Implementation of Wasiat Wajibah as a Means of Inheritance for Non-Moslem Heirs

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Abstract. This article discusses the Inheritance in Islamic Law. Inheritance in Islamic law can only be given to heirs on the condition that the heirs and heirs must be Muslim, have a blood relationship or marital relationship with the heir, and are not hindered by law from becoming heirs. The methodology of this article uses a normative juridical research method derived from a literature study. The result is the obligatory will can also be given to non-Muslim children and wives whose amount is the same as that of adopted children and adopted parents, based on Supreme Court Decision No. 368K/Ag/1995, which provides an expansion of the meaning for the granting of an obligatory will, whereas based on Article 209 of the Compilation of Islamic Law stipulates that obligatory will can only be given to adopted children and adopted parents.

Keywords: Obligatory Will, Inheritance, Non-Muslim, Jurisprudence.

1 Introduction

The diversity of religions that exist in Indonesia began with the large number of foreigners who came to Indonesia to trade. The spread of religion in Indonesia began with the Hindu-Buddhist religion brought by India. The Gujarat merchants spread the teachings of Islam. The arrival of Europeans also brought the teachings of Christianity-Catholicism, and traders from China adhered to the religion of Kong Hu Chu. Indonesian society, which has an open nature, also coexists with these religions.

For now, religion is the basis/foundation in uniting all elements that exist in living as a "pillar of support.". It is also stated in the common consciousness that the independence achieved in 1945 was the grace and will of God Almighty. The diversity of these dogmatics (precepts) towards religion in Indonesia is when this nation is liberated, that is, it is united in an implication of the same recognition of the One God (listed in the First Precept in Pancasila).

In Indonesia, Islam has the highest number of religious believers, it can be seen based on population records by religion published by the Ministry of Religious Affairs of the Republic of Indonesia in 2022, where 87.40% of the entire Indonesian population is Muslim, which is equivalent to 241.70 million people. It can be seen that the dominance of people who are Muslims is very much in Indonesia, one of the sources of Indonesian law is Islamic law, in addition to western law and customary law. Islamic law itself has a legal basis for carrying out all its religious activities; the highest legal basis of the Islamic religion is the Qur'an and the Al-

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Hadith. The Qur'an is a holy book that contains instructions for Muslims, while the Al-Hadith is the attitude and sayings of the prophet in Islam.

The existence of Islamic law in Indonesian society can be seen from public awareness of law and justice that are inseparable within the framework of national law. Then, various provisions of Indonesian law and legislation contain Islamic law materials. With the existence of Islamic law in the midst of religious diversity in Indonesia, it is often a legal problem, especially in terms of heritage which often makes judges in their position to examine cases need to make legal discoveries *(rechtvinding)*, as stipulated in Article 5 of Law Number 48 of 2009 concerning Judicial Power and Article 229 of the Compilation of Islamic Law which states "Judges have the authority to resolve a case based on a sense of justice and values in people's lives.".

In general, those entitled to be designated as heirs are blood families, both legal and out-of-wedlock, and the husband or wife who lives the longest[1]. Meanwhile, in the teachings of the Islamic religion, as stated in Article 171 letter c of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, it explains that 3 conditions must be met in order to be determined as an heir, namely; (1) have a blood or marital relationship, (2) Muslims, and (3) unobstructed by law from becoming an heir. Especially for adherents of the Islamic religion, it is emphasized that an heir is obliged by law to adhere to the religion of Islam. Otherwise the consequence is that you cannot have the right to be an heir again. The determination of such heirs shall determine for the meeting for the grant of heirs and wills.

According to the Clerics' fiqh, the definition of a will is a voluntary surrender of property from a person to another party that takes effect after the person dies, either material or beneficial property[2]. Then, what has become a debate and has happened in Indonesia is related to heirs who have religions other than Islam. According to field data, heirs who are not Muslim can also have their rights as heirs through obligatory wills. This phenomenon has undergone several developments in practice, where there is interference from the judge in the decisions made. The basis for granting an obligatory will is that it will expressly be given to adopted parents who do not receive a will to be given a mandatory will of up to 1/3 of the will of the adopted child, and for an adopted child who does not receive a will to be given an obligatory will of as much as 1/3 of the estate of his adopted parents[3].

The decision of the Religious Courts to grant the determination of inheritance in the form of an obligatory will is customary, as will be examined in this paper based on the jurisprudence from the Supreme Court of the Republic of Indonesia Decision Number 368K/Ag/1995 dated July 16, 1998 which provides legal rules for obligatory wills against children and wives who are not Muslim, which then the jurisprudence was used in several subsequent judgments, namely Supreme Court Decision No. 51 K/Ag/1999 dated September 29, 1999, and Supreme Court Decision Number: 16K/Ag/2010, etc. The existence of a Supreme Court Ruling that decided to give a share to the division of the inheritance of a mandatory will against a person who is not a Muslim has been considered a way out for the heir to have a different religion from his heir.

Furthermore, the obligatory will for heirs who are not Muslims will be further reviewed regarding the basis and consideration of the judge in deciding the case of the inheritance of different religions with the obligatory will, and then the extent to which this obligatory will can be used as the basis for the division of the inheritance of different religions.

2 Methods

In conducting legal research several research methods can be used. Research methods have a function of obtaining the truth from legal research activities in terms of developing legal knowledge and answering new legal issues that develop in society[4]. This article uses a normative juridical research method derived from a literature study[5]. This method is used to answer the problems that arise in this research, which cannot be separated from the need for data, which can be met by searching for materials from books or other articles. Normative juridical means that this research refers to the legal norms contained in statutory regulations and court decisions along with norms that apply and bind society[6]. The type of research used in this article is descriptive because it is intended to provide data about humans, circumstances, or other symptoms as accurately as possible[7].

Legal research is carried out to solve legal problems that arise, or that will arise. Therefore, the results that have been obtained are used to provide a prescription for the legal issues that have been raised[8]. This research uses a statutory approach, conceptual approach, and case approach. The statutory approach is carried out by reviewing all laws and regulations related to legal issues regarding the right to be heirs for non-Muslim heirs. In this case, it has been set in the Presidential Instruction of the Republic of Indonesia Number 1 of 1991 concerning the Compilation of Islamic Law. The purpose is to find out the legal ratio, the ontological basis, and the philosophical foundations of the regulation concerning the right to be heirs for non-Muslim heirs[9]. Then, the conceptual approach is born from the insights and doctrines that develop within the legal science itself[10]. This approach is carried out to provide a descriptive understanding of the concepts proposed by legal experts regarding the right to be heirs for non-Muslim heirs. The case approach is an approach that uses cases that have occurred and judges' decisions as a source of legal research material. The judge's decision is made with permanent legal force *(inkracht)*[11]. Suppose the court's decision wants to be used as primary legal material that has the power as a basis for legal research considerations. In that case, it is the legal reason the judge uses in giving the decision (judge's consideration). The jurisprudence and court decisions that will be used in this study include (1) Supreme Court Decision of the Republic of Indonesia Number 368/K/Ag/1995 dated July 16, 1998, and (2) Supreme Court Decision of the Republic of Indonesia Number 16K/Ag/2010, all of the Supreme Court Decisions are concerning about the right to be heirs for non-Muslim heirs.

The type of data used in this research is secondary data. Secondary data are data that are not obtained directly from the field but are obtained from literature studies[12]. This secondary data consists of primary, secondary, and tertiary legal materials. Primary legal materials are binding legal materials. Primary legal materials include, among others, written law such as statutory regulations and court decisions. This research was conducted by reviewing and analyzing primary legal materials concerning the Compilation of Islamic Law, such as Presidential Instruction No. 1 of 1991[13]. Secondary legal materials, such as books, scientific journals, articles from newspapers, and the internet, are used to explain the primary legal materials. Tertiary legal materials are guidelines for primary and secondary legal materials such as dictionaries and encyclopedias[14]. Data collection in this study was carried out by studying documents or library materials, which is a data collection done through written data using content analysis[15].

3 Discussion

3.1 Wasiat Wajibah for Non-Moslems According to Positive Law

Since man lives, he does many things, such as making money to use daily living expenses in addition to property for the descendants of his children and grandchildren. Before death a person will make a will with the aim that later the property left behind will not become between heirs.

In the Great Dictionary of Indonesian, Inheritance is something that is inherited, like a treasure, a good name, Heirloom treasures: which are not small in number. If an inheritance is to be passed on to the heirs, it needs to be contained in a letter known as a "Will.". Sebuah Wasiat itu dapat dibuat sendiri maupun dibuat di hadapan notaris. According to the Civil Code, a will (testament) is a deed that contains a person's statement about what he wants to happen after he dies, which can be revoked again[16]. A will statement is a letter issued by one party only (the will-maker); at any time, the will statement can be withdrawn by the person who made it. One of the conditions for the creation of a will (testament) is that the will must not conflict with the law.

Based on Article 875 of the Civil Code regarding Wills, several things need to be considered:

a. The Will shall take effect after the testator dies;
b. The will-maker himself may at some time revoke the will or may be changed while the testator is still alive;
c. The statement that the will was made without pressure shall be stated in the will by the will-maker.

A person who wants to make a will (testament) requires a person who makes a will (notary), something that will be inherited, the presence of witnesses and other parties, namely a notary to be kept and a proof letter made in the form of a deed that has legal force[17].

Articles 895 and 897 of the Civil Code provide conditions for a person to make a will. A will-maker is someone who's able to think normally with his thoughts; otherwise, the will that he made must be declared void. Then, the maker of the will must also be of legal age, in this case, 18 years old.

Wills can be divided into 2 categories, namely, Wills according to their form and also Wills according to their contents. The explanation of these 2 categories is as follows:

I. The will according to its content, consists of:

a. A will containing an *erfstelling* or will of the appointment of an inheritance is a will with the name of the person making the will, which is then given to a person or more, in whole or in part (1/2 or 1/3) of his wealth if he dies[18]. The person designated as the heir is called *testamentary erfgenaam*, which means the heir according to the will is the same as the heir according to the law.
b. A will containing a grant (legaat), which is a gift to one or several persons in the form of one or several certain objects or goods of a certain type, for example: the whole moving object, the right of use of the result (*vruchtgebruik*). Then all or part of the inheritance, something else to the property, for example, giving one or several certain objects of the property. The person who receives the *legaat* is called a *legataris*. He is not an heir, so he does not replace the rights and obligations of the deceased, is not obliged to pay his debts, and the legataris gets an inheritance under a special title[19].

II. The will, according to its form, consists of:

a. An olographic testament is a will written by the hand of the person who left the inheritance itself *(eigen handing)* made in front of a notary to be kept and must be attended by 2 witnesses[20].
   The making of this Will needs to be accompanied by a deed of storage (deed van depot) signed by the will maker, notary and 2 witnesses who attended the making of the will.
b. A public will *(Openbare testament)*, is a general will made by a notary and attended by 2 witnesses[21].
   This form of will is most often used where the person who's leaving the inheritance comes to the notary to declare his will.
c. A secret will, is a will made by another person (representative), then the will, will be signed by the beneficiary, which later the representative of the beneficiary will submit the will to the notary in sealed condition along with 4 witnesses[22].

3.2 Wasiat Wajibah According To Islamic Law Compilation

An obligatory will is a coercive policy of the ruler to give a will to a certain person in certain circumstances[23]. An obligatory will is a will aimed to heirs or relative who does not acquire a share of the deceased's estate due to an obstruction of the deceased'[24].

The elements of an obligatory will are:

a. It takes the form of a deed, meaning that the will must be made in written form. Given that a will has far-reaching consequences and only takes effect after the will maker dies, a will is bound by strict conditions.
b. Containing a final statement of will, which means unilateral legal action, the unilateral legal action in question is the act or statement of one person is sufficient for the arising of the desired legal effect, in this case, the statement of the testator to the wealth he left to the heirs.
c. What happens after he dies, means that the will is only valid and has legal consequences if the will-maker dies.

In Presidential Instruction No. 1 of 1999 concerning the Compilation of Islamic Law, obligatory wills have a broader aspect, not only the issue of conceived grandchildren but also regarding the relationship of adopted children. The Compilation of Islamic Law stipulates that between adopted children and adopted parents, a relationship is fostered by each other. Article 209 paragraphs (1) and (2) read: 1) The estate of the adopted child is divided under Articles 176 to 193 mentioned above, while those of the adopted parent who do not receive the will must be given a mandatory will as much as 1/3 of the wealth of the adopted son. 2) An adopted child who does not receive a will is given an obligatory will of up to 1/3 of the wealth of his adopted parents.

According to the article mentioned above, the estate of an adopted child or adopted parents must be divided according to its rules, that is, distributed to people who have a kinship relationship who are his heirs. Under this rule, the adopted parents or adopted child does not acquire the right of inheritance, since he is not the heir.

In fact, a non-Muslim does not get an inheritance if the heir adheres to Islam, but the existence of a will is a gift given by the heir to the person entitled to receive it, which will be given after

the heir dies. A will is not limited to anyone. Even a person who is a relative with the deceased cannot receive a will, nor can a will exceed one-third[25].

3.3 Enforcement of Wasiat Wajibah According to Court Precedents in Indonesia

In practice, it is not uncommon to find cases where the husband, wife, or child of the deceased party is not Muslim, and the heir does not leave a will to him, the parties can file a claim with the Religious Court to still be able to obtain a share of the heir's wealth. Not infrequently also, husbands, wives, or children as parties who are sued by the heirs because they have actually controlled the inheritance, demands which can result in the husband, wife, child who is not Muslim will lose the property which is the only support for his life.

Juridically, the provisions in the Compilation of Islamic Law, especially Article 209, state that obligatory wills are only intended for adopted children and adopted parents. However, in the legal system in Indonesia, the institution of wills including obligatory wills becomes the absolute competence of religious courts based on Law Number 7 of 1989 concerning Religious Courts jo. Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts.

The complexity of Indonesian society makes judges have to get out of the existing juridical formil by using the *rechtsvinding* function which is justified by positive law in Indonesia if there is no governing law. This authority is given in Article 5 of Law Number 48 of 2009 concerning Judicial Power. In addition, the Compilation of Islamic Law in Article 229 also gives judges the authority to settle cases by taking seriously the legal values that live in society so as to provide appropriate decisions with a sense of justice.

Legal findings that have been made by courts in Indonesia regarding obligatory wills have produced a rule of law to be used as a reference if in the future there are similar or similar legal problems, these decisions include:

1. **Supreme Court Decision Number 368K/Ag/1995 dated July 16, 1998.**
   This decision is a judgment that initiates a development of understanding of the existence of an obligatory will according to Article 209 of the Compilation of Islamic Law, where for the first time the Supreme Court in 1998 gave the opinion that a converted child has the same position as other children who adhere to the Islamic religion, but the child is not appointed as an heir but gets his inheritance rights in the form of an obligatory will.

   The Supreme Court Decision Number 368K/Ag/1995 which had given an opinion on a child who adhered to a different religion from his heir was later re-decided Supreme Court Decision No. 51 K/Ag/1999 of September 29, 1999, in its consideration the Supreme Court held as follows:

   "*Heirs who are not Muslims can still bequeath from the inheritance of the Heir who is Muslim, inheritance is carried out using the Obligatory Will Institution, where the share of children who are not Muslims gets the same share as the share of children who are Muslims as heirs;[26]*

2. **Supreme Court Decision Number 16K/Ag/2010 dated April 16, 2010**
   After the birth of Supreme Court Decision No. 368K/Ag/1995 dated July 16, 1998 and Supreme Court Decision No. 51 K/Ag/1999 which granted inheritance rights in the form

of a obligatory will to a child who did not adhere to the Islamic religion, in the decision of the Supreme Court No. 16K/Ag/2010 it also gives an extension of the meaning of the arrangement of obligatory wills as stipulated in Article 209 of the Compilation of Islamic Law against a wife who does not adhere to the Islamic religion, where in the case of the position in this judgment it is stated that a wife who is given this obligatory will has been married and accompanied the heir for 18 years, thus in its consideration the Supreme Court held as follows[27]:

"That the marriage of the testator to the Petitioner of Cassation has been long enough i.e. 18 years, means that for quite a long time also the Petitioner of Cassation is devoted to the testator, therefore even though the petitioner of the non-muslim Cassation is fit and just to acquire his rights as a wife to get a share of the estate in the form of a obligatory will and a share of the common property as the jurisprudence of the Supreme Court and according to the sense of justice;

Considering, that therefore the decision of the Makassar Religious High Court should be overturned and the Supreme Court will adjudicate with the following considerations:

That the issue of the position of non-muslim heirs has been studied by scholars including the cleric Yusuf Al Qardhawi, interpreting that non-Muslims who co-exist peacefully cannot be categorized as infidels of harbi, just as the Petitioner of Cassation with the heirs during life associates peacefully despite their different beliefs, therefore it is proper and proper for the Petitioner to obtain a share of the estate in the form of an obligatory will.;"

The decision against a wife who does not adhere to the Islamic religion who has accompanied her husband as the heir has also been followed by the Supreme Court Decision No. 721 K/Ag/ 2015 dated November 19, 2015, wherein in its consideration the Supreme Court held as follows[28]:

"That the Heir at the time of death was Muslim and left only one heir who converted to Islam, namely the Plaintiff (Sumarni binti Sirat / wife), while the children of the Heirs (the Defendants) were non-Muslim so that they became hindered as heirs. However, the two children of the Heir who are non-Muslims got/were given a share with a obligatory will;

That the issue of the position of non-muslim heirs has been studied by scholars including the cleric Yusuf Al Qardhawi, interpreting that non-Islamic persons who coexist peacefully cannot be categorized as infidels of harbi, as well as the children of the Petitioner Cassation with the heirs while living peacefully despite their different beliefs, therefore it is proper and proper for the children of the Cassation Petitioner to obtain a share of the heir's estate in the form of an obligatory will.;

That the marriage of the Plaintiff to the late Vincencius Papilaya bin Yos Papilaya has been quite a long time i.e. 17 years, therefore even though the deceased Vincencius Papilaya bin Yos Papilaya when married was non-muslim status, but the deceased was worthy and just to acquire his rights as the husband got half of the share of the common property during the marriage as per the jurisprudence of the Supreme Court and according to the sense of justice;"

From some of the Supreme Court decisions that have been described above, it can be seen that the Supreme Court has more than once provided legal findings related to obligatory wills, which means that obligatory wills as written in Article 209 of the Compilation of Islamic Law do not only apply to adopted children and adopted parents, but also apply to children and wives who do not adhere to the Islamic religion, thus the Supreme Court Decision Number 368K/Ag/1995 have been established as Jurisprudence.

3. Analysis of the granting of obligatory wills after the Supreme Court Decision Number 368K/Ag/1995

In the beliefs of religious people, religion is used as a foundation in realizing life, justice and moral guidance with the aim of creating a balanced life between the world and the hereafter. In the teachings of the Islamic religion there is a set of values commonly referred to as Islamic law (fiqh), fiqh is a practical manifestation of moral values that are the purpose of Shari'a.

Currently, the positive law governing Islamic inheritance is regulated in a Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, where the arrangement for inheritance is regulated in Article 171 letter which regulates the conditions for being able to inherit, including the heir and heir must be Muslim, have a blood relationship or marital relationship with the heir, and are not hindered by law to become heirs.

Then in the Compilation of Islamic Law also clearly regulates in Article 174 paragraph (1) regarding the position of a person or heirs who regulates the party who is entitled to be the heir of the male or female class, which is corroborated by the provisions of Article 171 letter c of the Compilation of Islamic Law related to the definition of the heir himself, that is as follows:

"heir is a person who at the time of death has a blood relationship or marital relationship with the heir, adhere to the Islamic religion and is not hindered by law from becoming an heir".

The distribution of obligatory wills when viewed based on the positive law that exists in Indonesia is currently regulated in Article 209 of the Compilation of Islamic Law which essentially states that obligatory wills can only be given to adopted children or adopted parents. In addition, there is no single regulation in Indonesia that states clearly that children and wives can obtain an obligatory will if they adhere to a religion other than Islam until finally starting in 1995 until the decision of case Number 368K / Ag / 1995 dated July 16, 1998, then the Indonesian people began to discuss the existence of obligatory wills for children and wives who adhere to religion other than Islam[29].

The ruling was a breakthrough by the Supreme Court in which they used their authority as a judge to make a legal discovery or commonly called *Rechtvinding*. According to Sudikno Mertokusumo, legal discovery is an activity, especially from judges in implementing laws in the event of concrete events[30]. The decision was the result of a consultative meeting of the Supreme Court conducted by Drs. H. Taufiq, SH. as chairman of the judge, and Drs. H. Muhaimin, SH. and H. Chabib Syarbini, SH. as member judges pronounced in open session on July 16, 1998, which stipulates that the heirs of the deceased Hj. Suyatmi that the son's share is equal to the share of two women and declares that the defendant II (Sri Widyastuti) is entitled to the estate of Hj. Suyatmi under an obligatory will equal to the share of the deceased's daughter[31]. Supreme Court Decision

No. 368K/Ag/1995 has become the basis for new consideration in terms of the determination of obligatory wills for non-muslim heirs.

Not only that decision, the Supreme Court Decision No. 16K/Ag/2010 dated April 16, 2010 also provides a legal discovery related to an obligatory will wherein in its legal opinion, the Supreme Court held that a non-Muslim wife who has long (18 years) accompanied the husband through a valid marriage was deemed worthy and fair to obtain her inheritance rights through an obligatory will. Until now, the decision to grant an obligatory will to non-Muslim children and wives has continued to be applied consistently so that the Supreme Court has made it as Jurisprudence, so that the impact of the birth of that jurisprudence makes the regulation of obligatory wills as stipulated in Article 209 of the Compilation of Islamic Law, experiencing a development of meaning that it can not only be given to adopted children and adopted parents, but can also be given to children and wives of non-Muslims[32].

According to Sudikno Mertokusumo, that the law must indeed be respected, but the law will always be outdated, so the panel of judge do not have to absolutely abide by it[33]. Thus it is true and fair to have a jurisprudence through a Supreme Court ruling that establishes the right of inheritance through obligatory wills for non-Muslim children and wives.[34]

Conclusion

The compilation of Islamic Law before the existence of Supreme Court Jurisprudence No. 368K/Ag/1995 only granted heir rights to heirs who adhered to the Islamic religion, had a blood relationship or marital relationship with the heir, and were not hindered by law from becoming heirs. However, along with the development of the times and patterns of life, there is a lot of found a family that adheres to different religions, until the existence of Supreme Court Decision No. 368K/Ag/1995 dated July 16, 1998, in which the Supreme Court made a legal discovery related to an obligatory will in which the legal opinion stated as a proper and just thing for a non-Muslim child and wife to continue to obtain her inheritance rights through an obligatory will.

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