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Legal Discovery Method for Non-Muslim Heirs as Recipients of *Wasiat Wajibah*

Ramdan Fawzi
Universitas Islam Bandung, Bandung, Indonesia
ramdanfawzi@unisba.ac.id

Encep Abdul Rojak
Universitas Islam Bandung, Bandung, Indonesia
encepabdulrojak@unisba.ac.id

Ilham Mujahid
Universitas Islam Bandung, Bandung, Indonesia
ilham_mujahid@unisba.ac.id

Mualimin Mochammad Sahid
Universiti Sains Islam Malaysia, Malaysia
mualimin.sahid@usim.edu.my

Abstract

The Islamic inheritance system has not fully accommodated the problem of inheritance distribution in the reality of society, especially the rights of non-Muslim heirs. Therefore, in several of its decisions, the Supreme Court of the Republic of Indonesia grants rights to non-Muslim heirs through *wasiat wajibah*. This study discusses *wasiat wajibah* in Islamic Law and Positive Law and the method of finding law used by Supreme Court judges in rulings on non-Muslim heirs. The research method uses normative juridical with a legislative, conceptual and case approach. The results of the study show that Islamic law (Quran, Hadith and Fiqh) has expressly regulated the provisions for the settlement of inheritance between heirs, the procedure for the division and transfer of the heir's

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property to the heirs, as well as the reasons for obtaining a share of the inheritance as well as the reasons that hinder the heirs. The method of legal discovery used by the Supreme Court Judges in the decision of non-Muslim heirs uses an extensive interpretation with a deepening of the Compilation of Islamic Law concerning *wasiat wajibah* for adopted children and adoptive parents. *Wasiat Wajibah* are a way out to get a share for non-Muslim heirs, because the recipients are not hindered due to religious differences. This decision is an extension of the Compilation of Islamic Law on *wasiat wajibah* . The Supreme Court's decision can be used as a reference for the Religious Court in deciding the same case.
KEYWORDS *Heirs; Jurisprudence; Non-Muslim; Wasiat Wajibah*

Abstrak

Sistem kewarisan Islam belum sepenuhnya mengakomodir problematika pembagian waris dalam realitas masyarakat, khususnya hak ahli waris non-muslim. Oleh karena itu, Mahkamah Agung Republik Indonesia dalam beberapa putusannya memberikan hak kepada ahli waris non-muslim melalui wasiat wajibah. Penelitian ini membahas tentang *wasiat wajibah* dalam Hukum Islam dan Hukum Positif dan metode penemuan hukum yang digunakan oleh hakim Mahkamah Agung dalam putusan tentang ahli waris non-muslim. Metode penelitian menggunakan yuridis normatif dengan pendekatan perundang-undangan, konseptual dan kasus. Hasil penelitian menunjukan bahwa hukum Islam (Alquran, Hadist dan Fikih) telah mengatur secara tegas dan jelas tentang ketentuan penyelesaian harta waris antara para ahli waris, tata cara pembagian dan peralihan harta si pewaris kepada ahli waris, juga sudah ditetapkan sebab-sebab mendapatkan bagian harta warisan juga sebab-sebab yang menghalangi ahli waris. Metode penemuan hukum yang digunakan oleh Hakim Mahkamah Agung dalam putusan ahli waris non-muslim menggunakan interpretasi secara ekstensif dengan pendalaman terhadap Kompilasi Hukum Islam tentang *wasiat wajibah* bagi anak angkat dan orang tua angkat. Wasiat wajibah menjadi jalan keluar untuk mendapatkan bagian bagi ahli waris non-muslim, karena penerimanya tidak terhalang karena perbedaan agama. Putusan ini merupakan perluasan terhadap Kompilasi Hukum Islam tentang *wasiat wajibah*. Putusan Mahkamah Agung dapat dijadikan sebagai rujukan bagi Pengadilan Agama dalam memutuskan perkara yang sama.

KATA KUNCI Ahli Waris; Non-Muslim *Yurisprudensi; Wasiat Wajibah*

Introduction

The Islamic inheritance system regulates clearly and in detail the provisions for the settlement of inheritance between heirs, the procedure for the division and transfer of the heir's property to the heirs, as well as the reasons for obtaining a share of the inheritance as well as the reasons that prevent the heirs from obtaining the inheritance.[294] In the provisions of Islamic inheritance law, three groups of people are prevented from becoming heirs, namely heirs of different religions, heirs who murder heirs, and slaves.[295]

The provisions of Islamic civil jurisprudence regarding inheritance barriers have an influence on Islamic legal products in Indonesia in the field of inheritance. Article 171 letters b and c of the Compilation of Islamic Law states that heirs and heirs must be in a state of Islam. This shows that if one of them is not Muslim, then the two cannot inherit each other, although Article 173 of the Compilation of Islamic Law does not mention religious differences as a barrier to being able to inherit.[296]

The Supreme Court Cassation Decision Number 368K/AG/1995 is a decision on the settlement of Islamic inheritance disputes with one of the heirs who is a non-Muslim. The chronology of the case in the decision is the filing of a lawsuit against the settlement of inheritance disputes to the Central Jakarta Religious Court which was decided on November 4, 1993 with decision Number 337/Pdt.G/1993/PA. JP, which granted the plaintiff's lawsuit in its entirety. Based on article 171 point C juncto articles 175 and 188 of the Compilation of Islamic Law, the defendant who is also a

[294] Muhammad Ali Ash-Shabuni, *Al-Mawaris Fi Al-Syari'ati Al-Islami* (Beirut: 'Scientist Kutub, 1979).

[295] Amrin, "A Review of Islamic Law on the Law of Inheritance of Different Religions," *Syar'ie* 5, no. 2 (2022): 146–55.

[296] A. Mukti Arto, *Bilateral Inheritance Law in the Compilation of Islamic Law*, 1st ed. (Solo: Balqis Queen, 2009); Budi Hariyanto, "Juridical Review of the Distribution of Inheritance of Different Religions According to the Civil Code (Civil Code) and the Compilation of Islamic Law (KHI)," *IUS* Journal 8, no. 02 (2020): 28–42.

Christian is automatically excluded from the inheritance recipient. The non-season defendant also rejected the decision by filing an appeal to the Jakarta High Court of Religion which was decided by the Panel of Judges on October 25, 1994 with number 14/Pdt.G/1994/PTA. JK. The Panel of Judges in its ruling accepted the appeal and the non-Muslim heirs were entitled to a share of the inheritance based on the principle of *wasiat wajibah*. This decision annuls the decision of the Central Jakarta Religious Court Number 337/Pdt.G/1993/PA. JP. This case was submitted to the Supreme Court with Decision Number 368K/AG/1995 which stipulated that nonMuslim heirs are entitled to inheritors' inheritance based on *Wasiat Wajibah*.

The Supreme Court's decision has provided a new paradigm in the field of inheritance law in Indonesia. This decision is the Supreme Court's jurisprudence that bridges the legal vacuum in resolving the issue of property division in the family, one of which is heirs of different religions. *wasiat wajibah* are considered the most realistic compromise for heirs of different religions and heirs, although, in Islamic law, religious differences have no obligation to obtain an inheritance.[297]

Several relevant previous studies have been conducted. For example, the research of Hakim and Nasution discusses legal arguments and fiqh principles at the Supreme Court in Indonesia after the new order on the rights of non-Muslims as heirs. The study found that although the judges' legal arguments were relatively progressive and inclusive by accommodating non-Muslim rights, their analogical interpretation of *wasiat wajibah* was still trapped in classical jurisprudence norms that placed religious differences and apostasy as barriers to inheritance.[298] Hermanto's research discusses the methods and approaches used by the

[297] M U Abshor, "Kewarisan Istri Non Muslim Dan Kewarisan Suami Murtad," *Sakina: Journal of Family Studies* 2, no. 3 (2020).

[298] Muhammad Lutfi Hakim and Khoiruddin Nasution, "Accommodating Non-Muslim Rights: Legal Arguments and Legal Principles in the Islamic Jurisprudence of the Indonesian Supreme Court in the Post-New Order Era," *Oxford Journal of Law and Religion* 11, no. 2–3 (2022): 288–313, https://doi.org/10.1093/ojlr/rwad004.

Supreme Court in deciding cases of interfaith inheritance. The research findings are the Supreme Court's Decision on the ability of non-Muslims to receive from Muslim heirs through *wasiat wajibah*, which is a form of progressive, innovative and responsive attitude of judges and has become jurisprudence for judges in Religious Courts.[299] Zubair, et al.'s research also examines Supreme Court rulings related to the transfer of inheritance to non-Muslims with an empirical juridical approach. The research findings are that the construction of inheritance law reform in judicial decisions has formulated inheritance law by granting inheritance rights to heirs of different religions (non-Muslims) with a *Wasiat wājibah*. However, the renewal of inheritance law in the jurisprudence of the Supreme Court of the Republic of Indonesia has exceeded the quantitative limit in the granting of *Wasiat wājibah* by ignoring the maximum limit.[300]

The next research was motivated by the inconsistency between the discourse and the application of Islamic inheritance law that grew and developed in the Pontianak community with the binding decisions of the religious courts. This research uses an empirical legal approach based on legal sociology. The results of the study show that the construction of inheritance law carried out by the Pontianak Religious Court judges uses the method of legal discovery by referring to jurisprudence. In addition, it analyzes the provisions of inheritance in fiqh books. The legal reasoning postulates taken by the judge are the postulates of socio-cultural reasoning, the relationship of family rights and responsibilities in society.[301]

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[299] Agus Hermanto et al., "Inheritance Division for Non-Muslim Heirs According to the Supreme Court's Decision," in *1st Raden Intan International Conference on Muslim Societies and Social Sciences (RIICMuSSS 2019)* (Atlantis Press, 2020), 190–94, https://doi.org/10.2991/assehr.k.201113.036.

[300] Asni Zubair and Hamzah Latif, "The Construction of Inheritance Law Reform in Indonesia: Questioning the Transfer of Properties through Wasiat W Jibah to Non-Muslim Heirs," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (2022): 176–97, https://doi.org/10.22373/sjhk.v6i1.12628.

[301] Muhammad Hasan, "Construction of Modern Islamic Inheritance Law Based on Ijtihad of the Judges at the Religious Court of Pontianak, West Kalimantan," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 2 (2023), https://doi.org/DOI: 10.22373/sjhk.v7i2.8852.

This study complements the previous research, namely discussing *wasiat wajibah* in Islamic Law and Positive Law and the method of legal discovery used by the Supreme Court in deciding non-Muslim heirs to be part of the inheritance through *wasiat wajibah*.

Methods

The research method uses normative juridical, with a legislative, conceptual and case approach. Sources of legal materials include: Supreme Court rulings related to non-Muslim heirs with obligatory wills, Compilation of Islamic Law, Quran, Hadith and Fiqh related to the legal issues under review. The technique of collecting legal materials uses document studies. The process of collecting legal materials begins with an inventory of legal materials, systematization and classification of legal materials by the theme of the study. The analysis technique uses prescriptive analysis with logic and deductive legal reasoning.

Discussion

Wasiat Wajibah: How do Islamic Law and Positive Law Regulate it?

Islamic law regulates the division of inheritance for people left by heirs, including people of different religions, who cannot inherit each other.[302] This means that for heirs who are of different religions from the heirs, they cannot inherit their inheritance from each other.[303] The provisions of inheritance for Muslims are contained in Surah an-Nisa [4] verses 7, 11, 12, and 176. These four verses are a reference for Islamic law in resolving inheritance problems.[304]

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[302] Safira Rahmi Khouw, La Ode Angga, and Sabri Fataruba, "A Study of Islamic Law on Compulsory Wills to Heirs of Different Religions," *Tatohi: Journal of Legal* Sciences 1, no. 11 (2022): 1120–29.

[303] Hasan Khalid Dabis, "Rules of Inheritance in Islamic Laws (A Quranic Study)," *Review of International Geographical Education Online* 11, no. 9 (2021): 779–87, https://doi.org/10.48047/rigeo.11.09.66.

[304] Siti Aminah, and Nok Izatul Yazidah. "The Study of Social Arithmetic in the Calculation of Faraidh (Inheritance) in QS. An-Nisa." *Prismatics: Journal of*

AlQuran Surat. An-Nisa [4] ayat 7: For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an wajibah share.[305]

Abul Hasan Ali bin Ahmad Al-Wahidi quoted from the mufassir, that the Qur'an Surah An-Nisa [4] verse 7 was revealed in relation to the death of a companion named Aus bin Tsabit Al-Anshari by leaving a wife named Um Kuhhah with three daughters. His wife and children are the heirs of Aus bin Tsabit Al-Anshari, who of course got a share of the wealth he left behind. However, the tradition of jahiliyah Arab inheritance does not pay attention to the nearest heir even though it is his wife and children. So that the two nephews of Aus bin Tsabit al-Anshar took all the inheritance without leaving it for his wife and children Aus. The principle of dividing the Arab Jahiliyah inheritance only gives inheritance to adult men, even if they are not the closest heirs. The reason used was that men were able to fight on horseback and were able to take the spoils of war.[306]

The Prophet called the person who controlled the treasure of Aus bin Tsabit named Suwaid and Arfajah. Before the Prophet, both of them were confident and firm in their stance in accordance with the habit of jahiliyah in the distribution of inheritance, and both said: "O Messenger of Allah, the son of um Kuhhah cannot ride a horse, cannot carry a weapon and cannot defeat the enemy." Then the Messenger of Peace Be Upon Him replied, "Disband you until I wait for what Allah will tell me about this matter." Then they dispersed and left the Prophet. Not long afterwards

Mathematics Education and Research 1.1 (2018): 50-56.

[305] Md Habibur Rahman, Abu Talib Mohammad Monawer, and Noor Mohammad Osmani, "Wasiyyah Wajibah in Islamic Estate Planning: An Analysis," *Jurnal Islam Dan Masyarakat Kontemporari* 21, no. 3 (2020): 72–86, https://doi.org/10.37231/jimk.2020.21.3.448.

[306] Samia Zouaoui and Khaled Rezeg, "Islamic Inheritance Calculation System Based on Arabic Ontology (AraFamOnto)," *Journal of King Saud University-Computer and Information Sciences* 33, no. 1 (2021): 68–76, https://doi.org/10.1016/j.jksuci.2018.11.015; Juhrah M Arib et al., "The Inheritance of Human Traits in the Qur'an Based on the Scientific Interpretation of Zaghlūl Rāghib Muḥammad an-Najjā," *AL QUDS: Jurnal Studi Alquran Dan Hadis* 6, no. 2 (2022): 863–86, https://doi.org/10.29240/alquds.v6i2.4199.

came Surah an-Nisa [4] verse 7 which regulates the provisions of inheritance, that for children there is a part of their parents' inheritance.[307]

QS. An-Nisa [4] article 11: Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two-thirds of one's estate. And if there is only one, for her it is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.[308]

Abul Hasan Ali bin Ahmad al-Wahidi mentioned that there are two narrations that background the descent of this verse. 1), verse 11 of this surah an-Nisa is related to the inheritance of Jabin bin Abdillah. Regarding this there are two different paths: First, narrated from Jabir, he said: 'The Prophet peace be upon him and the Companions of Abu Bakr Ash-Siddiq visited me on foot in the village of the Banu Salamah, then the Prophet (peace be upon him) met me in an unconscious state. Then the Messenger asked me to take water, perform ablution, sprinkle water on me, and then after that I immediately came to my senses. Then I asked him: 'What do you command me to do with my inheritance, O Messenger of Allah?' Then verse 11 of Surah an-nisa came down."

Narrated from the companion of Jabir bin Abdillah, he said: 'A woman came with two children, and she said: 'O Messenger of Allah, these are the two sons of Tsabit bin Qais, or he said: 'These are the two sons of Sa'd bin Ar-Rabi', who died with you during the battle of Uhud, while their inheritance was completely taken away by his uncle. without leaving any

[307] Abul Hasan Ali bin Ahmad Al-Wahidi An-Naisaburi, *Asbabun Nuzul* (Jakarta: Darul Kutub Al-Islamiyyah, 2010).
[308] Admin, "Surah An-Nisa Verses 7 & 11."

treasures, so what is your view, O Messenger of Allah?' So for Allah's sake they will not be married forever unless they have wealth. Then the Messenger of Peace upon him said: 'Allah will decide the matter.' Then came the Qur'an surah An-Nisa' [4] verse 11. Then the Messenger of Allah said to me: 'Call me the woman and her friend.' Then the Messenger of peace (peace upon him) said to the uncle of the two daughters: 'Give them two two-thirds, give their mother one-third, and the side is for you.'" (HR. Ar-Daruquthni).[309]

QS. An-Nisa [4] ayat 12: And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one-fourth if you leave no child.[310] But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants or descendants but has a brother or a sister, then one is a sixth for each. But if there are more than two, they share a third, after any bequest which was made or debt, as long as no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing.[311]

Muhammad as-Sayyid Thanthawi in Tafsir *Al-Wasith* explains that Surah an-nisa [4] verse 12 includes three main discussions, namely the distribution of inheritance for husbands, the distribution of inheritance for wives and the distribution of inheritance for half-mothers.[312]

The first discussion, related to the inheritance share for the husband is divided into two conditions, namely: 1) if the deceased wife does not have children or grandchildren of the absolute heir son, either male or female, either one or more, either from the inherited husband or her ex-husband, then the husband's share only gets half of the inheritance left

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[309] An-Naisaburi, *Asbabun Nuzul*.

[310] Alexander David Russell, *Muslim Law: An Historical Introduction to the Law of Inheritance* (London: Routledge, 2013), https://doi.org/10.4324/9780203707951.

[311] Admin, “Surat An-Nisa Ayat 12,” Saudi Arabia, n.d.

[312] Hasan Munthe, “Surah An-Nisa Ayat 6-7, 12, 176 Defenisi Tentang Warisan,” *Al-Usrah: Journal of Al-Ahwal As-Shakhsiyah* 11, no. 3 (2024), https://doi.org/10.30821/al-usrah.v11i3.21242.

by the wife; 2) If the wife dies and there is a child or grandchild of a son with her, as detailed earlier, then the husband only gets a quarter of his wife's inheritance. The rest of the distribution is given to other heirs. The husband's share of the inheritance is given if the will and heirs' debts have been paid first.[313]

The second discussion is the distribution of inheritance for the wife if the deceased is her husband. There are also two conditions for the distribution of inheritance to the wife, first if the husband dies and does not have children, second: if the husband dies and leaves children. If the husband dies and he has no children or grandchildren from the male line, with the details as in the discussion of the husband's inheritance, then the wife only gets a quarter of the inheritance left by the husband. The second condition, if the husband dies and has children or grandchildren from the male line, with the same details as before, then the wife only gets an eighth of the inheritance left by the husband. The distribution of this inheritance is carried out after the heirs' debts are paid. Also the implementation of the will if the heir makes a will before he dies.[314]

The third discussion is the distribution of heirs intended for the heirs of brothers and sisters based on *the kalalah* principle. This principle is a state of inheritance division that does not have parental heirs directly up and heirs of children, grandchildren, and so on down. In this third part, the heirs are entitled to receive only the brothers and sisters of the mother. This is based on two arguments. 1), the existence of the *qira'ah of Sa'd bin Abi Waqqash* clearly states the redaction: "and the deceased has one brother or one half-sister". Second, for the heirs of brothers and sisters, the biological and fatherly sisters have been contained in the Qur'an Surah an-nisa [4] verse 176. The verse contains the law of inheritance division

[313] Herfin Fahri, "Tinjauan Hukum Warisan Perspektif Islam; Konsep Waris Dalam Al Quran, Al Sunnah Dan Kaidah Fikih," *Al Hikmah: Jurnal Studi Keislaman* 13, no. 01 (2023): 165–89, https://doi.org/10.36835/hjsk.v13i01.4071.

[314] Zuleika Adelina and Desinthya Ni Putu, "Islamic Inheritance Law (Faraid) and Its Economic Implication," *Tazkia Islamic Finance and Business Review* 8, no. 1 (2014): 97–118, https://doi.org/10.30993/tifbr.v8i1.64.

with the *Kalalah* principle. This has similarities with Surah an-Nisa [4] verse 12, but the subject matter of the law is different. Allah said: "They ask you about the distribution of *the inheritance*, say, 'Allah will tell you about the inheritance of *the kalalah*'. In this case, there are two conditions in terms of the inheritance of the brother and sister of the mother periodically. First, if the heir has only one brother or one half-sister, then his share will only be one-sixth, regardless of the gender of the male and female. Second, if the heirs have more than one brother or sister of the same mother, then they jointly get a third of the inheritance. While the rest is distributed to other existing heirs. The distribution of this inheritance is carried out after the obligation to pay debts and wills made by the heirs is fulfilled.[315]

QS. An-Nisa [4] ayat 176: They request from you a [legal] ruling. Say, "Allah gives you a ruling concerning one having neither descendants nor ascendants [as heirs]." If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two-thirds of what he left. If both brothers and sisters exist, the male will have the share of two females. Allah makes clear to you [His law], lest you go astray. And Allah knows of all things.[316]

Islam has regulated the subject and object of inheritance law. The subjects of inheritance law are those who are entitled to receive inheritance from deceased people. There are at least several reasons why a person is included in the part that will get the inheritance, including kinship, marriage, and the liberation of the servant.[317]

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[315] Muhammad Assayid Thanthawi, *Al-Wasith*, Juz I, n.d.; Shahbaz Cheema, "Distribution of Inheritance under Islamic Law: An Appraisal of Online Inheritance Calculators," *Journal of Islamic Thought and Civilization* 11, no. 1 (2021): 112–31, https://doi.org/10.32350/jitc.111.07.

[316] Admin, "Surat An-Nisa Ayat 176," Saudi Arabia, n.d.

[317] Wahbah Al-Zuhaili, *Al-Fiqh Al-Islamy Wa Adillatuhu*, Jilid 10 (Damsyiq: Dar al-Fikr, 2006).

Kinship is the destiny of a person who is his ancestor, which is connected from the result of a valid marriage.[318][319] This relationship is inherently legally valid. The second part is marriage, which means a legally valid relationship between a man and a woman. This second type can be inherited if the marriage bond remains intact until one of the parties dies. If this relationship is severed and a divorce occurs that has permanent legal force, then there is no longer the right to inherit each other between the two. Then the last is to free a slave.[320] However, this third part in the current era no longer exists.

Islam has established legal subjects who are prevented from receiving inheritance.[321] In general, the obstacle to receiving this inheritance is divided into two circumstances, the first is based on the nature inherent in the subject of the law, such as killing the heir, apostate, and servant of the slave. Then the second is based on the position of the subject of the law itself which is further away from the heir, so that other heirs are closer and have more rights to become heirs.[322]

The Compilation of Islamic Law regulates legal subjects who are prevented from obtaining inheritance. Article 173 states that those who are prevented from receiving inheritance are based on the decision of the judge who has permanent legal force in the law because Blamed for killing or attempting to kill or severely persecuting the heir, or accused of

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[318] Muhammad Jamil, "Nasab Dalam Perspektif Tafsir Ahkam," *AHKAM: Jurnal Ilmu Syariah* 16, no. 1 (2016).

[319] Jamil, Muhammad. "Nasab in the perspective of tafsir ahkam." *AHKAM: Journal of Sharia Sciences* 16.1 (2016). See, Khalidi, Muhadi. "A Study of Islamic Law on the Provisions of the Inheritance Rights of Children Resulting from Blood Marriage." *The Rule of Law: Journal of Legal Studies* 11.1 (2022): 105-123.

[320] Sajuti Thalib, *Hukum Kewarisan Islam Di Indonesia* (Jakarta: Sinar Grafika, 2008); Richard Kimber, "The Qur'anic Law Of Inheritance," in *Issues in Islamic Law* (Routledge, 2017), 183–217.

[321] Oemar Moechthar, Agus Sekarmadji, and Ave Maria Frisa Katherina, "A Juridical Study of Granting Wills to Heirs in the Perspective of Islamic Inheritance Law," *Yuridika* 37, no. 3 (2022): 739, https://doi.org/10.20473/ydk.v37i3.41161; Zainuddin Zainuddin, "The Value of Justice in the Distribution of Inheritance for Substitute Heirs in Islamic Inheritance Law," *IOSR Journal of Humanities And Social Science (IOSR-JHSS)* 26, no. 11 (2021): 42–46, https://doi.org/10.9790/0837-2604041520.

[322] Ash-Shabuni, *Al-Mawaris Fi Al-Syari'ati Al-Islami*; Reza Valavion, "Barrier of Inheritance," *Private Law Research* 9, no. 33 (2020): 221–41, https://doi.org/10.22054/jplr.2021.41161.2187.

defamation for filing a complaint that the heir has committed a crime that is threatened with a sentence of 5 years in prison or a heavier sentence.[323]

Based on the concept of Islamic law, a will contains a message to give something from someone to another person made while still alive, either in the form of goods, receivables or benefits to be owned that are transferred after the testator dies. Some jurists define a will as a voluntary gift of property rights by the testator which is carried out after the giver dies.[324]. Therefore, the concept of a will is made and carried out when a person is still in a state of health, sane, able to think, and without any coercion from others, who make a contract to transfer his rights to someone who is still alive, where the implementation of the transfer of his rights is carried out after the testator dies.[325]

Indonesia's positive law has regulated the concept of a mandatory will associated with an adopted child and adoptive parents. This is as stated in the Compilation of Islamic Law Article 209 which is considered the result of ijtihad of Indonesian Muslim scholars and judges which is confirmed through a Presidential Instruction.[326] Article 209 of the Compilation of Islamic Law contains a concept that combines the concepts of Customary Law and Civil Law, with a maximum limit of 1/3 of the amount of property owned.[327]

The legal formulation of the will contained in Article 209 paragraphs (1) and (2) stipulates that: 1. The inheritance of the adopted child is divided based on Articles 176-193 mentioned above, while the adoptive parents who do not receive the *Wasiat Wajibah* are given a *wasiat wajibah* of up to 1/3 of the inheritance of the adopted child. 2. For

[323] Zakiul Fuady Muhammad Daud, "Analysis of Judges' Decisions Against Heirs of Different Religions in a Sharia Perspective': Case Study No.1803/Pdt.G/2011/PA. Sby.," *Jurnal As-Salam* 5, no. 1 (2021): 62–75, https://doi.org/10.37249/assalam.v5i1.261.

[324] Sayyid Sabik, *Fiqih Sunnah* (Bandung: Al-Ma'Arif, 1987).

[325] Maizal, Eva, and Marwan, "The Inheritance of Different Religions in Judges' Decisions in Indonesia."

[326] Khouw, Angga, and Fataruba, "A Study of Islamic Law on Compulsory Wills to Heirs of Different Religions."

[327] Maizal, Eva, and Marwan, “Kewarisan Beda Agama Dalam Putusan-Putusan Hakim Di Indonesia.”

adopted children who do not receive a will, they are given a *wasiat wajibah* of not more than 1/3 of the inheritance of their adoptive parents.[328]

This article is the only one that regulates *wasiat wajibah* intended for adoptive parents and adopted children. Both can receive their inheritance by way of a *wasiat wajibah*, and legally the two cannot inherit each other because there is no basis for inheriting each other. However, based on the principle of compulsory will, both can benefit from each other and receive inheritance by not exceeding 1/3 of the inheritance. The Supreme Court is of the view that Article 209 of the Compilation of Islamic Law, the enforcement of unlimited *wasiat wajibah* given only to adoptive parents and adopted children, also given to non-Muslim heirs is ijtihad and an expansion of the meaning of the article.[329]

In practice, inheritance disputes with one of the non-Muslim heirs are often encountered without making a will beforehand, so this will cause problems in society. One of the parties will make demands to the Religious Court as a form of effort to protect their rights. With the expansion of Article 209 of the Compilation of Islamic Law, the concept can be applied not only to adoptive heirs, but also to heirs of different religions.[330] This means that there is a development in the application of compulsory wills in inheritance law in Indonesia.

Method of Legal Discovery in Decisions of Non-Muslim Heirs with *Wasiat Wajibah*

The legal basis is the reason for the transfer of property when a person dies, namely by way of a will. Will means a message made by the

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[328] Susilo Hendri et al., "Hak Waris Anak Yang Berbeda Agama Dengan Orang Tua Berdasarkan Hukum Islam," *Jurnal Usm Law Review* 4, no. 1 (2021): 175, https://doi.org/10.26623/julr.v4i1.3409.

[329] Mahkamah Agung, "Yurisprudensi Wasiat Wajibah," 2018.

[330] Haniah Ilhami, "Development of the Regulation Related to Obligatory Bequest (Wasiat Wajibah) in Indonesian Islamic Inheritance Law System," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 27, no. 3 (2015): 553–65, https://doi.org/10.22146/jmh.15884.

heir before he dies regarding the transfer of property that must be given to the beneficiary of the will. The Supreme Court considers this as a solution to the problem of inheritance of different religions. The position of heirs of different religions is legally prevented as the recipient of the inheritance, but if the will is made by the heir, then there is no obstacle to receiving the property.[331]

Based on the applicable positive law, there have been no clear rules regarding the settlement of inheritance disputes for those of different religions. However, this case always exists in the community so it requires legal certainty in its resolution. For example, in the case of inheritance to a child or wife who is a non-Muslim, in 1998 the Supreme Court resolved this case by way of a mandatory will for non-Muslim heirs, so that he still got his parents' inheritance that no longer exists, with decision number 368 K/Ag/1999. This decision is a reference to a case with the same lawsuit material. Then the application of compulsory wills does not only apply to the heirs of husbands or wives, for children who are not Muslims, mandatory wills have also been applied by the Supreme Court. This is stated in decision number 51 K/Ag/1999 in 1999. Also, for non-Muslim wives who accompany their husbands for 18 years, *wasiat wajibah* are applied in decision number 16 K/Ag/2010.[332]

The Supreme Court's Decision No. 368K/AG/1995 ruled that non-Muslim children obtain a share of their parent's inheritance using a compulsory will with the status of not as heirs. He is only the recipient of a mandatory will set by the Supreme Court, even though his parents do not make the *wasiat wajibah*. This is a legal breakthrough through the Supreme Court's jurisprudence to resolve the issue of Islamic inheritance between heirs of different religions.[333]

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[331] Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 331 K/Ag/2018" (Jakarta, 2018).

[332] Mahkamah Agung, "Yurisprudensi," Mahkamah Agung, 2018.

[333] Maizal, Eva, and Marwan, "Kewarisan Beda Agama Dalam Putusan-Putusan Hakim Di Indonesia."

Several decisions from the Supreme Court and the Religious Court related to the implementation of the concept of *wasiat wajibah* by the concept of Article 209 of the Compilation of Islamic Law, namely the provision of *wasiat wajibah* for adopted children or their adoptive parents. For example, the Cassation Decision of the Supreme Court of the Republic of Indonesia Number 368 K/AG/1999 dated April 17, 1999[334] in conjunction with the Decision of the High Court of Religion of Surabaya Number 238/Pdt.G/1998/PTA. Sby dated December 2, 1998 Jo Decision of the Malang Religious Court Number 1034/Pdt.G/1998/PA. Mlg dated September 2, 1998 decided to give a compulsory will to an adopted child who accompanies, cares, serves, and takes care of his adoptive parents responsibly.[335]The Supreme Court's Review Decision (PK) Number 109 PK/Ag/2016 dated November 28, 2016 has the implementation of article 209 of the Compilation of Islamic Law concerning the giving of compulsory wills to adopted children as much as 1/3, then the rest is calculated as inheritance. Then the Supreme Court Cassation Decision Number 489 K/AG/2011 dated December 23, 2011, and the Supreme Court Review Decision Number 02 PK/Pdt/2013 dated July 18, 2013, gave a share to the stepchildren and adopted children to get a share of the heirs' inheritance based on the obligatory will.[336] These decisions are in line with the formulation contained in Indonesia's positive law.

Furthermore, the application of mandatory wills given to heirs of different religions by the Supreme Court is also very numerous, which includes the provision of mandatory wills to non-Muslim fathers, non-Muslim husbands, non-Muslim wives, non-Muslim wives and

[334] Imamatus Shalehah, "Waris Beda Agama (Analisis Putusan Perkara Kewarisan Beda Agama Dalam Putusan Ma 16/Kag/2018)," *Al-Manhaj: Journal of Indonesian Islamic Family Law* 2, no. 1 (2020): 31, https://doi.org/10.19105/al-manhaj.v2i1.3076.

[335] Maizal, Eva, and Marwan, "Kewarisan Beda Agama Dalam Putusan-Putusan Hakim Di Indonesia."

[336] Badai Husein Hasibuan, "Pembagian Harta Waris Beda Agama Menurut Hukum Islam, Hukum Perdata Dan Hukum Adat," *Jurnal AL-MAQASID: Jurnal Ilmu Kesyariahan Dan Keperdataan* 8, no. 1 (2022): 1–13, https://doi.org/10.24952/almaqasid.v8i1.5550.

children, and non-Muslim brothers.[337] For example, the granting of a compulsory will to a non-Muslim father is contained in the Supreme Court Cassation Decision No. 59 K/AG/2001 dated May 8, 2002, in conjunction with the Jakarta High Court of Religion Decision No. 07/Pdt.G/2000/PTA. JK dated June 21, 2000, and the Decision of the North Jakarta Religious Court dated October 13, 1999. In the ruling, there is a rule that is considered ijtihad by the judge who decided the case, which reads that "a non-Muslim father gets the right to the property of his son who is Practicing Islam", where the decision is based on a mandatory will.[338]

Then the provision of a compulsory will be decided for non-Muslim husbands of Muslim wives. This can be seen in the Supreme Court Cassation Decision Number 331 K/AG/2018. This decision began with a request by a non-Muslim husband, who asked for a share of the property of his Muslim wife by way of a mandatory will and a decision granting a mandatory will of ¼ of his wife's inheritance. The basis of this decision states that the husband always takes care of his wife while she is alive, even taking care of and treating her to the doctor.[339]

The case of giving a compulsory will also applies to a non-Muslim wife who has accompanied her husband for many years, so she files a case for her husband's inheritance and is granted through a compulsory will. The Supreme Court Cassation Decision No. 16 K/AG/2010, dated April 30, 2010, has stipulated and provided a way for non-Muslim wives to legally obtain their husband's inheritance. There is also a ruling that states that non-Muslim wives and children do not wear hijab for their brothers. This is contained in the Supreme Court Cassation decision Number 218

[337] Edy Sanjaya, Indira Hastuti, and Budi Prasetyo, "Distribution Of Different Religion Legacy According To Islamic Instruction Law (Case Study Of The Supreme Court Decision Number 368 K/Ag/1995)," *International Journal of Educational Research & Social Sciences* 3, no. 1 (2022): 538–46, https://doi.org/10.51601/ijersc.v3i1.307.

[338] Agung, "Yurisprudensi."

[339] Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 331 K/Ag/2018."

K/AG/2016 dated May 26, 2016, showing the existence of non-Muslim heirs consisting of wives and daughters.[340]

Countries that have a civil law or continental European legal system, jurisprudence is defined as judges' decisions that have permanent legal force and these decisions are followed by other judges in the same case. However, on the contrary, it is different from the conditions in countries that apply common-law or Anglo-Saxon law, that jurisprudence is a legal science that contains positive legal principles and legal relationships.[341] Theoretically, jurisprudence is not only a court decision with permanent legal force but is accepted as one of the sources of law in both existing legal systems, namely the civil-law and common-law legal systems.[342]

Judges play a big role in overcoming the existing legal vacuum. Judges are not allowed to reject cases filed based on the absence of law, or unclear laws and regulations, but must decide the case with full responsibility. Article 10 of Law number 48 of 2009 concerning judicial power states that the court is prohibited from refusing to examine, adjudicate, and decide a case submitted on the pretext that the law does not exist or is not clear, but is obliged to examine and adjudicate it. This means that the judge must be considered to know the law as the principle of *ius curia novit*, namely that the judge is prohibited from rejecting the case submitted to him because there is no law or there is no law yet.[343] Judges, in this case, must continue to explore and find laws that live and develop in a society with the aim of so that the legal verdict in the concrete

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[340] Mahkamah Agung, "Putusan Nomor 218 K/Ag/2016" (Jakarta, 2016).

[341] Paulus Effendi Lotulung, *Peranan Yurisprudensi Sebagai Sumber Hukum* (Jakarta: Badan Pembinaan Hukum Nasional, n.d.).

[342] Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New York: Routledge, 2017), https://doi.org/10.4324/9780203787823; Tudor-Alexandru Chiuariu, "The Overthrow of the General Principle of Law Iura Novit Curia or the Judge's Desire Not to Apply the Law. The Restriction of the Right of Access to Court in the Contentious Administrative Subject to a Time Limit," *Conferin a Interna Ional de Drept, Studii Europene i Rela Ii Interna Ionale* 6, no. VI (2018): 593–604.

[343] Julian Lew, "Iura Novit Curia and Due Process," *Forthcoming, Queen Mary School of Law Legal Studies Research Paper*, no. 72 (2010), https://doi.org/10.2139/ssrn.1733531.

incident can meet the demands of justice and legal benefits for justice seekers.[344]

Article 10 of Law number 48 of 2009 concerning judicial power, is the juridical basis so that the legal vacuum can be overcome and resolved. This means that the judge must have the ability to find the law to apply to the case he will decide. A legal figure, Van Apeldorn said that when judges are tasked with deciding cases and forming laws, they must pay attention to the principles, 1) Conformity between the Law and the facts of the trial. This is to avoid mistakes in legal excavation, 2) Judges can add legal references if deemed necessary. Judges as the spearheads in law enforcement and justice in society, he is required to act based on justice.[345]

Legal discovery by judges can be carried out by studying, interpreting, and deepening the law to produce legal breakthroughs.[346] Methods that can be used by judges include:

1) The method of interpretation of law based on language (grammatical) is a way of interpreting legislation based on the meaning of the words used in a law. Language is the basic capital of communication and the values that will be presented. Understanding the legal language used can be a way to apply the law fairly, it can also be a way to discover the law.
2) The historical method of interpretation is the interpretation of legislation through the history of the occurrence of the regulation. There are two types of historical interpretation methods, namely 1) interpretation through legal history related to the development of something related to law as a whole, and 2) interpretation according to the history of its determination by studying the development of law

[344] Cesare Cavallini, "Why Is the Iura Novit Curia Principle Not Applied Yet in English Law? New Comparative Reflections," *Global Jurist* 17, no. 3 (2017): 20170010, https://doi.org/10.1515/gj-2017-0010.

[345] Septatinus Hia, Felianis Ndruru, and Zetria Erma, "The Role of Judges in Criminal Case Trials as Modification and Reform of Criminal Law," *LEGAL BRIEF* 12, no. 3 (2023): 327–37, https://doi.org/10.35335/legal.v12i3.794.

[346] Afif Khalid, "Penafsiran Hukum Oleh Hakim Dalam Sistem Peradilan Di Indonesia," *Al-Adl: Jurnal Hukum* 6, no. 11 (2014): 9–36, https://doi.org/10.31602/al-adl.v6i11.196.

since it was made, cross-opinions that occur in the legislature, and the intention of its establishment at the time of its making.

3) The method of systematic interpretation is a study through the interpretation of the relationship between article one and other articles in one legislation, as well as the relationship with other related laws so that a complete understanding is found.
4) The Sociological Teleological Interpretation method, namely the meaning of legislation, is usually determined based on societal objectives. The provisions of the legislation that have been left behind must be adjusted to the current social conditions.
5) The Interpretation method is an examination of the explanations that have been determined by the lawmakers.
6) The method of interpretation extensively is the study of the law by exploring and expanding the meaning contained in the words of the law so that the meaning is broader.
7) The Restrictive Interpretation method is the study of legislation through restrictions and narrowing the intent of the articles in the regulation.
8) The analogy interpretation method is the interpretation of a law and regulation by providing an allusion to the essence of the regulation, adjusted to the applicable legal principles, and then seeing the similarity of the causes and legal reasons so that the same values will be obtained between the two.
9) Legal interpretation based on positive legal materials, such as the material system of applicable legislation.
10) The method of interpretation of argumentus a contrario is an interpretation method that is based on the opposite condition of the current situation, from a concrete legal position, so that a complete understanding of a law will be obtained.[347]

[347] Enju Juanda, "Konstruksi Hukum Dan Metode Interpretasi Hukum," *Jurnal Ilmiah Galuh Justisi* 4, no. 2 (2017): 168–80, https://doi.org/10.25157/jigj.v4i2.322; Diah Imaningrum Susanti, *Legal Interpretation: Theory and Method* (Jakarta: Sinar Grafika, 2019), 33–41.

The method of legal discovery used by the Supreme Court in the case of non-Muslim heirs is examining laws and regulations as well as the opinions of scholars regarding the position of non-Muslim heirs and *wasiat wajibah*. In its ruling, the Supreme Court quoted Yusuf al-qaradhawi as saying about the position of non-Muslim interactions with Muslims. Non-Muslims who coexist with Muslims are categorized as good non-Muslims, excluding non-Muslims who are harbi.[348] The Supreme Court added that for non-Muslim husbands and wives who have been side by side, it shows that there is a good relationship.[349]

In addition, the Supreme Court explores legal findings by examining the applicable laws and regulations. Article 209 of the Compilation of Islamic Law regulates mandatory wills for adopted children and adoptive parents. In its explanation, the Supreme Court applies a compulsory will to the decision of non-Muslim heirs as an extension of the article. The Supreme Court applies an extensive interpretation method to Article 209 of the Compilation of Islamic Law, by deepening and expanding the meaning contained in Article 209 which contains the rules of *wasiat wajibah*. With this method, the Supreme Court expanded the application of *wasiat wajibah* which is not only applied to adopted children and adoptive parents but also applied to heirs of different religions.[350]

The Supreme Court from 1998 to 2016 has consistently applied *wasiat wajibah* to non-Muslim heirs, either to children or wives or other heirs. With the consistency of the Supreme Court in applying this *wasiat wajibah*, the Supreme Court's decision is a jurisprudence that can be referred to by the Religious Court in examining and deciding the same case.[351] However, the birth of several Supreme Court decisions related to

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[348] Jumatul Husna, Oloan Muda Hasim Harahap, and Lutfi Elfalahi. *Analis pendapat Yusuf Al-Qaradhawi tentang Kebolehan Muslim Mewarisi Harta Non Muslim*. Diss. IAIN Curup, 2019.

[349] Mahkamah Agung, "Yurisprudensi Wasiat Wajibah."

[350] Bambang Santoso, *Pembaharuan Hukum* (Tangerang Selatan: Pamulang Press, 2021); Mahkamah Agung, "Yurisprudensi Wasiat Wajibah."

[351] Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 331 K/Ag/2018"; Lotulung, *Peranan Yurisprudensi Sebagai Sumber Hukum*.

mandatory wills for non-Muslim heirs is a historical inevitability that must be interpreted positively for the sake of future history.[352] The discovery of law in the Supreme Court's jurisprudence is indeed an alternative to filling the void of Islamic law as a response to the reality of society. The jurisprudence of the Supreme Court of the Republic of Indonesia has expanded Article 209 of the Compilation of Islamic Law by adding parties who can accept a Wasiat wājibah, including heirs who are prevented from obtaining an inheritance due to religious differences. However, the construction of inheritance law against the transfer of inheritance with a *Wasiat wājibah* in the Supreme Court's jurisprudence has exceeded the quantitative limit in the granting of a *Wasiat wājibah* and has not paid attention to the signs in the application of the *Wasiat wājibah* by ignoring the maximum limit.[353] Therefore, judges in the Religious Court in resolving Islamic inheritance cases related to non-Muslim heirs should, in addition to using material and formal legal sources, also perform ijtihad to obtain a fair and legally certain legal decision.

Conclusion

The Supreme Court's decision on non-Muslim heirs is a reference for judges in the Supreme Court and the Religious Court in the same case. The granting of *wasiat wajibah* for non-Muslim heirs by the Supreme Court is based on a good family relationship between heirs and non-Muslim heirs. *Wasiat Wajibah* are a way to get a share because the recipient is not hindered due to religious differences. The method used by the Supreme Court in legal discovery uses an extensive interpretation with a deepening of Article 209 of the Compilation of Islamic Law concerning *wasiat wajibah* for adopted children and adoptive parents. This research

[352] Rahmad Setyawan et al., “Contemporary Ijtihad Deconstruction in The Supreme Court: Wasiat Wajibah as An Alternative for Non-Muslim Heirs in Indonesia,” *Jurnal Ilmiah Al-Syir’ah* 22, no. 1 (2024): 25–40, https://doi.org/10.30984/jis.v22i1.2968.

[353] Zubair and Latif, “The Construction of Inheritance Law Reform in Indonesia: Questioning the Transfer of Properties through Wasiat W Jibah to Non-Muslim Heirs.”

complements previous research and can be used as a reference for judges in the Religious Court to settle cases related to non-Muslim heirs.

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