



## Basic law consideration of the supreme court to decide the non-uslim heritage experience with *wasiat wajibah*

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### Abstract

Inheritance law applies if there has been a death. In Islam, inheritance law is classified as fiqh. Inheritance is given to eligible families, according to the level set out in Islamic inheritance law. There are also 3 (three) causes which an heir has no right (hindered) to inherit in Islam, such as: killing the heir, different religion, and apostates. The position of husband / wife, parents, children who are not Muslim is not an heir, but does not prevent these parties from obtaining inheritance from the will if the testator before dying to leave the will. But many events, the testator dies without leaving a will. So, it often becomes a problem in the future. Not infrequently, the parties concerned are sued by the heirs because in real terms they have mastered the inheritance, a claim which could result them loses the asset while it is the only life support. Since the Adjudication of the Supreme Court in 1995, adjudication number 368 K/Ag/1995 *wasiat wajibah* can be given not only to adopted children as regulated in section 209 KHI but can also be given to heirs who are not Muslim. The adjudication was later recognized and became jurisprudence of the Supreme Court. This study uses empirical methods to find out the legal arguments of the Supreme Court judges in adjudicating these cases.

**Keywords:** inheritance law, different religion, islam, fiqh, wasiat wajibah, jurisprudence

### 1. Introduction

The beginning of the establishment of the Unitary State of the Republic of Indonesia (NKRI) was the result of the efforts of our ancestors who willingly struggled to achieve independence from invaders. Independence was not easily achieved, likewise the recognition of other countries that Indonesia was an independent country at that time. It should be noted that the first country to recognize that Indonesia was independent was Egypt. Even today, Indonesia and Egypt still maintain close friendships. On the other hand, Indonesia has a cultural mix due to past history. There is a European culture from Dutch colonialization, Arabic culture from commerce, and Communist from Japanese colonialization. Many things that lead Indonesia to diversity of law, race, culture, religion, and language. Although it has fundamental differences, it does not distinguish the country's purpose, independence. In order for justice, legal certainty, and expediency become life guarantee of Indonesian people. Indonesian people, which are mostly Muslims, have influences on the political, economic, and other systems. Among them, there are government regulations related to the hajj quota, the procedures for the construction of the mosque as public facilities, and the provision of inheritance. It should be noted that in Indonesia, there are various inheritance systems, including: Islamic inheritance, traditional inheritance, and Western inheritance. Later, it will be adapted to the religion, race, culture, and beliefs of each individual concerned. In addition to the inheritance system, Indonesia also has a family system, including patrilineal, matrilineal, and parental (bilateral). Thus, Indonesia as a country that is rich in cultural diversity which also resulted

In the law, one of prevailing inheritance law cannot be single <sup>[1]</sup>.

In Islamic law, it is regulated that an heir who has a blood relationship or marital relationship with the testator, is a Muslim and not hindered by the law to become an heir. This implies that spouse, parents, children who are not Muslim cannot be heirs who are Muslim. Likewise, stepchildren are not included as heirs <sup>[2]</sup>. Inheritance law applies if there has been a death. In Islam, inheritance law is classified as fiqh. Inheritance is given to eligible families, according to the level set out in Islamic inheritance law. There are also 3 (three) causes which an heir has no right (hindered) to inherit in Islam, such as: killing the heir, different religion, and apostates. As the Prophet's hadith narrated by Bukhori and Muslims that the Prophet (PBUH) once said:

"Muslims are not entitled to inherit the legacy of non-Muslims, and vice versa, those non-Muslims are not able to inherit the legacy of Muslims <sup>[3]</sup>".

Islamic Inheritance Law regulates who has the right to inherit and who has no right to inherit due to inheritance barriers or commonly called *mawani' al-irs*. There is also a barrier for the recipient of inheritance who is adopted children. Although the love of both parents is equally good for their biological children and adopted children. But Islam provides this provision, because the portion of biological children who are more entitled. Not to distinguish both,

<sup>1</sup> Della Wahtikasari, "Perbandingan Hakim Memperluas Pranata Wasiat Wajibah yang Diatur dalam Kompilasi Hukum Islam", Master Thesis (Surakarta: University of Sebelas Maret, 2019).

<sup>2</sup> Pokja Yurisprudensi. Jurisprudence of The Supreme Court of the Republic of Indonesia, General Report (Department of Law and Public Relation Agency for Adiministrative Affairs of The Supreme Court, 2018), p. 50.

<sup>3</sup> HR. Bukhari dan Muslim

there are only inheritance law and guardianship restrictions that need to be obeyed.

The procedure for giving inheritance to adopted children can use the will, one of which is *wasiat wajibah*. It is a testament whose implementation is not influenced or not dependent on the will of the deceased, so the implementation of *Wasiat Wajibah* does not require evidence that the will is pronounced or desired, but its implementation is based on legal reasons that justify that the will must be carried out <sup>[4]</sup>.

Initially, the provision of the *wasiat wajibah* was intended for grandchildren whose parents died before the testator. Then, it develops into an adopted child to foster parents and vice versa. Regarding this will, it is regulated in the Compilation of Islamic Law (KHI), especially in article 209 which regulates foster parents and adopted children who are basically not heirs and can be given a *wasiat wajibah* if they do not get a will from a testator provided the portion does not exceed 1/3 from inheritance. KHI does not regulate further regarding other parties that can be given *wasiat wajibah* besides the two parties above.

Compilation of Islamic Law is a collection of *ijma'* (consensus) of Indonesian scholars (ulama) who are posted on issues of Islamic law. The goal is to make it easier for government agencies and the public to solve problems related to Islamic law.

Basically, the position of husband / wife, parents, children who are not Muslim is not an heir, but does not prevent these parties from obtaining inheritance from the will if the testator before dying to leave the will. But many events, the testator dies without leaving a will. So, it often becomes a problem in the future. Not a few filed claims to the Religious Courts to remain a share of the testator's assets. Not infrequently, the parties concerned are sued by the heirs because in real terms they have mastered the inheritance, a claim which could result in a husband / wife, parents, children who do not have faith in Islam loses the asset while it is the only life support.

The adjudication of the Supreme Court judge above has become new jurisprudence. Because in the Al-Qur'an, Al-Hadith, and the Compilation of Islamic Law (KHI), there is no provision regarding inheritance rights for non-Muslim heirs. Even clearly stated *haram* or obstructed.

## 2. Research Methods

The methods used in the study was a Empirical Law Research, is also called Sociological Law Research, what is investigated initially is secondary data that provides an explanation of the writing of legal research, then proceed with primary data research in the field or the community <sup>[5]</sup>. It means that empirical law research is a law research that functions to see the law in the real sense and examine how law works in the community. This law research is taken from facts in society, legal entities, or government bodies. Empirical law research is carried out by examining directly in the field, to see clearly how the application of legislation or legal rules relating to law enforcement works, as well as conducting interviews with several respondents who are considered to be able to provide information about the implementation of law enforcement.

<sup>4</sup> Suparman Usman Yusuf Somawinata, *Fiqih Mewari* (Jakarta: Gaya Media Pratama, 2002), p. 163.

<sup>5</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 2014), p. 42

Characteristics of the research used is perspective. Perspective law writing is research describes and analyzes phenomena, social events, attitudes, beliefs, perception, peoples motivations individual or group. This method is very important and big aspect effects on the success or failed of a study, especially for collected data. Research methods are techniques or ways of searching, obtain, collect or record data, whether in the form of primary data on secondary data used for the purposes of preparing scientific papers and then analyze the factors related to the points problem so that there will be truth about the data to be was obtained.

This perspective law research aims to provide accurate and clear data on the legal considerations of judges in adjudicating law of *wasiat wajibah*, which is expanded in scope by the Supreme Court in considering justice, legal certainty, and benefits for husband / wife, parents, children who are not Muslim that cannot become heirs of Muslim testator. As a solution to legal problems.

## 3. Literature Review

Inheritance law is regulated in Book II, together with objects in general. It is because of the view that inheritance is a way to acquire property rights which are too narrow and can lead to misunderstanding. Because, what is transferred is not only property rights, but also other material rights (property rights) and in addition also obligations which are included in the Law of Wealth. This is due to the influence of Roman law which considers inheritance is *zaak* (intangible) itself, and the heirs have material rights (*zakelijkrecht*) on it.

Therefore, speaking of inheritance law, there must be 3 (three) things:

- a. There are people who die (death);
- b. There are treasures left, and;
- c. There are heirs <sup>[6]</sup>.

The source of Islamic inheritance law is guided by the Qur'an, Hadith, Ijma', Ijtihad, Urf or behavior. Egypt was the first country to form an official body based on Islamic jurisprudence. In Egypt also has formed an official department that is membership of the scholars and legal experts whose job is drafting and designing laws that regulate marriage, divorce, maintenance, time of iddah, nasab, dowry, childcare, etc. Surely, based on Islamic jurisprudence, but it is somewhat different from Turkey. If Turkey is only based on the Hanafi mazhab, Egypt is not bound by any mazhab. The following laws in Egypt which regulate marriages, divorce, subsistence, the period of iddah, nasab, omnipotence, etc., are regulated at:

- a. Act no. 26 of 1920
- b. Act no. 56 of 1923
- c. Act no. 25 of 1929

In 1926, Minister of Justice, called Wazirul Adl, re-established a department tasked with drafting and designing Laws on Al-Akhwat Al-Syakhsyiyah, Waqf Law, inheritance, testament, etc. It is established as Act No. 77 of 1942.

In Indonesia there was initially Act No. 7 of 1989 concerning the Religious Courts established to regulate

<sup>6</sup> Dr. Musthafa Al-Khin, *al-Fiqhul Manhaji*, vol. II (Damaskus: Darul Qalam, 2013), p. 274.

Islamic inheritance law especially for Muslims in Indonesia. Later, Islamic inheritance law which has become positive law in Indonesia is summarized in writing in the Compilation of Islamic Law (KHI) and confirmed by Presidential Instruction No. 1 of 1991. Even though KHI is not a law, the judicial executors agree to using KHI as a guideline in deciding cases in a court of law. It should be noted that KHI contains 3 (three) books, namely:

- a. Book I Marriage Law (section 1-170)
- b. Book II Inheritance Law (section 171-214)
- c. Book III Representative Law (section 215-229)

So that your child / wife / sibling who apostate, is not an heir. However, this can be immediately accepted by the party who agreed. There will be turmoil and protest if the inheritance is not shared with those who apostatize. This is reasonable, especially if these parties have accompanied the whole life of the deceased.

But it has been anticipated in order to get a wise solution and in accordance with the methods recommended by Islamic teachings. Previously, it will be explained in advance what are the laws stipulated in Islamic syariah related to apostasy, including:

- a. Prohibition of breaking family ties,
- b. Cannot be an heir, if the testator is Muslim.
- c. An apostate is not a mahrom<sup>7</sup>, even though the testator was his mahrom before.

No inheritance rights for apostates. But it seems impossible, there are several ways that can be done to transfer property from the testator to the party who has apostatized, including gift, will, or *wasiat wajibah*. All three are *makruh* or allowed according to Islamic law and positive law in Indonesia.

### 3. Research Results and Discussion

Initially, the provision of the *wasiat wajibah* was intended for grandchildren whose parents died before the testator. Then, it develops into an adopted child to foster parents and vice versa. Regarding this will, it is regulated in the Compilation of Islamic Law (KHI), especially in article 209 which regulates foster parents and adopted children who are basically not heirs and can be given a *wasiat wajibah* if they do not get a will from a testator provided the portion does not exceed 1/3 from inheritance. KHI does not regulate further regarding other parties that can be given *wasiat wajibah* besides the two parties above.

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In its development, the will is not only intended for these 2 (two) cases, but is used the Supreme Court as the basis for decision to give inheritance to the heirs who are prohibited from inheriting in Islamic Law, including:

1. Adjudication of the Supreme Court Number 368 K / Ag / 1995 concerning the granting of *wasiat wajibah* to non-Muslim biological children.

Adjudication No. 368 K / Ag / 1995 dated July 16, 1998, was the first decision ever to decide that a child who

converted to a religion had the same status as another child, not an heir but received a *Wasiat Wajibah*. This adjudication has expanded the provision of *Wasiat Wajibah* from the previous KHI arranged only for adopted children and foster parents.

2. Adjudication of the Supreme Court Number 51 K / Ag / 1999 concerning granting *Wasiat Wajibah* to non-Muslim siblings.

The decision to grant a *wasiat wajibah* to a child who is not a Muslim is decided again by the Supreme Court a year later through adjudication No. 51 K / Ag / 1999 dated 29 February 1999.

"The heirs who are not Muslim can still inherit from the testators who are Muslim, the inheritance is carried out using the *wasiat wajibah*, where the portion of non-Muslim children get the same portion as Muslim children".

3. Adjudication of the Supreme Court Number 16 K / Ag / 2010 concerning the granting of *wasiat wajibah* to spouse of different religions.

In 2010, adjudication No. 16 K / Ag / 2010 on April 16, 2010, The Supreme Court has also decided that spouse of different religions (non-Muslims) who has been married and accompanied the testator for 18 years of marriage are also entitled to inheritance through *wasiat wajibah*. The decision was considered as follows:

"That the marriage of the testator with the Cassation Petitioner has been long enough that 18 years, it means that the Cassation Petitioner also devoted himself to the heir, so that even if the non-Muslim Cassation Petitioner is eligible and fair to obtain his rights as a wife to get a share of the inheritance in the form of inheritance *wasiat wajibah* and shared assets as the jurisprudence of the Supreme Court and in accordance with a sense of justice".

Considering that therefore the adjudication of the Makassar High Religious Court must be overturned and the Supreme Court will adjudicate itself with the following considerations:

"The issue of the position of heirs to non-Muslims has been widely studied by among the ulama including Yusuf Al Qardhawi, interpreting that non-Muslims living side by side in peace cannot be categorized as harbi infidels, so the Cassation Petitioners together with the heirs during life get along in harmony despite different beliefs, because it is proper that the Cassation Petitioners obtain a share of the inheritance in the form of *wasiat wajibah*".

4. Adjudication of the Supreme Court Number 721 K / Ag / 2015 concerning the granting of *wasiat wajibah* to non-Muslim biological children.

Similar adjudication was also followed in 2015 through adjudication number 721 K / Ag / 2015 dated November 19, 2015. In its consideration the Supreme Court stated following:

"That the testator at the time of death was Muslim and only left one heir who embraced the religion of Islam, the Plaintiff (Sumarni binti Sirat / wife), while the children of the testator (Defendant) were non-Muslim so that they were prevented from becoming heirs. However, the two children of the heir who are non-Muslims are given part of *wasiat wajibah*".

"Whereas the issue of the position of heirs to non-Muslims has been widely studied by the ulama including Yusuf Al

<sup>7</sup> QS. Al-Furqon verse 54 and QS An-Nisaa' verse 23

Qardhawi, interpreting that non-Muslims who live side by side in peace cannot be categorized as pagan harbi, so the children of the Cassation Petitioner with the heirs during his lifetime getting along peacefully despite different beliefs, because it is proper and appropriate for the children of the Cassation Petitioners to obtain a share of the inheritance in the form of *wasiat wajibah*".

"That the Plaintiff's marriage to the late Vincencius Papilaya bin Yos Papilaya has been long enough that is 17 years, therefore even though the late Vincencius Papilaya bin Yos Papilaya when he married was a non-Muslim status, but it was proper and fair to get his rights as a husband to get half ½ part from joint property during the marriage as is the jurisprudence of the Supreme Court and in accordance with a sense of justice".

5. Adjudication of the Supreme Court Number 218 K / Ag / 2016 concerning the granting of *wasiat wajibah* to non-Muslim biological children.

The provision of *wasiat wajibah* to non-Muslim heirs was then followed by the Yogyakarta Religious Court on December 22, 2014 in its adjudication no. 0042 / Pdt. G / 2014 / PA.Yk which was then strengthened by the Yogyakarta High Religious Court and also the Supreme Court at the cassation level in 2016 through decision no. 218 K / Ag / 2016.

6. Adjudication of the Supreme Court Number 331 K / Ag / 2018 concerning the granting of *wasiat wajibah* to wife of different religions <sup>[8]</sup>. In this adjudication, one of its consideration states:

"Considering that, by observing the relationship between the Cassation Petitioners and the testator during his lifetime which was quite good and harmonious, even the Cassation Petitioners had accompanied him as a wife in joy and sorrow, even when he was sick, the Cassation Petitioners continued to care for him faithfully and always accompanied until he was treated to China, it is appropriate that the Cassation Petitioners who is a non-Muslim be given a share of the inheritance in the form of a *wasiat wajibah* of ¼ (a quarter) of the inheritance".

The results showed that there was no positive law governing the issue of inheritance of different religions, so the judge was demanded to adjudicate on the case. Because the judge is based on section 10 of the Judicial Law that "The court is prohibited from refusing to examine, adjudicate, and decide on the case he filed on the pretext that the law does not exist or is unclear but it is obligatory to examine and adjudicate it. As well as maintaining the family wholeness and for the sake of upholding the identity of the Islamic religion that is *Rahmatan lil alamiin*, preventing harm and for the benefit of the wider society. So that religious differences do not become an obstacle to the fulfillment of the rights of Indonesian citizens, especially the right to inheritance.

## 4. Closing

### 4.1. Conclusion

The nature of Islamic inheritance law is *Faraidh* law. Where the regulation is clearly explained in the *Qur'an* and the amount of the distribution of each heir. Forcing and regulating. It means to force to be studied and practiced by Muslims. Regulating to maintain harmony and family

integrity, it can be done by deliberation to reach consensus. The Prophet once said, that the law of inheritance will be left behind. That is, many will be ignored, and the distribution follows the division of inheritance law in addition to Islamic inheritance law, it will be categorized as sinful, wrong doing, infidel and wicked. But obviously, it is clear, the rules are in the Qur'an, which when carried out gets merried.

The purpose of regulating inheritance law is of course that there will be no problems in the future. Disputes of assets between one heir and another often occur, not infrequently to the point of contradicting each other in court that leads to broken relationship.

## 5. Suggestions

The outline of *wasiat wajibah* is one form of Islamic law reform carried out by Muslim countries, which in principle is intended as alternative solutions for the existence of a relative who does not obtain inheritance, either because he was veiled by other heirs or is blocked by *shara'*. Based on these implementations, the application of the wills is very closely related to the principle of benefit. But, new breakthroughs do not deviate the rules and norms in religion, both Islam and other religions.

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<sup>8</sup> Yurisprudensi, *Jurisprudence*, p. 52-53,