepting any additional terms from humans. Therefore, each term and condition regarding inheritance is a form of ritualistic that must be followed by every individual Muslim in any circumstance.

This has implications for justice in Islam where justice desired in Islam is just to the God. This means that every Muslim has been given right by the God that he must be able to act according to God's order on him. Justice in Islam relies on truth and not only lust. In Islam, justice takes into account the balance of various needs to prioritize common benefit than special benefit. Justice in Islam aims to achieve benefits for human beings, both in the world and in the hereafter.

**Notes**

1. Hazairin is an expert in customary inheritance law and Islamic inheritance law. He is one of the prominent reformists in Islamic law in Indonesia who initiated the bilateral inheritance system (Hammad, 2014; Wahidah, 2015).

2. This Islamic inheritance system is, of course, the legal system required by Muslims and is expected to be used as a law in Indonesia, especially given that the majority of Indonesian citizens are Muslims.
3. Staatsblad is references containing any publications, whether in the form of information, rules, legislation or policies issued by the state or government that was in power at the time of Indonesia’s independence.

4. Article 173 contains: “a person is prevented from being a heir if the decision of a Judge who has a fixed legal force, shall be punished for: (a) The blame has been murdered or attempted to kill or persecute the successor. (b) defamatory blame has filed a complaint that the heir has committed a crime which is threatened with a 5-year sentence or heavier punishment” (Enactment RI, 2012, p. 376).

5. Ibn Hazm also states that “it is compulsory for every Muslim to have a will to relatives who do not accept the property of the heirs either because of slavery, the difference of religion, being hindered or being non-heirs. He should make a will as he wants to, no limits. If he dies and does not make a will, then heirs must give those who are considered worthy”. Ibn Hazm added that if his parents or one of the two is of a different religion, or a slave, it is obligatory for him to give a will to both or one of them even if he did not make a will (Ibn Hazm, 1983, pp. 313-314).

6. This is an interpretation of Quran (33:4-5), which states that dealing with adopted children differs from dealing with biological children. Besides, the relationship of adopted children to the biological parent still exists and is not extinguished by adoption.

7. These are the Qur’anic verses that promote doing good to closer family first (2: 86 & 177; 4: 7; 16: 90; 17: 26; etc.).

8. Article 22 AB and Article 14 of Law No. 14 of 1970: “Judge cannot refuse to adjudicate the case submitted to him by reason of incomplete or unclear legislation which regulates it but it is obliged to prosecute” (Samsudin, 2014).

9. The 1945 Constitution in Article 28E verse 1 reads: “Every person is free to embrace religion and worship in accordance with their respective religions and beliefs.” Also, Article 28J verse 1 reads: “Every person shall respect the human rights of others in the order of life in society, nation and state.” Also, Article 28D verse 1 reads: “Every person shall have the right to be free from discriminatory treatment on any basis and entitled to the protection of such discriminatory treatment” and “everyone is entitled to the recognition of a guarantee of fair protection and legal certainty and equal treatment in front of the law” (Constitution RI 1945, p. 13) available at: http://jdih.pom.go.id/uud1945.pdf (accessed 25 December 2017).

10. Discretionary is a type of punishment for non-criminal in which its forms and degree depend upon the policy of leaders (Rulings of MUI, 2012, p. 9).

11. Like the jurisprudence of the Supreme Court of the Republic of Indonesia no. 179/K/SIP/1960 dated 23 October 1961: based on the sense of humanity and common justice on the equality of rights between legitimate and illegitimate children, illegitimate and legitimate children are entitled to inherit from common property. In other words, it is considered legitimate (M. Muhibbin, 2012, p. 305).

12. Mula’anah is a child born of a mother who is dismissed by her husband and affirmed by the oath of li’an; then the nasab with the father is disconnected and all legal consequences are the responsibility of the mother (Sayid, 1989, pp. 276-277).

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