

Compulsory Testament: Efforts to Protect and Fulfil the Welfare Rights of Adopted Children in Indonesia's Islamic Inheritance System

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Abstract: The *wasiat wajibah* (compulsory testament) is part of the Islamic inheritance system. However, concrete rules of *wasiat wajibah* are not found in Qur'an and Hadith. Nonetheless, Muslim scholars in Indonesia, through the Compilation of Islamic Law, made a legal breakthrough by allowing the granting of a compulsory testament to the adopted children. This article analyses the Shari'ah bases of this compulsory testament as an effort to protect and fulfil the right to welfare for adopted children. The primary argument of this article is that requiring a compulsory testament for adopted children is beneficial not only to individuals or specific groups, but also to all human beings. In Islamic law, compulsory testament for adopted children is categorised as *hadhanah* (efforts to care for adopted children) to maintain both their physical and spiritual health, seek their education, and overcome their economic problems. Therefore, when granting a compulsory testament to adopted children, a judge must prioritise their welfare.

Keywords: Adopted Children; Welfare; *Wasiat Wajibah*; Compulsory Testament

I. INTRODUCTION

Islam is a universal religion comprised of three major components: faith, Shari'ah, and morals. As part of Islamic teachings, Islamic law has the *maqāṣid asy-syarī'ah* (objective of law) of protecting the most important values, which are religion, the soul, mind, lineage, and property.¹ The fifth goal is classified as a *maqāshid ad-darūriyât* (primary need) or an emergency goal. One of the provisions regulated in Islamic law is the issue of inheritance, which is part of Islamic family law known as *fiqh mawaris* (Islamic inheritance law).² Inheritance law as part of the Islamic legal system testament, of course, always refer to general legal principles. In Islamic law, there are seven principles: monotheism, justice, *amar bil ma'rūf wa nahi anil munkar* (enjoining rights and forbidding wrong), independence or freedom, equality or egalitarianism, cooperation, and tolerance.³ The Islamic system of inheritance adheres to the

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¹ Zainuddin Zainuddin, "Restorative Justice Concept on Jarimah Qishas in Islamic Criminal Law" (2017) 17 *Journal of Legal Dynamics* 335, 336.

² Defel Fakhadi, "Patriarkisme Hukum Kewarisan Islam: Kritik Hukum Waris Dan Kompilasi Hukum Islam" (in Indonesian) ['Patriarchism of Islamic Inheritance Law: Criticism of Inheritance Law and Compilation of Islamic Law'] (2021) 21 *Journal of Islamic Law* 1, 5.

³ Tedi Supriyadi, "Reinterpretasi Kewarisan Islam Bagi Perempuan", (in Indonesian) ['Reinterpretation of Islamic Inheritance for Women'] vol 14 (2016) <<https://ejournal.upi.edu/index.php/SosioReligi/article/view/5612>> accessed 2 December 2022.

idea of balanced justice, which states that everyone is treated fairly depending on his services or rights.⁴

As a general rule, Islamic law does not justify giving adopted children inheritance because, adopted children are not considered to be on the same level as biological children. Adopted children therefore does not inherit from their adoptive parents. Furthermore, Islamic law forbids the loss of an adopted child's identity, so the child must still be assigned to his biological father.⁵

It is undeniable that the bond between adopted children and their adoptive parents is so strong that parents almost always leave grants or testament for adopted children before their adoptive parents die.⁶ In Indonesian society, adoption tends to be appreciated and occurs frequently.

Therefore, the birth of a compulsory testament in the Compilation of Islamic Law is a response to the phenomenon of adoption, and adopted children are given material rights to inherit through compulsory testament.⁷ Adopted children do not fall under the descendants of the deceased due to the absence of an Intestate Succession Blood Tie. They may however inherit in terms of a bequest.⁸

The bloodline of the adopted child remains with his biological parents. As such, adopted children do not inherit a fixed share from their adoptive parents' and vice versa. Even so, adopted children still compulsory testament from their adoptive parents' estate and vice versa in accordance with Article 209 of Presidential Instruction of the Republic of Indonesia Number 1 of the Year 1991 on the Compilation of Islamic Laws.⁹

Adopted children are not heirs and thus do not share in the inheritance/compulsory. The only way for an adopted child to inherit from his adoptive parents is through a compulsory testament. Looking at the reality above, this compulsory testament is very much needed for adopted children to support their future lives, because that occur regarding adopted children who are not given a compulsory testament even though the adopted child requires it. Some adopted children are forced into debt just for the sake of their survival.

Various studies regarding the obligatory placement of adopted children have been carried out previously. Search results on Google Scholar using Harzing's Publish or Perish application (Windows GUI Edition) 8.6.4198.332. There are three keywords entered, namely: "compulsory testament", "adopted children", and "child welfare", so from 2010 to 2022, data were found on 18 studies related to compulsory testaments on adopted children. Furthermore, based on bibliometric analysis, visualize the results of the analysis. In VOS Viewer, the

⁴ Zainuddin, Salle and Andi Risma, 'Balanced Justice in Islamic Inheritance to Realize Unity and Sustainability of Collective' 3rd International Conference on Business Law and Local Wisdom in Tourism (ICBLT 2022) (Atlantis Press SARL 2023) <http://dx.doi.org/10.2991/978-2-494069-93-0_9> accessed 2 February 2023.

⁵ Subiyanti, Jumadi Purwoatmodjo and Budi Santoso, "Implementasi Wasiat Wajibah Untuk Anak Angkat Menurut Kompilasi Hukum Islam" (in Indonesian) ['Implementation of Compulsory Testament for Adopted Children According to Compilation of Islamic Law'] (2019) 12 *Rinjani Scientific Journal* 313, 315.

⁶ Nadya Faisal and Asni Zubair, "Wasiat Wajibah Terhadap Anak Angkat (Tinjauan Filsafat Hukum Islam Pasal 209 Kompilasi Hukum Islam)" (in Indonesian) ['Compulsory Testament Against Adopted Children (Review of Islamic Law Philosophy to the Article 209 Compilation of Islamic Law)'] (2017) 3 *Ar Risalah: Jurnal Hukum Keluarga Islam* 75, 77.

⁷ Ismail, "Testaments of "Wajibah" and Renewal Thoughts of Islamic Inheritance Law in Indonesia" (2021) XXI *INNOVATIO: Journal for Religious Innovation Studies* 122, 124.

⁸ Sheikh Khalid Abduroaf, *Deceased Estates: Islamic Law Mode of Distribution* (Second Edi, Highlands Waqaf Trust Publishers 2018) 43.

⁹ Senen and Abdullah Kelib, "Implementasi Bagian Wasiat Harta Waris Anak Angkat Dalam Kajian Kompilasi Hukum Islam (KHI)" (in Indonesian) ['Implementation of Inheritance of Adopted Children in the Compilation of Islamic Law (KHI) Study'] (2019) 2 *Jurnal USM Law Review* 52, 54.

computer program used to visualize the bibliometric map, it was found that there was only 1 cluster identified out of 8 items, namely the green cluster on the overlay visualization menu, meaning that research related to compulsory testaments on adopted children is rarely carried out to the protection and fulfilment of rights in child welfare.

Based on the above data, the authors formulated the following research issues: How is the protection and fulfilment of the welfare rights of adopted children ensured through a compulsory testament in the Islamic inheritance law system? This article is also equipped with an explanation of the theoretical basis for the concept of compulsory testament in the Islamic inheritance law system and compulsory testament for adopted children from the perspective of *maslahah al-`ammâh* (public interest).

II. THE CONCEPTION OF COMPULSORY TESTAMENTS IN THE ISLAMIC INHERITANCE LEGAL SYSTEM

The term *washîyyah* (compulsory) is taken from *washaitu-ûshi asy-syai'a*, (I convey something). In *Shari'ah*,¹⁰ a testament is a gift of objects, receivables, or benefits by a person to another person, provided that the person who is given the testament have the gift after the death of the person making the testament. In terminology, a testament is a gift from one person to another in the form of goods, receivables, or benefits to be owned by the person who was given the testament after the person who made the testament has died.¹¹

Another meaning of compulsory is a *tasharruf* (release) of inheritance that is carried out after someone dies. According to the origin of the law, a testament is an act done voluntarily under any circumstances. Therefore, in Islamic law, there is no testament that is not carried out by way of a judge's decision.¹²

The testament is not only known in Islamic law but are also known in civil law. A testament in Dutch is known as the arrangement of which is contained in Book II of the Civil Code (KUH Perdata), so it is not included in the category of contract law. It is said that a testament is a deed that contains a person's statement about what he wants to happen after he dies, which can be revoked. If a similarity is drawn between testament in Islamic law and those in the Civil Code, then both are equally valid after the testator dies.

Meanwhile, the concept of compulsory testament is not formally defined. Some experts have however provided a definition of "compulsory testament", such as Bismar Siregar, who stated that it is a testament intended for heirs or relatives who do not receive a share of the inheritance from the person who died due to a Shari'ah obstacle. Meanwhile, Eman Suparman comments in his book that the compulsory testament is a testament whose implementation is not influenced by or does not depend on the wishes of the deceased.¹³

Another definition of a compulsory testament is an act carried out by a ruler or judge as a state apparatus who forces or gives a compulsory testament for a person who has died, which is

¹⁰ According to John Esposito, *Shari'ah* is God's eternal and immutable will for humanity expressed in the Quran and the Sunnah. See Raficq S Abdulla, and Mohamed M Keshavjee, *Understanding Sharia: Islamic Law in a Globalised World* (IB Tauris in association with The Institute of Ismaili Studies 2018) xiii.

¹¹ Eko Setiawan, "Penerapan Wasiat Wajibah Menurut Kompilasi Hukum Islam (KHI) Dalam Kajian Normatif Yuridis" (in Indonesian) [*'Application of Compulsory Testament According to the Compilation of Islamic Law (KHI) in Normative Juridical Studies'*] (2017) 2 *Muslim Heritage* 43, 44.

¹² Siska Lis Sulistiyani, "Hukum Perdata Islam: Penerapan Hukum Keluarga Dan Hukum Bisnis Islam Di Indonesia" (in Indonesian) [*'Islamic Civil Law: Implementation of Family Law and Islamic Business Law in Indonesia'*] (Sinar Grafika 2018) 130-131.

¹³ Syafi'i, "Wasiat Wajibah Dalam Kewarisan Islam Di Indonesia" (in Indonesian) [*'Compulsory Testament in Islamic Inheritance in Indonesia'*] (2017) 02 *Journal of Misykat* 119, 119.

given to certain people under certain circumstances. So, a compulsory testament is a testament that is deemed to have been made by someone who died, even though he did not leave the testament.¹⁴

A testament is primarily concerned with what and who the subject who gives it desires. However, when the testament is based on the word “compulsory”, the fulfilment is more concerned with determining who is deserving and entitled to receive the assets left behind (even though there was no prior testament). Compulsory testaments do not require proof that the testament has been spoken, written, or desired by someone who leaves assets. This is because it is based on legal reasons justifying the testament’s execution.¹⁵

The provisions of the obligatory testament are the result of the *ijtihad* of the scholars in interpreting Qur’an, Surah al-Baqarah: 2:80, which translates as:

“It is obligatory upon you, if one of you comes (signs) of death, if he leaves a lot of wealth, make a testament for parents and relatives in a *ma’ruf* (good/fair) way; this is an obligation for people who are pious.”

Some scholars believe that when interpreting the above verse that, a testament (to parents and relatives) that was originally obligatory remains and is enforced so that the granting of a compulsory testament to the dutifulness to *wālidain* (parents) and *aqrabîn* (relatives) who get the share can be implemented and executed.¹⁶

If the testament in the verse above is understood textually and separately from both other verses and hadith,¹⁷ then it can mean: (1) the testator may bequeath assets to the family, whether the family is Muslim or not; (2) the beneficiary may bequeath property to the family, both the family that receives the inheritance and the family that does not receive the inheritance; and (3) bequests may bequeath assets to the family with an unlimited number of testament.¹⁸

This compulsory is a branch of knowledge that is closely related to inheritance, which was originally introduced in Egypt in 1946 as a provision in the law known as the code of testament. The introduction was then carried out in several other Arab countries, such as Syria, Lebanon, and Morocco.¹⁹

The implementation of the compulsory testament affects the transfer of the value of inheritance rights to other heirs. The term “compulsory testament” in classical Islamic law has never been

¹⁴ Zulfia Hanum and Alfi Syahr, “Wasiat Wajibah Sebagai Wujud Penyelesaian Perkara Waris Beda Agama Dalam Perkembangan Sosial Masyarakat” (in Indonesian) [‘Compulsory Testament as a Form of Settlement of Inheritance Cases of Different Religions in Social Development’] (2016) 1 *Holistik: Journal For Islamic Social Sciences* 123, 123.

¹⁵ Azmi Zamroni Ahmad, “Wasiat Wajibah Dalam Perspektif Hukum Positif Dan Hukum Islam: Analisis Maqasid Asy-Syari’ah Jasser Auda” (in Indonesian) [‘The Obligatory Testament in the Perspective of Positive Law and Islamic Law: Analysis of Maqasid Asy-Syari’ah Jasser Auda’] (2018) 52 *Asy-Syir’ah: Journal of Syari’ah Sciences and Law* 55, 59.

¹⁶ Mohammad Yasir Fauzi, ‘Wasiat Wajibah Bagi Non Muslim Dalam Perspektif Hukum Islam Dan Hukum Positif Serta Kontribusinya Terhadap Hukum Keluarga Di Indonesia’ (in Indonesian) [‘Compulsory Testament for Non-Muslims in the Perspective of Islamic Law and Positive Law and Their Contribution to Family Law in Indonesia’] (Universitas Islam Negeri Raden Intan Lampung 2020) <http://repository.radenintan.ac.id/13497/1/WASIAT_WAJIBAH_BAGI_NON_MUSLIM.pdf> accessed 2 December 2022.

¹⁷ According to the majority of hadith scholars, the forms of hadith are all news relating to; Words, Deeds, Taqir, and the things of the Prophet Muhammad. See, Khabibul Khoiri and Kholid Akhmad Muzakki, ‘History of the Development of Hadith (Comparative of Shi’ah and Sunni)’ (2022) 1 *AISE: Az Ziqri Islamic Studies And Education* 24, 24.

¹⁸ Samsul Hadi, “Pembatasan Wasiat Sebagai Bentuk Keadilan Hukum Islam” (in Indonesian) [‘Restrictions on Testament as a Form of Justice in Islamic Law’] (2016) 9 *Al-Ahwal: Journal of Islamic Family Law* 169, 171.

¹⁹ Aden Rosadi and Siti Ropiah, “Reconstruction of Different Religion Inheritance through Compulsory Testament” (2020) 8 *Scientific Journal Peuradeun* 327, 328.

known. So far, adopted children has no place in Islamic Law to obtain a fixed share of inheritance. Compulsory testament are the result of reasoning and interpretation from Muslim scholars in Indonesia, which, according to Middle Eastern scholars, substantially enforces compulsory testaments. In Indonesia, it is intended for adopted children, while in the Islamic world, it is intended for granddaughters.²⁰

The compulsory testament in Indonesia began to be known at the same time as the birth of Islamic law compilation, as a manifestation of the consensus of Islamic jurists in Indonesia. This means that it is a new product of the inheritance system in Indonesian Islamic law. Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law has its provisions regarding the concept of a compulsory testament, namely limiting the people who are entitled to receive a compulsory testament to adopted children and adoptive parents. Adoptive parents who do not receive a testament are given a compulsory testament for a maximum of one-third of the adopted child's inheritance (similar to the testate estate/*wasiyat*), while adopted children who do not receive a testament are given a compulsory testament for one-third of the adopted parents' assets.²¹

In Article 209 paragraphs 1 and 2 of the Compilation of Islamic Law, it is emphasized that:

- (1) The inheritance of the adopted child is divided based on Articles 176–193 mentioned above, while adoptive parents who do not receive a testament are given a compulsory testament of up to 1/3 of the testament of the adopted children.
- (2) Adoptive children who do not receive a testament are given a compulsory testament of up to 1/3 of the inheritance of their adoptive parents.

Based on the provisions above, it is clear that adopted children and adoptive parents each have the right to a compulsory testament of up to one-third of the assets, provided that they have never received assets in the form of grants or testament during their lifetime. The maximum limit of the compulsory testament received by the child and adoptive parents is one-third of the assets, indicating that there is no obligation to realize it in that amount, but it may be less depending on the judge's considerations when looking at the condition of the heirs and the assets left behind.²²

The compulsory testament implicitly contains the elements stated in Article 209 of the Compilation of Islamic Law, namely: a) the legal subject is the adopted child against the adoptive parents or vice versa, the adoptive parents towards the adopted child; b) not given or declared by the testator to the beneficiary but carried out by the state; c) the portion of the recipient of the testament is as much as possible or may not exceed one-third of the testator's inheritance.²³

The provisions of a compulsory testament have several conditions that must be met, including: a) a person who testament receive them is not included in the heirs; even if that person only gets a small portion of the inheritance, that person is not obliged to be given a compulsory testament; b) if the heir or the person who died is a grandparent and has not given a testament

²⁰ Nur Farikha and M Ali Syaifudin Zuhri, "Konsep Waris Anak Angkat Dalam Wasiat Wajibah Perspektif Kompilasi Hukum Islam Dan Prof. Wahbah Zuhaili" (in Indonesian) ['The Concept of Inheritance of Adopted Children in Compulsory Testament from the Perspective of Compilation of Islamic Law and Prof. Wahba Zuhaili'] (2020) 1 Rechtenstudent Journal 232, 237.

²¹ Fauzi (n 15).

²² Munadi Usman, "Wasiat Wajibah Untuk Anak Angkat Perspektif Siyāsah Al-Syar'iyah" (in Indonesian) ['Compulsory Testament for Adopted Children from the Siyāsah Al-Syar'iyah Perspective'] (2021) 3 ADHKI: Journal of Islamic Family Law 19, 23.

²³ Syafi'i (n 12).

to a grandson who is obliged to get a testament, he can give it through a grant in the amount that he wants to bequeath.²⁴

Giving one's testament is essentially an act of *ikhtariyah* (voluntary), that is, an action done on one's own volition under any circumstances. The obligation to make a testament for someone arises from their failure to fulfil Allah SWT's rights, such as failing to perform the pilgrimage,²⁵ refusing to pay zakat, violating fasting prohibitions, and other things mandated by *Shari'ah* rather than by authorities or judges. However, as a state apparatus, the ruler or judge has the authority to force or grant a compulsory testament to a specific person in certain circumstances.²⁶

III. COMPULSORY TESTAMENT FOR ADOPTED CHILDREN FROM THE PERSPECTIVE OF PUBLIC INTEREST

Maslahah (public interest) in Arabic means "actions that encourage human kindness." In its general meaning, it is everything beneficial to humans, either in the sense of attracting or producing it, such as generating profit or pleasure or in the sense of rejecting or avoiding it, such as rejecting harm or damage. Thus, *maslahah* contains two sides, namely attracting or bringing benefit and rejecting or avoiding harm.²⁷

The theory of *mashlahah* was first proposed by Imam al-Syatibi, a well-known Islamic legal thinker who explains much about the theory of *mashlahah* in his work, *al-Muwafaqat*, using the concept of the purpose of *maqāṣid asy-syarī'ah*.²⁸ The formulation of Islamic Shari'ah objectives aims to realize the *maslahah al-`āmmāh* (public interest) by making Shari'ah law rules the most important while also becoming *sahīh li kulli zamān wa makān* (compatible with the needs of space and time) for a fair, dignified, and beneficial human life.²⁹

This provision concerning the compulsory testament for adopted children truly fills a legal void based on the reality of life, which is that the position of adopted children in the family differs from that of biological children. Adopted children are not heirs who can inherit property from adoptive parents; however, in terms of service to adoptive parents and their role in the family, they are sometimes equal to, and sometimes even surpass, biological children. Adopted children look after and assist their adoptive parents at home or work. Thus, it is extremely

²⁴ Nabila Khalisha and Rahmi Zubaedah, "Ketentuan Penyerahan Wasiat Wajibah Kepada Ahli Waris Yang Berbeda Agama Di Pengadilan Dan Pertimbangan Hakim Dalam Putusan Pengadilan Agama Bekasi Nomor 0024 / Pdt . P / 2016 / PA . Bks" (in Indonesian) ['Provisions for Granting Compulsory Testament to Heirs of Different Religions in Court and Judge Considerations in the Bekasi Religious Court Decision Number 0024 / Pdt. P / 2016 / PA . Bks'] (2021) 7 *El-Faqih: Journal of Islamic Thought and Law* 1.

²⁵ The Hajj is a journey for individual pilgrims to attend and show their submission to Allah (God). See Dino Bozonelos and Razaq Raj, 'Hajj : American Muslims and the Ritual of a Lifetime' (2020) 18 *Journal of Hospitality & Tourism* 1.

²⁶ Safira Rahmi Khouw, La Ode Angga and Sabri Fataruba, "Kajian Hukum Islam Tentang Wasiat Wajibah Kepada Ahli Waris Beda Agama" (in Indonesian) ['Islamic Law Studies Concerning Compulsory Testament to Heirs of Different Religions'] (2022) 1 *Tatohi: Journal of Law Science* 11, 20.

²⁷ Levi Winanda Putri and Anis Hidayatul Imtihanah, "Hak Hadhanah Anak Yang Belum Mumayyiz Kepada Ayah Kandung Perspektif Hukum Islam (Studi Desa Kincang Wetan Madiun)" (in Indonesian) ['Custody Rights of Children Who Have Not Mumayyiz to Biological Fathers Perspective of Islamic Law (Study of Kincang Wetan Madiun Village)'] (2021) 1 *Journal of Legal Anthology* 132, 133.

²⁸ Nur Kholish and others, "The Significance of Maqasid Syariah Principles in Improving Islamic" (2020) 13 *International Journal of Innovation, Creativity and Change* 1342, 1345 <https://www.ijicc.net/images/Vol_14/Iss_3/13367_Kholish_2020_E1_R.pdf> accessed 2 December 2022.

²⁹ Habiburrahman, "Polemik Pemberian Harta Waris Melalui Wasiat Kepada Anak Angkat" (in Indonesian) ['The Polemic of Giving Inheritance Through Testaments to Adopted Children'] (2014) 16 *Journal of Asy-Syari'ah* 125, 128.

unjust if the adopted child does not receive a portion of the adoptive parents' inheritance. Therefore, it is not that the Islamic legal system is unjust, but rather that Islamic law needs a legal norm that allows adopted children to inherit from the estate and the inheritors must leave a portion for their benefit.

Given the facts stated above, this compulsory testament for adopted children is included in *maslahah* content, specifically *maslahah al-`ammâh* (public interest) and *maslahah al-khashshah* (personal interest). This is because the compulsory testament is a rule that is not only for the benefit of specific individuals or group but also for the benefit of other people or all human beings.

In the perspective of public interest, adopted children can get a share of the inheritance as a compulsory testament with the reconstruction of Islamic legal thought as follows: First, in Islam, adopted children are "permitted" to the extent of maintenance, protection, and education but are prohibited from receiving the same status as biological children. This sentence should be included in legal considerations for every decision or determination on adoption by a religious court. Second, the adopted child can obtain assets from his adoptive parents based on a testament, the amount of which may not exceed 1/3 (one-third) of the assets of his adoptive parents who have died. If the adoptive parents do not leave a testament, they can be given based on a compulsory testament; third, granting of a compulsory testament may not harm the rights of the heirs: that is, a person is prohibited from giving waqf, which can harm the heirs.³⁰

In the Compilation of Islamic Law, the grant of a wajibah testament to adoption of children is a legal breakthrough to actualize Islamic inheritance law and accommodate the social reality that is developing in Indonesian society so that justice is achieved and the continuity of the family of parents and their adoption of children is a benefit.³¹ In general, it is often formulated that the purpose of Islamic law is to ensure the happiness of human life in this world and the hereafter by taking all that is beneficial and rejecting what is harmful.³²

The granting of a compulsory testament is a form of *hifz al-mâl* (safeguarding assets) so that the heir's assets are not distributed to certain people only. The judge specifies that granting a compulsory testament to adopted children is only intended to benefit the extended family involved and to provide justice for adopted children, who undoubtedly contribute to their adoptive parents. In the view of the judges, Sharia'ah always upholds justice, mercy, compassion, benefit, and wisdom, so that deviates from these things is not the goal of the Shari'ah. Therefore, creating justice in society is the embodiment of Shari'ah itself.³³

The presence of Islamic law compilation is critical to contextualize Islamic Fiqh in Indonesian society and to accommodate the rights of adopted children so that their existence becomes legal. Thus, once the adopted child has entered the middle of his adopted family, he testament have a definite legal basis, even if there must still be a difference in inheritance position with biological children.

³⁰ Risdianto, "Position of Wasiat Wajibah According to Islamic Family Law in Indonesia" (2017) 3 Journal of Notarius 97, 97.

³¹ Riyanta, "Hubungan Muslim Dan Non Muslim Dalam Kewarisan: Dinamika Pemikiran Fiqh Klasik Menuju Fiqh Indonesia Modern" (in Indonesian) ['Muslim and Non-Muslim Relations in Inheritance: The Dynamics of Classical Fiqh Thought Towards Modern Indonesian Fiqh'] (Kurnia Kalam Semesta 2018). 9

³² Moh Yasir, Joko Widodo and Ali Ashar, "Islamic Law and National Law (Comparative Study of Islamic Criminal Law and Indonesian Criminal Law)" (2021) 6 ALHURRIYAH : Jurnal Hukum Islam 167, 169.

³³ Zakiul Fuady Muhammad Daud, "Menyoal Rekonstruksi Maqashid Dalam Pembaharuan Hukum Kewarisan Islam" (in Indonesian) ['Questioning Maqashid Reconstruction in the Reform of Islamic Inheritance Law'] (2018) 18 *Scientific Journal of Islam Futura* 1, 3.

IV. PROTECTION AND FULFILMENT OF ADOPTED CHILDREN'S WELFARE RIGHTS THROUGH A COMPULSORY TESTAMENT

Protection and fulfilment of child welfare are fields of national development. The essence of national development is to develop the whole human being. On that basis, protecting children is an effort to protect humans by building a complete human being. Ignoring child protection issues testament does not strengthen national development. The absence of child protection testament causes various social problems that can disrupt order, security, and national development. One of the efforts to protect children is through the adoption of neglected children.³⁴

The primary goal of child protection and fulfilment is to provide child welfare. Therefore, the legal considerations of the courts in Indonesia in terms of child adoption are currently focused on the interests of the child's welfare.³⁵ Initially, child adoption was carried out solely to continue and maintain lineage in a family that did not have biological children, but in subsequent developments, the purpose of child adoption has changed to be for the welfare of the child.³⁶

Adopted children are part of Allah SWT's mandate and grace, and they have inherent dignity as whole human beings. Adopted children and children in general are shoots, potential, and the younger generation to continue the ideals of national fighters, have a strategic role, have special characteristics, and characteristics that ensure the continuity of the nation's and state's existence in the future, so they need to have the most opportunities to grow and develop optimally, both physically, mentally, and socially, and to have a noble character. As a result, it is necessary to carry out protection efforts to ensure the welfare of children by ensuring the fulfilment of their rights and the existence of non-discriminatory treatment.³⁷

The position of adopted children is not strictly regulated in Islamic law because, basically, they do not know the term "adopted child." However, Islamic law encourages people to help each other. One of them is caring for and helping orphans and the poor. Prophet Mohammad *Shalla Alahu 'Alaihi wa Sallam* (SAW) states:

One who looks after the orphan whether he is his relative or not, I and he would be together in Paradise like this, and Malik (explained it) with the gesture by drawing his index finger and middle finger close together.³⁸

In addition, Islamic law prohibits the act of adopting a child, which results in a lineage (blood relationship) with the adoptive family. In other words, the notion that the position of an adopted child is the same as that of a biological child is prohibited. The position of an adopted child cannot result in a family relationship with the adoptive parents. Therefore, when someone

³⁴ Muhammad Al-Ghazali, "Perlindungan Terhadap Hak-Hak Anak Angkat Dalam Pembagian Harta Waris Perspektif Kitab Undang-Undang Hukum Perdata Dan Hukum Islam" (in Indonesian) ['Protection of the Rights of Adopted Children in the Distribution of Inheritance Perspective of the Book of Civil Law and Islamic Law'] (2016) 1 Qiyas Journal of Islamic Law and Justice 101, 104.

³⁵ Anis Mashdurohatun, Abdul Khoir and M Ali Mansyur, "Legal Reconstruction on Adoption of Children Based on Justice Values" (2022) 26 International Journal of Business, Economics and Law 149, 142.

³⁶ Tasya Shalsa Ilaha, Roy V Karamoy and Dientje Rumimpunu, "Tinjauan Terhadap Hak Memperoleh Waris Anak Angkat Berdasarkan Hibah Wasiah" (in Indonesian) ['Overview of the Right to Obtain Inheritance of Adopted Children Based on Wasiah Grants'] (2021) 1X Journal of Lex Privatum 78, 82.

³⁷ Iim Amalia, "Hak Asuh (Hadhanah) Anak Angkat Akibat Perceraian Orang Tua Angkat Dalam Perspektif Hukum Islam" (in Indonesian) ['Custody Rights (Hadhanah) of Adopted Children Due to Divorce of Adoptive Parents in the Perspective of Islamic Law'] (2021) 21 Syakhshia: Journal of Islamic Civil Law 387, 388.

³⁸ Imam Muslim ibn al-Hajjaj al-Naysaburi, "Sahih Muslim", The Book of *Zuhd* and Softening of Hearts, Hadith 2983, <https://sunnah.com/muslim:2983>, accessed 2 December 2022

adopts a child, there is only a civil relationship.³⁹ Allah SWT emphasizes in Qur'an, Surah al-Aḥzāb: 33:4, which translates as:

Allah has not made for any man two hearts within him; nor has He made your wives whose backs you liken to the backs of your mothers as your mothers, nor has He made those whom you assert to be your sons your real sons; these are the words of your mouths; and Allah speaks the truth and He guides to the way.

Adoption of a child by court determination is a form of state legal protection for child welfare. According to state law, the primary goal of adopting a child is to provide for the child's welfare and clothing.⁴⁰ If the adoption turns out to be contrary to the above objectives, there are legal efforts to ensure that the adoption behaviour contrary to the goal of improving the child's life. Thus, the function of determining adopted children by the Court is so that legal certainty related to the purpose of adopting children can be carried out properly, as well as serving as legal protection for children for adoption activities that have goals outside the provisions of laws and regulations.⁴¹

Compulsory testaments can be used in one of two ways: as a state action to legally transfer ownership of property from one person to another, or as an alternative to giving shares to parents and close relatives who do not receive an inheritance, including adopted children, the implementation of which occurs after the death of the property's owner. The compulsory testament lies in emphasizing state action.⁴²

A judge is a state official who has the authority to burden or order a compulsory testament decision on and for a particular person. So, a compulsory testament is a stipulation carried out by a leader or judge as the highest state apparatus to burden and give mandatory decisions for people who have died and then distribute them to people under certain circumstances.

One of the decisions of the Republic of Indonesia Supreme Court Number 182 K/Sip/1959 contains legal rules that adopted children have the right to inherit assets left by adoptive parents that are not assets inherited by their adoptive parents. This is also reflected in The Republic of Indonesia Supreme Court in *Suroso* Case which granted the claim of an adopted child as the legal heir to the marital property of his adoptive parents.⁴³

Despite a Supreme Court decision on the rights of adopted children, jurisprudence in Religious Courts shows that there is still a disparity in the obligatory testament for adopted children. Some Religious Court judges are untestamenting to grant inheritance rights to adopted children based on a compulsory testament of 1/3 of their adoptive parents' inheritance without first considering whether the maximum grant usurped the rights of the heirs or was fair and wise. While some other judges require a testament that does not exceed the smallest percentage of the heirs.⁴⁴

³⁹ Moh Ali and M Hendarto, "The Position of Adopted Children As The Heir Dzawil Arham In Islamic Inheritance Law System (Study on Religious Court Verdict Number: 0002 / Pdt.P/2013/Pa.Kp) " (2020) 2 Trunojoyo Law Review 79, 81.

⁴⁰ Febry Emawan Dewata, "The Adoptions of Children in The Compilation of Islamic Law" (2017) 1 Voice Justisia: Jurnal Hukum dan Keadilan 187. 189.

⁴¹ *ibid.*

⁴² Sidik Tono, "Wasiat Wajibah Sebagai Alternatif Mengakomodasi Bagian Ahli Waris Non Muslim Di Indonesia" (in Indonesian) ['Compulsory Testament as an Alternative to Accommodate the Share of Non-Muslim Heirs in Indonesia'] (Univesitas Islam Indonesia 2013) <<https://dspace.uui.ac.id/handle/123456789/9416>> accessed 7 December 2022.

⁴³ *Suroso v Riatun* (1988) Civil Case Number 1413K/Pdt/1988 (Indonesia).

⁴⁴ Mila Yuniarsih and others, "Wasiat Wajibah Bagi Anak Adopsi Untuk Mendapat Harta Waris' (in Indonesian)" ['Compulsory testament for Adopted Children to Obtain Inheritance'] (2022) 3 Ma'mal: Journal of Sharia and Law Laboratory 38, 40.

The compulsory testament is a legal invention of the twentieth century that was developed as a significant solution to Islamic law in formulating justice. Because justice is both the soul and the goal of the law, it testament be in accordance with a sense of justice if the adopted child is given a share of the inheritance through a compulsory testament, and it testament fulfil legal certainty more if it is established through a legislative process or the judicial process of court judges. Thus, the value of its benefit to the Indonesian people testament be more felt as a form of law that is *rahmatan lil 'alamin* (a mercy to all creation).

According to M. Quraish Shihab, scholars generally agree that two legal relationships can exist between adopted children and their adoptive parents. First, the parents who adopted him thought he was their biological child. This acceptance and belief establish the child as a biological child with the right to inherit from both parents. Second, the parents realize that the adopted child is not a biological child, and they do not recognize him as a biological child. This child still has the right to be educated and cared for, and his adoptive parents have the right to act as guardians for him.⁴⁵ However, Islam does not justify equating his position with that of biological children, such as naming the child after his adoptive parents or having a mutual inheritance relationship. Nonetheless, this does not imply that Islam encourages parents to abandon their adopted children. Islam opens opportunities for adoptive parents to give part of their wealth through a testament, provided that the amount is not more than one-third of the assets left behind.⁴⁶

Article 171 letter h of the Compilation of Islamic Law (KHI) stipulates that “An adopted child is a child who is under maintenance for his daily life, educational expenses, and so on, and whose responsibilities are transferred from his original parents to his adoptive parents based on a court decision.” If a disaster occurs and results in the death of the adoptive parents, there testament be social changes regarding the distribution of the inheritance left behind. The position of adopted children or adoptive parents in the inheritance law regulated by customary inheritance law is that both are heirs who can inherit from each other. Whereas in the Civil Code and Islamic law, both are not included as heirs.⁴⁷

The basis of the compulsory testament is regulated in Article 209 of the Compilation of Islamic Law as a form of state intervention and protection for the welfare of adopted children. Such an arrangement is regarded as a legal breakthrough that testament benefit the development of adopted children in Indonesia. According to the Compilation of Islamic Law, even if there is no testament from the deceased, the obligation to share assets through the compulsory testament remains in effect so that adopted children can live a decent and prosperous life after their adoptive parents die.⁴⁸

Article 209 provisions can also be interpreted to mean that in the Compilation of Islamic Law, an adopted child who does not receive a testament from his adoptive parents while he is still alive means that his adoptive parents have never given a testament in an *ikhtiyariyah* (voluntary) manner, namely a testament given at the testament of the adopted child. The child

⁴⁵ M. Quraish Shihab, M. Quraish Shihab Menjawab : 1001 Soal Keislaman Yang Patut Anda Ketahui (in Indonesian) [M. Quraish Shihab Answered: 1001 Islamic Questions You Should Know] (Lentera Hati 2014) 576-577.

⁴⁶ *ibid.*

⁴⁷ Djamal, “Wasiat Wajibah Bagi Anak Angkat Dalam Perlindungan Hukum Terhadap Anak (Perspektif Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak Dan Kompilasi Hukum Islam)” (in Indonesian) [‘Compulsory Testament for Adopted Children in Legal Protection of Children (Perspective of Law Number 23 of 2002 concerning Child Protection and Compilation of Islamic Law’] (2018) VII Al-Bayyinah: Journal of Islamic Law 117.

⁴⁸ Ahmad Rofiq, Hukum Islam Di Indonesia (in Indonesian) [Islamic Law in Indonesia] (1st edn, Raja Grafindo Persada 2003) 26.

then has the right to a compulsory testament under the provisions of the Compilation of Islamic Law, provided that it does not exceed one-third of the inheritance.⁴⁹

According to Ahmad Rofiq, it can be seen that the main basis for including the obligatory testament in the Compilation of Islamic Law is to ensure that the child's future is sustainable even if the adoptive parent has passed away. Such an arrangement is clearly in favour of the development of the adopted child. This obligatory testament arrangement is carried out in anticipation of the attitude of the deceased's family, which may ignore the fate of the child who has been adopted by the deceased.⁵⁰ This Compulsory testament is necessary to cover adopted children's economic weaknesses (protection and fulfilment of welfare). So, it is recommended for humans to *tabarruk* (do good) with some of the assets they have, considering that all humans need it as an additional good deed.⁵¹

The Compilation of Islamic Law provides compulsory testaments to adopted children because the relationship cannot be legally denied, so the distribution of inheritance for adopted children through this obligatory testament is based on benefit and justice for both the adopted children themselves and their adoptive parents.⁵² By employing this concept, Islamic law seeks to avoid the practice of 'pure' inheritance between the party who adopts and the party appointed, which is prevalent in Indonesian society, particularly in Javanese society.⁵³

The legal position of the compulsory testament is an effort and an alternative solution that is justified in *Shari'ah Law*. This does not intend to develop Islamic inheritance law but instead is a complement that is inseparable from the actual Islamic inheritance law system, intending to show flexibility, coolness, and friendliness, as well as the perfection of Islamic law as *rahmatan lil 'alamin* (a mercy to all creation).

The positive values of the legal construction of a compulsory testament are: first, the right of an adopted child to be able to receive a share of the inheritance of his adoptive parents and vice versa, where the status is clarified, can only be obtained through an obligatory testament institution. This implies that the relationship between the two is not one of mutual inheritance; First, this includes the loss of the testator's commercial elements (adopted children and adoptive fathers) and the release of the liability elements without reliance on the will of the testator and the approval of heirs. Second, both adopted children and adoptive parents only receive a share of the inheritance, not exceeding 1/3 of the stipulated portion. This also closes the possibility for adopted children to claim all the assets left by their adoptive parents, and vice versa.⁵⁴

The inclusion of a compulsory testament in the Compilation of Islamic Law bridges the gap that has previously existed between adopted children and adoptive parents who do not inherit from each other automatically due to the lack of inheritance provisions between the two as opposed to the automatic inheritance received by a natural born descendant. Adopted children who have been instrumental in caring for their adoptive parents in many cases, do not receive

⁴⁹ Watni Marpaung and Muhammad Amar Adly, "Discourse of Wasiat Wajibah in Review of Istinbath Islamic Law" (2022) 04 Taqin: Journal of Sharia and Law 11, 12.

⁵⁰ Dewata (n 37).

⁵¹ Maimun Nawawi, Pengantar Hukum Kewarisan Islam (in Indonesian) [Introduction to Islamic Inheritance Law] (Pustaka Radja 2016) 76.

⁵² Yuniarsih and others (n 41).

⁵³ Eus Nurlaelawati, "Managing Familial Issues: Unique Features of Legal Form in Indonesia" in Jajat Burhanudin and Van Kees Dijk (eds), *Islam in Indonesia: Contrasting Images and Interpretations* (Amsterdam University Press 2013) 278.

⁵⁴ Abd Halim, "Wasiat Wajibah Dan Perkembangan Penerapannya Dalam Putusan Mahkamah Agung" (in Indonesian) ['Compulsory Testament and Developments in Their Application in Supreme Court decisions'] (2018) 6 Al-Mazaahib (Journal of Comparative Law) 149.

an inheritance when their adoptive parents die or vice versa. This creates injustice in society unless the adoptive parents or adopted child have previously made a testament.⁵⁵

Adoption of a child in inheritance law has no legal effect on the status of adopted children. As a solution, the Compilation of Islamic Law allows the granting of mandatory wills as long as it does not exceed 1/3 (one third) of the total clean assets of the inheritance. According to the Compilation of Islamic Law, the position (status) of an adopted child is to remain a legitimate child based on a court decision by not severing blood ties with his biological parents. This is a manifestation of faith that carries out a humanitarian mission by caring for others as children and fulfil all of their needs.⁵⁶

The granting of a compulsory testament to adopted children in Islamic law is an expanded *haḍānah* (child rearing), which according to Islamic jurisprudence, as quoted by Abu Bakar al-Jabir, is defined as an effort to protect the child from all kinds of dangers that may befall him, maintain his health both physically and spiritually, and seek education until he can stand alone and face life as a Muslim. Meanwhile, according to Zahabi, it is serving young children by educating and improving their personalities through people who have the right to educate them at a certain age because they cannot do it themselves. The above definition is the same as that in Indonesian jurisprudence as explained in Article 1 letter (g), namely: “an activity of nurturing and educating children until they are adults or able to stand on their own.”⁵⁷

Adopted children may receive a share as a compulsory testament from the inheritance with the following reconstruction: ⁵⁸

1. Adopted children in Islam is only permitted in terms of maintenance, protection, and education and are prohibited from receiving the same status as biological children.
2. Adopted children can receive assets from their adoptive parents based on a testament that does not exceed 1/3 of the inheritance of their adoptive parents who have passed away. If the adoptive parents do not leave a testament, it can be given based on the compulsory testament.
3. The granting of a compulsory testament may not prejudice the rights of the heirs. If the assets of the adoptive parents are small and not sufficient for the welfare of the heirs, then there is no compulsory testament for the adopted children. Forcing a testament or an obligatory testament on adopted children who have been forbidden by Allah SWT to be treated as their children is the same as violating Allah’s law.
4. If there is a dispute regarding the status of an adopted child, it must be proven by a court decision stating that the adopted child is entitled or not to the testament or compulsory testament.

Based on Article 209, paragraphs 1 and 2, of the Compilation of Islamic Law, the adopted child or adoptive parents are entitled to a maximum of 1/3 (one third) of the obligatory testament if they do not receive it. Thus, the compulsory testament is a way out for the adopted child or adoptive parents to get a share of the inheritance. If the adopted child is not given a share of his adoptive parents’ inheritance, it testament cause a schism in the family relationship between

⁵⁵ Ade Kurniawan Akbar, “Pengaturan Wasiat Wajibah Terhadap Anak Angkat Menurut Hukum Islam” (in Indonesian) [‘Compulsory Testament Arrangements for Adopted Children According to Islamic Law’] (2019) 4 AL-IMARAH: Journal of Government and Islamic Politics, 7,7.

⁵⁶ Helda Mega Maya C.P., “Legalitas Hukum Wasiat Wajibah Orang Tua Angkat Menurut Hukum Islam” (in Indonesian) [‘The Legality of Adoptive Parents’s Compulsory Testament According to Islamic Law’] (2021) 4 Rechtsregel: Journal of Law Science 213, 215.

⁵⁷ *ibid.*

⁵⁸ Yuniarsih and others (n 49).

the adopted child and his adoptive parents, or, in other words, testament harm him. Meanwhile, Islam does not want its followers to face difficulties or harm.

Giving a compulsory testament to adopted children to provide economic protection for the child so that the child grows well does not conflict with Islamic law because it is included in the category of doing good. As Allah says in Qur'an, Surat al-Mā'idah (The Prophets) 5:2⁵⁹, as follows:

The compulsory testament also has a positive impact on adopted children:⁶⁰

1. Adopted children testament learn to be more self-sufficient now that their adoptive parents are no longer alive to care for them.
2. Even though he is not a biological child, the adopted child believes he is very valuable to his adoptive parents.
3. The adopted child testament believe he is a biological child, despite the fact that he is not entitled to a position in inheritance. However, due to a Religious Court decision, he is still entitled to no more than one-third of the heir's inheritance.

This compulsory testament for adopted children has a *maslahat* (value) in the form of *hifz al-māl* (protecting and maintaining assets). If property problems create gaps and conflicts within the family, through a compulsory testament, the property rights of adopted children testament be more guaranteed because there are also *hifz al-nafs* (legal rules that protect lives). However, a compulsory testament for adopted children is not directly an emergency, in the sense that if the adopted child does not get it, the testament will not directly cause damage to the adopted child's life, even though the person concerned testament still be in trouble. Thus, the existence of this obligation testament helps the adopted child live his life in the future.

The regulation of compulsory testaments in Indonesia contains elements of fulfilling welfare, which can be seen from the purpose of its implementation, which is to give inheritance to heirs who are the most respected by other heirs or to provide opportunities for children and adoptive parents to get a share of the inheritance through the obligatory testament. The stipulation of testament from inheritance is intended so that no human being has a monopoly on welfare and economic wealth without regard for other people, including family, relatives, and adopted children⁶¹. There is a Hadīth of Prophet Mohammad *Shalla Alahu 'Alaihi wa Sallam* (SAW) states:

“...It is better for you to leave your inheritors wealthy rather than to leave them poor, begging people (for their sustenance); and whatever you spend for Allah's Sake, you will get reward for it even for the morsel of food which you put in your wives mouth...”⁶²

⁵⁹ “O you who believe! do not violate the signs appointed by Allah nor the sacred month, nor (interfere with) the offerings, nor the victims with garlands, nor those going to the sacred house seeking the grace and pleasure of their Lord; and when you are free from the obligations of the pilgrimage, then hunt, and let not hatred of a people-because they hindered you from the Sacred Masjid- incite you to exceed the limits, and help one another in goodness and piety, and do not help one another in sin and aggression; and be careful of (your duty to) Allah; surely Allah is severe in requiting (evil)”. The Holy Koran [Qur'an] 5, 2, Muhammad Habib Shakir (trans) (EZreads Publications 2009), <https://quran-archive.org/explorer/m-h-shakir/1974?page=679#top> accessed 7 December 2022.

⁶⁰Yuniarsih and others (n 55).

⁶¹ Muhammad Nuruddien, “Wasiat Wajibah Keadilan Dan Kesejahteraan Keluarga Perspektif Undang-Undang Mesir Dan Kompilasi Hukum Islam” (in Indonesian) [‘Compulsory Testament, Justice and Family Welfare in the Perspective of Egyptian Law and Compilation of Islamic Law’] (2022) 17 Journal of Reflektika 1, 3.

⁶² Muḥammad ibn Ismā'īl Bukhārī, “Sahih al-Bukhari”, The Book of Military Expeditions led by the Prophet (pbuh) (Al-Maghaazi), Hadith 4409, <https://sunnah.com/bukhari/64>, accessed 2 December 2022.

The distribution of welfare occurs regardless of the subject's contribution to the common interest; that is, an heir who, as long as the heir is still alive, does not contribute to the heir still receives a share of the rights to the heir's property in comparison to someone who has contributed to the heir but does not obtain the right or part of the inheritance due Islamic Law obstacles.⁶³

In the Islamic inheritance system, testament is given to the *aṣḥāb al-furuḍ* (primary heirs), especially to economically weak people. In addition, the testament occurs because of the excess assets owned by the deceased. If the inheritance is small, the testament is not allowed because it is feared that it testament harm the heirs. As stated in the moral message contained in the Qur'an, Surat An-Nisā' (The Prophets) 4:9, regarding the prohibition of leaving weak heirs. Allah SWT says:

“And let those fear who, should they leave behind them weakly offspring, would fear on their account; so let them be careful of (their duty to) Allah, and let them speak right words”

The Compilation of Islamic Law, which regulates the rights of adopted children to the assets of their adoptive parents, was formed to provide justice. The highest justice is justice that comes from noble values (religion) to achieve common prosperity, and for that, justice must be upheld.

V. CONCLUSION

Compulsory testament is an action taken by the judge as a state apparatus to force or to give a compulsory testament for a deceased person who is given a will. Compulsory testaments for adopted children are one of the legal breakthroughs through the Compilation of Islamic Law to provide protection and fulfilment of the welfare rights of adopted children. The granting of a compulsory testament to adoptees is not only for the benefit of individuals or certain groups; it is also for the benefit of all human beings. In Islamic law, obligatory bequests for adopted children are a form of *hadhanah*. The meaning of *hadhanah* is an effort to protect the child from all kinds of dangers that may befall him, maintain his health both physically and spiritually, and seek education until he can stand alone and face life as a Muslim. Thus, the judge's decision to assign a compulsory testament to adopted children is primarily for the benefit of the child's welfare. The provisions in Article 209 Paragraph (2) The Compilation of Islamic Law are in accordance with Islamic law because it is in accordance with the principle of *maslahah*, it is everything beneficial to humans and the principle of 'is which is the main principle in Islamic law.

⁶³ Muhammad Nuruddien, (n.58).