

The Construction Of Inheritance On Different Religion And Reconstruction Through Mandatory Places

Dr. Siti Ropiah, SH., M.Hum¹

STAI Haji Agus Salim Cikarang Bekasi¹Jl. Jenderal Urip Sumohardjo Kali Ulu Desa Tanjunga Sari Kec.
Cikarang Utara Kab. Bekasi

Corresponding Author: Dr. Siti Ropiah

Abstrak: Basic excuse judge in the Supreme Court decision No.16K / AG / 2010 is was borrowed which according to some Islamic thinkers non Muslim heirs inherit the estate through the streets was borrowed. Their opinions are as stated by Ibn Hazm, Al-Tabari and Muhammad Rashid Rida. (Wahbah Al-Zuhaili, 1989: 13). The concept "was borrowed" inspired by the opinion of Ibn Hazm, that in his opinion saying that the authorities must issue a portion of the relics of a person who died as a testament of him even though he did not intestate before, based on a thought that the authorities have a duty to ensure the rights of people who has not been fulfilled. According to the legal system in Indonesia, the agency will include was borrowed into absolute competence of the religious courts based on Law No. 7 of 1989 on the Religious Court related to Act No. 3 of 2006 on the amendment of Law No. 7 of 1989 on the Religious Courts. The judge referred to in inheritance Islam in Indonesia is conducted by judges in the sphere of religious courts in accordance with the first level of absolute competence as mandated by law.

Keyword : Construction, Authorities, Mandatory place

Date of Submission: 01-10-2018

Date of acceptance: 16-10-2018

I. Introduction

A. The background of Problem

Regarding wasiat obligah, ulama based it on Q.S. al-Baqarah (2): 180, but the ulama² differed in opinion regarding the will law in the verse, as well as its status; muhkamah or mansukhah. Some scholars such as ibn 'Abbas, Hasan al-Basri, Dahhak, Thawus, Masruq, Muslim ibn Yasar and al-'Ala ibn Ziyad and al-Razi argued that the verse is muhkamah which means that the legal will must be carried out on parents and relatives whether those who receive inheritance or do not receive inheritance, but according to Al-Tabari the verse is included in the category of the court but is judged by inheritance verses, and Abu Muslim al-Ashfahani compromises it with the method of al jam'u between these verses with the hadith of Usamah bin Zaid so the will applies only to heirs who do not receive inheritance.

Some other scholars such as Ibn 'Umar, Abu Musa al-Ash'ari, and Sa'ad ibn Musayyab argued that QS. al-Baqarah (2): 180 has been commanded by the mawaris verse in Q.S. al-Nisa '(4): 11, both to those who receive inheritance or those who do not receive inheritance. This is based on the hadith below

كَانَ الْمَالُ لِلْوَالِدِ وَكَانَتْ الْوَصِيَّةُ لِلْوَالِدَيْنِ وَحَدَّثَنَا مُحَمَّدُ بْنُ يُوسُفَ، عَنْ زُرْقَاءَ، عَنْ ابْنِ أَبِي نَجِيحٍ، عَنْ عَطَاءَ، عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا قَالَ
فَنَسَخَ اللَّهُ مِنْ ذَلِكَ مَا أَحَبَّ فَجَعَلَ لِلذَّكَرِ مِثْلَ حَظِّ الْأُنثَيَيْنِ وَجَعَلَ لِلأَبْيُونِ لِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسَ وَجَعَلَ لِلْمَرْأَةِ التَّمَنُّ وَالرُّبْعَ وَاللِّزْجَ السَّطْرَ وَالرُّبْعَ
رواه البخاري

Imam Shafi'i is one of the scholars who argued that Sura al-Baqarah 2/180 was commanded by a verse which explained inheritance law. He believes that because Allah SWT has ordered a will, whereas Allah has determined the portion of inheritance, then the will becomes a sunnah (tathawu)³

In formal juridical terms in determining mandatory wasiat, religious court judges using the provisions of the Islamic Law Compilation as stated in Presidential Instruction Number 1 of 1991 specifically article 209

¹Lecturer at STAI Haji Agus Salim Cikarang Bekasi

² Al-Qurthubi, Al-Jami 'Liahkam al qur'an, (Beirut: Muassasah al Risalah, 2006), 176. See also Al-Sayis, Tafsir Ayat al Ahkam, (Egypt: Matba'ah Muhammad Ali Sabih wa Auladah, 1953), 55. The scholar who argues that this verse is muhkam because of the different perspectives of the prophet. According to them, between the verses of the nascis and the verses of mansukh both must be one meaning, whereas the will and the heirs are clearly two different meanings, then the heir law can not violate the law of will. See al-T {abari, Tafsir al-Thabari, juz 3, 384-385.

³Muhammad ibn Idris al-Shafi'i, *Ahkam al-Qur'an li al-Shafi'i*, Maktabah Syamilah.

understand that wasiat obligah is only intended for adopted children and adoptive parents. Judges in the religious court in Indonesia as one of the enforcers of Islamic law have also carried out the function of determining the decision of the cases presented to him by first presenting legal considerations on the decision. And through this decision there is no denying that it has played a role in Islamic legal thought even more so when the decision contains an update on Islamic⁴ legal thought.

The provision of mandatory wasiat for different religious family members does not take place just like that, but there are considerations of the judge that between the heirs and heirs have lived in harmony, mutual respect, and mutual assistance. As for the basis of the decision of the Supreme Court in case number 368 K / AG / 1995 so the Panel of Judges in the Court of Cassation argued that, heirs with different religions and heirs, could obtain inheritance through the mandatory way of wasiat is based on the opinion of Ibn Hazm who in his opinion said the ruler is obliged to issue a portion of the inheritance of someone who died as a will from him even though he did not have an earlier intention, based on a thought that the ruler has an obligation to guarantee the rights of his people that have not been carried out. The reason for the Supreme Court in case number 51K / AG / 1999 is to only base it on obligatory wasiat.

As for the case number 16 K / AG / 2010 the Supreme Court based its decision that according to the Supreme Court the marriage of the testator with his wife had been going on for 18 years. The Chief Justice saw the fact that his wife had devoted herself to the family with her husband for a long time. In addition there are legal reasons that their marriages are legal and recorded in the civil registry so that they refer to civil law. then the judge considers that the wife is not included in the harbi kafir but the zimmi infidel as expressed by Yusuf Qard} awi>, the wife of a different religion has the right to obtain inheritance based on obligatory wasiat. Thus the reasons underlying the decision of the judge in the Supreme Court Decision No 16K / AG / 2010 provide inheritance to non-Muslims, namely:

1. MA considers this to be mandatory wasiat.
2. The wife has served her husband for approximately 18 years
3. The wife is not declared an heir
4. The reason for the law is that the relationship between heirs and heirs (husband and wife) is recorded in the civil registry
5. Based on the opinion of Yusuf Qordhawi.

Based on the above, the judge in this context does have the authority to deviate from the provisions of the written law that already exists, but is intended to create justice in the midst of people's lives. Judges must adequately and clearly clarify their legal considerations by considering various legal aspects. Legal decisions by judges which are then used as the basis for decisions that have a similar case referred to as jurisprudence law are aimed at avoiding disparity in judicial decisions in the same case.

The Supreme Court is of the opinion that non-Muslim heirs through obligatory wasiat are for the following reasons. That is, basically, there are no statutory provisions that explicitly give a will to the non-Muslim heirs to get a share of the inheritance of the Muslim heir. But implicitly there are loopholes that allow the text in the Act to be interpreted as having space to provide parts to non-Muslim heirs through Wajibah Wajib or whatever the name suggests⁵, in the field of Islamic inheritance law. Based on the explanation above,

II. The formulation and the limitations of the Problem

1. How is the inheritance construction through wasiat obligatory?
2. How is the reconstruction of different religions inherited through wasiat obligatory?

III. Purpose and objectives

1. Want to know more details and much about the obligatory wasiat.
2. Knowing the position of the wife who has served her husband for 18 years and is not an heir
3. Knowing in detail the laws on the relationship between heirs and heirs (husband and wife) recorded in the civil registry

IV. The discussion

The Indonesian Supreme Court's Decree on Wajibah Wajibah refers to the Presidential Instruction of the Republic of Indonesia Number 1 of 1991 concerning Compilation of Islamic Law (KHI) and there are several legal considerations that accompany it, including legal considerations that refer to customary law and Law Number 4 of 1979. that, with regard to mandatory wasiat, the Supreme Court specifically issued a Supreme

⁴ Abdul Manan, *Reformasi Hukum Islam Di Indonesia Tinjauan dari Aspek Metodologis, Legalisasi, dan Yurisprudensi* (Jakarta: PT Raja Grafindo Persada, 2007), 311-327

⁵ Interview with Dr. H. Andi Syamsu Alam, SH.MH

Court circular letter dated April 7, 1979 Number 2 of 1979 Concerning Appointment of Children whose legal consequences were the existence of a compulsory wasiat in terms of the distribution of inheritance.

According to Islam the tradition⁶ of adoption of children can be accepted but with changes in the following conditions:

1. The status of nasab of adopted children is not connected to the two adoptive parents, but still as before, which is attributed to their biological parents.
2. The status of adoption does not create an inheritance law relationship between adopted children and adoptive parents, as well as their families.⁷

The position of adopted children and adoptive parents in inheritance law according to the Compilation of Islamic Law is expressly stipulated in article 209 of the Compilation of Islamic Law. In general, it can be said that the status of adopted children and adoptive parents regulated in the Compilation of Islamic Law remains the same as their original status, that is only having a nasal relationship with their biological parents in the same way as the opinions of fiqh scholars, therefore he only has an heir relationship with them. Thus it is seen that the adoption of children does not change the status and position as well as existing nasab relations. The concept of adopting a child like this is different from the concept of adoption as regulated in the positive law that is developing at this time which attributes adopted children to their adoptive parents, so that among them can inherit each other.

Although the adoption does not change the child's nasab status, it does not reduce the value and meaning of the child's appointment, especially this can be seen from:

First; the adoption of children creates the law of the maintenance of daily life changes which were initially under the control of their biological parents who moved to their adoptive parents. Second; responsibility for education costs which must first be addressed by biological parents move to adoptive parents.

Third; the adoption of a child is inadequate if only with the agreement of both parties, even though it has been formalized through traditional and religious ceremonies, but must be obtained through a court decision, thus the status of the child will become clear and legal in the eyes of the law.

Fourth; the existence of a legal adopted child status as stated above will create legal consequences in inheritance, where the child will obtain mandatory wasiat as much as one third of the property. Likewise, the opposite is the case if the child dies, the adoptive father will also be able to obtain the obligatory obligation as much as one third of the assets of the adopted child.

In the Compilation of Islamic Law adoptive parents are obliged to have an intention (wasiat obligah) for the benefit of their adopted children as adoptive parents have accepted the burden of responsibility to take care of all the needs of their adopted children. So even though the adopted child is naqli's argument does not get the inheritance of his adoptive parents, but in terms of benefit especially for the child who is emotionally and socially so close to his adoptive parents, adoptive parents' responsibilities remain, especially when linked to the word of God QS al-Zariyat / 51: 19

ولا تجعلوا مع الله الها اخر اني لكم منه نذير مبين

"And do not make another God besides Allah. Actually I am a real warning from God for you". Based on the above verse, if it is related to the obligation of adoptive parents to fulfill their responsibilities to adopted children, then the status of adopted children is identical with poor people who need help from their adoptive parents so that their future is guaranteed, especially in terms of their economy. The Compilation of Islamic Law consistently remains in accordance with the faraid which places the position of adopted children still placed outside the heirs, the same as opinions in fiqh, but by adopting limited customary law into the value of Islamic law due to the transfer of responsibility of biological parents to adoptive parents regarding the maintenance of everyday life.

The foundation that can be used to make the rules regarding obligatory wasiat to adopted children as stipulated in the Compilation of Islamic Law as part of fiqh is only through consideration of al-maslahah almursalah. That is, with consideration of the benefit and custom of some of our people (for example, reluctance to do polygamy even though they have not been given offspring for years), it is mandatory for people who are considered adopted children. The adopted child here can be formulated as a person who deserves to be a child of the family, who is cared for, educated and raised in the hope of caring for and caring for in his old age. This obligatory testament is applied as a way to equalize inheritance for people who cannot inherit, but these people have a very close inner relationship even though it is not a relationship of blood relations. So basically this

⁶ Pagar, *Kedudukan Anak Angkat dalam Warisan: Suatu Telaah Atas Pembaharuan Hukum Islam Indonesia*, (Mimbar Hukum No. 54 Tahun 2001), 9.

⁷ Pagar, *Kedudukan Anak Angkat dalam Warisan: Suatu Telaah Atas Pembaharuan Hukum Islam Indonesia*, (Mimbar Hukum No. 54 Tahun 2001), 9.

obligatory testament is set to create benefit for those who are entitled to get it. Because Wasiat has the potential to realize special justice related to personal interests and has effectiveness in the use of property, the development of social relations and familial relations in addition to reflecting the care of the parties to the interests of others.

Article 209 KHI which regulates mandatory wasiat is different from obligatory wasiat which is known in Islamic countries in general which identifies orphan grandchildren as recipients of obligatory wasiat. Indonesian Islamic law experts through KHI have used obligatory wasiat to give rights to adopted children and adoptive parents with maximum acceptance of one third of inheritance.

The idea behind the spirit of constructing the obligatory will is that Indonesian Islamic law experts feel obliged to bridge the gap between Islamic law and customary law. Because as is well known Islamic law strongly rejects adoption institutions, while among Muslim families in Indonesia there is a lot of adoption practices, then the Islamic law experts in Indonesia try to accommodate the value system that exists in both laws by taking the obligatory wasiat institution from the law Islam as a means to receive the moral value facilities that are behind the practice of adoption in customary law. This effort, according to Ratno Lukito, must be done because social reality shows that the people who acted on the adoption, adoptive parents always thought about the welfare of their adopted children when they died.⁸

The existence of KHI establishes a compulsory wasiat institution for adopted children and adoptive fathers which is different from the obligatory wasiat institution which is known in other Islamic countries can stimulate the growth of anticipatory understanding of the development of legal needs. Whereas Article 209 which regulates mandatory wasiat through KHI is a success achieved by the Indonesian people which has a connection with the spirit of progressive law. KHI, especially article 209⁹ has shifted the existence of inheritance law provisions that exist in classical fiqh books. After the existence of KHI, several articles governing inheritance law in Indonesia can be said to be laws that are "authentic Indonesian in character", this is because this law applies to all indigenous Indonesians, this inheritance law is also a form of fulfillment of the thoughts of Indonesian Islamic law experts itself which has been raised since the 1950s, which was introduced by TM Hasbi Ash-Shiddieqy who advocated that fiqh (Islamic law) applied in Indonesia was an Indonesian¹⁰ fiqh that was fiqh that was in accordance with the cultural character of the Indonesian people. Like Hasbi, Hazairin also stressed the need for a formulation of Islamic law that is unique to Indonesian society. Hazairin's idea was conveyed in his speech at the opening of the Islamic University in Jakarta.

According to Muhammad Daud Ali, the compilation of the KHI, especially those relating to the obligatory articles of obligation, always pay attention to benefit, especially in the category of ijtihadi. Therefore, it is expected that besides being able to maintain and accommodate legal aspirations and community justice, it will also be able to play a role as a social engineering of the Indonesian Muslim community.

Opinions similar to Daud Ali, described by Abdul Manan, that the renewal of the rule, if seen from the substance has the aim to realize masalahah for the benefit of man, which is maintaining religion, soul, mind, property and descent which in the term fiqh is called al-kulliyat Al -khamsah. Using mashlahah theory to solve various legal problems has inspired Islamic law experts in Indonesia to use this theory in the context of reforming Islamic law, both by forming legislation and by incorporating Islamic law values into national legalization. This is in accordance with what Satria Effendi said that judges need to focus more on upholding justice than just focusing and rigid on the legal text because the legal text is the media to achieve goals, namely to uphold justice.

Reconstruction of interfaith inheritance through wasiat obligah which was originally in KHI will only be for adopted children and foster parents then applied also to non-Muslim wives from Muslim husbands, where religious differences remain one of the barriers to inheriting each other. Regarding the barrier to receiving inheritance due to religious differences, please note that this rule has caused many difficulties in areas where family members embrace various religions, Indonesia is included in this category.

Reconstruction can be understood, because the absence of positive law that underlies the provision of obligatory wasiat for a non-Muslim encourages the Supreme Court to make legal discovery efforts in deciding

⁸Ratno Lukito, *Hukum Islam dan Realitas Sosial*, (Yogyakarta: Fakultas Syari'ah UIN Sunan Kalijaga, 2008), 111

⁹T.M. Hasbi Ash-Shiddieqy, *Syari'at Islam menjawab Tantangan Zaman*, (Yogyakarta: IAIN al-Jami'ah al-Islamiyah al-Hukumiyah, 1961), 42. lihat juga Agus Moh. Najib, *Pengembangan Metodologi Fikih Indonesiadan Kontribusinya Bagi Pembentukan Hukum Nasional*, Seri Disertasi, (Jakarta: Kementerian Agama RI, 2011), 57

¹⁰T.M. Hasbi Ash-Shiddieqy, *Syari'at Islam menjawab Tantangan Zaman*, (Yogyakarta: IAIN al-Jami'ah al-Islamiyah al-Hukumiyah, 1961), 42. lihat juga Agus Moh. Najib, *Pengembangan Metodologi Fikih Indonesiadan Kontribusinya Bagi Pembentukan Hukum Nasional*, Seri Disertasi, (Jakarta: Kementerian Agama RI, 2011), 57

these cases based on the provisions of Article 10 of the Judicial Power Act that "Courts are prohibited refused to examine, try and decide on a case that was filed under the pretext that the law did not exist or was unclear, but was obliged to examine and try it ". In other words, the court must find its own law independently. In this regard, in Article 5 paragraph (1) of the Act, it is explained that "Judges and Constitutional Justices must dig, follow, and understand the legal values and sense of justice that lives in society. This provision is the legal basis for KHI that can be used as an indirect reference or as a guide. The provisions of Article above are in line with article 229 of the KHI that "Judges in resolving cases filed against him must pay serious attention to the legal values that live in society, so that their decisions are in accordance with a sense of justice".

The decision of the Supreme Court by choosing the obligatory will contains the value of justice (philosophical aspects) and the value of benefit (sociological aspects) desired by the letter al-baqarah verse 180. Legal reasoning developed by the Supreme Court is in line with the way of thinking by using maqas 'id al-shari'ah.

In addition, it is also based on considerations to provide substantive justice to litigants. That is, the Supreme Court seeks to fulfill the sense of justice of all parties

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا

“Verily Allah tells you to convey the message to those who have the right to receive it, and (command you) if you set a law among men so that you will justly establish. Verily Allah gives the best teaching to you. Verily, Allah is all-hearer and sees”.

The core characteristic of progressive law is the law for human interests and refuses to maintain the status quo in law. This is in line with the principle of determining the benefit in Islamic law, among others: al-dararu yuzalu (all those containing immunity must be avoided), daar'u al-mafa- sid muqaddamun 'ala jalb al-masa.cf. (avoiding that brings damage takes precedence over an action that brings kemaslahtan), and al-masaqqah tajlib al-taysir (all difficulties can bring convenience)¹¹, then the three principles of determining benefits in Islamic law have conformity with the characteristics of progressive law , namely law for humans. Based on these rules it can be understood that Islamic Shari'a has great attention to the ease and lightness of law for humans. This means that Islamic law positions the law for human benefit, this is in accordance with the spirit of progressive law, which is law for humans.

According to Mustafa Syalabi that the existence of a will system in Islamic law is very important as an antidote to riots in the family. Because there are among family members who are not entitled to receive inheritance by inheritance. Even though he has been instrumental in guarding the property or a poor grandchild who is hindered, or because of different religions and so on. So with the existence of a will system regulated in Islamic law that disappointment can be overcome.

Illat contained in article 209 paragraph (2) KHI is not because of nasab relationship, because adopted children do not have nasab relationship with their adoptive father, but nevertheless have emotional closeness with his adoptive father, being part of his family members, then what becomes illat is emotional closeness . The breakthrough of inheritance law by using the obligatory Wasiat institution is a compromise approach in the effort to realize substantive justice without feeling breaking the legal provisions of warsi, because law is a means not an objective.¹²

Based on the explanation above, that inheritance construction and reconstruction of different religious inheritance can be described as follows:

Reviewed	Construction	Reconstruction
Philosophical foundation	Have special human relations in terms of closeness and mutual help..	Because of closeness, dedication, service, and living in harmony..
Source of law	Article 209 KHI SEMA No. 2 of 1979	Article 10 and Article 5 (1) of Law No.48 of 2009
Legal Material	Adopted child, adoptive parents	Religious differences (non-Muslim wives)

V. Conclusion

The construction of a heritage through obligatory wills contained in article 209 KHI is given to adopted children and parents with the consideration that between the child and the adopted parents there is a special relationship that is having emotional closeness and for the sake of the benefits and justice. While the recital of the obligatory will is given to non-Muslims with the consideration that the non-Muslim wife has lived in

¹¹ Jaih Mubarak, *kaidah fiqh: sejarah dan kaidah asasi* (Jakarta: PT. Raja Grafindo Persada, tth) , 151. Lihat pula Asjmuni A. Rahman, *Metode Penetapan Hukum Islam*, (Jakarta: Bulan Bintang, 1986), 3-4

¹²Ahmad Rofiq, “*Hukum Islam di Indonesia*”, (Jakarta: Raja Grafindo Persada,2002), Cet. 4, 448

harmony and devoted herself to her husband, the will is obliged by the judge to realize the substantive benefits and justice, in order to maintain the integrity of the family without contravening the provisions of Islamic law.

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Dr. Siti Ropiah, "The Construction Of Inheritance On Different Religion And Reconstruction Through Mandatory Places" IOSR Journal of Research & Method in Education (IOSR-JRME) , vol. 8, no. 5, 2018, pp. 87-92.