Al-Qadha: Jurnal Hukum Islam dan Perundang-Undangan
Vol. 11, No. 1, Juni 2024,(32-48)
https://doi.org/10.32505/qadha.v11i1.8833
https://journal.iainlangsa.ac.id/index.
p-ISSN 2356-1637 | e-ISSN 2581-0103

Religious and Cultural Diversity in Inheritance Law: A Discussion on the Impact of Judicial Will Considerations on the National Legal System in Indonesia

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Submitted: Jun 23, 2024	*Accepted:* Jul 7, 2024	*Published:* Jul 13, 2024

How to Cite (Chicago): Najamudin, Najamudin, Idzam Fautanu, Moh. Najib, Dede Kania, and Ahmad Hasan Ridwan. 2024. "Religious and Cultural Diversity in Inheritance Law: A Discussion on the Impact of Judicial Will Considerations on the National Legal System in Indonesia". Al-Qadha : Jurnal Hukum Islam Dan Perundang-Undangan 11 (1). https://doi.org/10.32505/qadha.v11i1.8833.

Abstract

The obligatory will regulated in Article 209 of the Compilation of Islamic Law is only for adoptive parents and adopted children, there is no obligatory will for heirs of different religions. On the other hand, there is a need for legal provisions that present a solution to provide part of the inheritance to heirs who do not receive inheritance due to religious differences. The purpose of this research is to analyze the important obligatory will in terms of its necessity, as well as a study of the obligatory will in terms of the procedure or implementation of the obligatory will itself in resolving disputes in court with legal considerations that are certain, fair and beneficial. The research method uses a qualitative method with a normative juridical approach. Primary data was obtained from regulations, laws, verdict numbers: 368 K/AG/1995, 51 K/AG/1999, 16 K/AG/2010, 721 K/AG/2015, 218 K/AG/2016 and 331 K/AG/2018. Supreme Court Decision No. 331 K/AG/2018 as well as the Compilation of Islamic Law (KHI) article 209 and regulations governing mandatory wills, secondary, tertiary data obtained from library studies, books, documents, journals and so on that have the same relevance to this research. The analysis process uses a legal logic approach, which analyzes the norms and laws or regulations that apply in depth, radically, systematically, and logically. The results of this study concluded that the dynamics of religious court decisions regarding compulsory bequests for heirs of different religions vary greatly, some are granted and some are rejected, the consideration depends on the sitting of the case that is disputed in the religious court, while the granting of compulsory bequests for heirs of different religions refers to the opinion who allows it as long as it is a will and the different religion in question is not kafir dzimmi. The effect of this decision becomes jurisprudence as part of the source of law for judges at levels below the Supreme Court. The contribution of the religious court's decision on this matter is that it can become a permanent jurisprudence so that it is proposed as a new article in KHI to fill in the missing article regarding mandatory wills for heirs of different religions.

Keywords: Religious and cultural diversity, Inheritance law, Mandatory wills.

Abstrak

Wajib wasiat yang diatur dalam Pasal 209 KHI hanya berlaku bagi orang tua angkat dan anak angkat, tidak ada wasiat bagi ahli waris yang berbeda agama. Di sisi lain, perlu adanya ketentuan hukum yang memberikan solusi untuk memberikan sebagian harta warisan kepada ahli waris yang tidak menerima warisan karena perbedaan agama. Tujuan dari penelitian ini adalah untuk menganalisis pentingnya wasiat wajib ditinjau dari kebutuhannya, serta mengkaji tentang wasiat wajib ditinjau dari tata cara atau pelaksanaan wasiat itu sendiri dalam menyelesaikan sengketa di pengadilan dengan pertimbangan hukum yang adil dan bermanfaat. Metode penelitian menggunakan metode kualitatif dengan pendekatan yuridis normatif. Data primer diperoleh dari peraturan, undang-undang, putusan nomor: 368 K/AG/1995, 51 K/AG/1999, 16 K/AG/2010, 721 K/AG/2015, 218 K/AG/2016 dan 331 K/ AG/2018. Putusan Mahkamah Agung Nomor 331 K/AG/2018 serta Kompilasi Hukum Islam (KHI) pasal 209 dan peraturan yang mengatur tentang wasiat, data sekunder, tersier diperoleh dari studi kepustakaan, buku, dokumen, jurnal dan sebagainya yang mempunyai relevansi yang sama dengan penelitian ini. Proses analisisnya menggunakan pendekatan logika hukum, yaitu menganalisis norma dan peraturan perundang-undangan yang berlaku secara mendalam, radikal, sistematis, dan logis. Hasil penelitian ini menyimpulkan bahwa dinamika putusan pengadilan agama mengenai warisan wajib bagi ahli waris yang berbeda agama sangat bervariasi, ada yang dikabulkan dan ada pula yang ditolak, pertimbangannya tergantung pada duduknya perkara yang disengketakan di pengadilan agama, sedangkan pemberian wasiat wajibah bagi ahli waris yang berbeda agama mengacu pada pendapat yang membolehkannya sepanjang itu wasiat dan agama yang berbeda tersebut tidak kafir dzimmi. Akibat putusan ini menjadi yurisprudensi sebagai bagian dari sumber hukum bagi hakim setingkat di bawah Mahkamah Agung. Kontribusi putusan pengadilan agama terhadap hal tersebut adalah dapat menjadi yurisprudensi tetap sehingga diusulkan menjadi pasal baru dalam KHI untuk mengisi pasal yang hilang mengenai wasiat wajibah bagi ahli waris yang berbeda agama.

Kata Kunci: Keberagaman agama dan budaya, Hukum waris, Wasiat wajibah.

Introduction

The law of inheritance in Islam has received great attention because the distribution of inheritance often has unfavorable consequences for families who are left to die, not only in terms of the implementation of the provisions that have been clearly mentioned in the Qur'an or Al-Hadith,[1] but also in the case of those who feel that they deserve an inheritance, but in reality because of something they are prevented from getting an inheritance, such as because of religious differences. Inheritance is to discuss the wealth left behind or *the recital* of a deceased person for the heirs left behind. Basically, the distribution of this heritage property is determined directly by the Qur'an and As-Sunnah and then has been made into applicable laws and regulations which are materially explained in Kompilasi Hukum Islam (KHI).[2]

The case of the division of inheritance, the recipients of inheritance or heirs, and the way in which the division is determined is regulated by the Compilation of Islamic Law, but

[1] Abdulah Pakarti, Muhammad Husni, and Diana Farid. 2023. "Implementasi Hukum Waris Dalam Islam: Studi Komparatif Tentang Praktek Waris Di Negara-Negara Muslim". El-Ahli : Jurnal Hukum Keluarga Islam 4 (2), 37-62. https://doi.org/10.56874/el-ahli.v4i2.1267.

[2] Ahmad Azhar Basyir. *Hukum Waris Islam.Universitas Islam Indonesia*. (Yogyakarta: UII press, 2010), 8.

not only about inheritance as a law whose basis is *ijbari* and *ta'abudi*[3]. According to Ahmad Rafiq, a compulsory will is an action taken by the ruler or judge as a state apparatus to force or give a will decision for a person who has died, which is given to a certain person under certain circumstances. In another version, Chairuman Pasaribu and Suhrawardi K. Lubis stated that a compulsory will is a will that is seen as having been made by a person who is about to die, even though he did not leave the will.[4] Broadly speaking, the successor heir (succession of position) and the obligatory will are the same.[5]

The obstruction of a person from receiving an inheritance due to different religions was also criticized by An-Na'imi who argued that the obstruction of a person of a different religion from the heir is a discrimination in family law and sharia law. An-Na'imi's opinion leads us to think that there is a postulate that states that one does not inherit from the heir because of different religions does not have to be interpreted that the person should not get a share of the heir's inheritance.[6] David Smith Powers stated with his *theory of proto-Islamic law* (Islamic primitive law) that Islamic inheritance law based on the Qur'an is different from the inheritance system in the Islamic tradition or what is *termed the proto-Islamic of inheritance*.[7]

Cases of heirs of different religions occur a lot, even though there is no provision in the laws and regulations, including the KHI, the judge cannot stop or avoid adjudicating it when the parties have submitted it to the Court.[8] Along with the times, the Supreme Court in some of its decisions stipulates a part for heirs of different religions by way of compulsory wills.[9] among others, the decision number: 368 K/AG/1995, 51 K/AG/1999, 16 K/AG/2010, 721 K/AG/2015, 218 K/AG/2016 and 331 K/AG/2018. The Supreme Court's Decision No. 331 K/AG/2018 in the 2018 Supreme Court Annual Report was declared a *landmark decision*, namely a decision that will affect legal developments in the future. This among other things means that the Supreme Court views that the decision is in accordance with the current legal awareness of the Indonesian people, or at least seen as a decision that can be the best solution to the current inheritance law problem, namely the absence of the right of heirs of different

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3 Wasdikin et al., "Asas Hukum Kewarisan Islam Sebagai Parameter Dalam Menyelesaikan Masalah Waris," *Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 4, no. 1 (2023): 15–28, https://doi.org/https://doi.org/10.15575/as.v4i1.21052.

4 Abdul Manan, *Aneka Masalah*, 166.

5 Somawinata.

6 Hendri Susilo et al., "Hak Waris Anak Yang Berbeda Agama Dengan Orang Tua Berdasarkan Hukum Islam," *JURNAL USM LAW REVIEW* 4, no. 1 (June 18, 2021): 175, https://doi.org/10.26623/julr.v4i1.3409; Rara Siti Masruroh and Mohammad Fauzan Ni'ami, "The Supreme Court's Decision On Mandatory Will For Different Religions: Progressive Legal Studies," *Al-ʾAdalah : Jurnal Syariah Dan Hukum Islam* 7, no. 1 (June 30, 2022): 141–60, https://doi.org/10.31538/adlh.v7i1.2291.

7 Safrudin Edi Wibowom, *Kritik Sejarah Dan Literasi TerhadapHukum Waris Islam Dalam Pandangan David S. Powers,* ISLAMICA, Vol. 4, No. 2, Maret 2010, https://www.researchgate.net., diakses tanggal 13 Maret 2023.

8 Burhan Latip, Ahmad Muhajir, Elly Lestari, dan Muhammad Farid Hasan. 2024. "Penyelesaian Sengketa Kewarisan Melalui Mediasi: Jalan Terbaik Menyelesaikan Masalah". Mawaddah: Jurnal Hukum Keluarga Islam 1 (1):58-67. https://doi.org/10.52496/mjhki.v1i1.4.

9 Wasiat wajibah adalah wasiat yang pelaksanaannya tidak dipengaruhi atau tidak bergantung kepada kemauan atau kehendak si yang meninggal dunia. Wasiat ini tetap harus dilaksanakan, baik diucapkan atau tidak diucapkan, baik dikehendaki maupun tidak dikehendaki oleh si yang meninggal dunia. Lihat: Suparman Usman dan Yusuf Somawinata, *Fiqih Mawaris Hukum Kewarisan Islam*, (Jakarta: Gaya Media Pratama, 1997), 163.

religions to receive an inheritance. From some of these decisions, it turns out that the reasons used as legal considerations for giving obligatory wills to heirs of different religions are different. In Decision No. 368 K/AG/1995 and No. 51 K/AG/1999, the considerations put forward include that the position of the child, both Muslim and non-Muslim, is the same, only the way of giving the share is different, namely the Muslim with the inheritance, while the non-Muslim with the compulsory will.

In Decision No. 16 K/AG/2010, the consideration that was put forward more broadly, namely the length of time the wife served her husband, Yusuf Qardhawi's opinion that a person who apostates but gets along well is not kafir harbi, a sense of justice and jurisprudence. Similar considerations are found in Decision Number 721 K/AG/2015, namely that during his lifetime the heirs remained in harmony with their children, Yusuf Qardhawi's opinion, sense of justice and jurisprudence. The consideration in Decision No. 218 K/AG/2016 provides protection to feelings of racial injustice and has a sense of Islamic universal justice and egalitarian principles in Islamic inheritance. The considerations in Decision Number 331 K/AG/2018 are mainly analogy and jurisprudence arguments. Although in the end both give obligatory wills to heirs of different religions, academically raises questions about the reason for consideration (*ratio decidendi*) and the istimbath method used.

The problem of inheritance rights of non-Muslim children arises from Muslim parents as described, because the KHI does not regulate biological children of different religions or non-Muslims, who according to Islamic law are not entitled to receive inheritance from their Muslim parents, whether they can be given a compulsory will.[10] Article 209 of the KHI only regulates the granting of compulsory wills to adoptive parents and adopted children as stipulated in Article 209 of the KHI.

The provisions in Article 209 of the KHI show that adoptive parents and adopted children who should not be entitled to inheritance can be given mandatory wills considering that adoptive parents and adopted children are close relatives of the heirs. The provisions in Article 209 of the KHI do not regulate (empty norm) whether a non-Muslim biological child who was not entitled to his father's inheritance can be given a mandatory will as well as adoptive parents and adopted children, considering that biological children are also close people and even the closest people to the heirs.

In addition, there have been many studies related to compulsory wills and inheritances for different religions, but they do not comprehensively explain the existence of an empty norm in article 209 of the IPR which does not regulate whether biological children or non-Muslim heirs who were not entitled to inheritance can be given compulsory wills as well as adoptive parents and adopted children. This research focuses on this and tries to provide legal offers to fill the blank norms in article 209 of the KHI.

The approach used in this research is normative juridical, which is an analysis conducted with normative legal theory by linking the analysis to legal events that become the

[10] Miftahul Huda, Niswatul Hidayati, and Khairil Umami, "Fiqh And Custom Negotiation In Inheritance Dispute Tradition At Mataraman Society, East Java," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 15, no. 2 (December 29, 2020): 224–50, https://doi.org/10.19105/al-lhkam.v15i2.3787; Zaitun Muzana, Jasni Bin Sulong, and Faisal Husen Ismail, "Customary Practices of Sharing Inheritance: An Analysis of Society Practices in Pidie Aceh Darussalam," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 11, no. 2 (January 2, 2017): 275, https://doi.org/10.19105/al-ihkam.v11i2.1037.

background of the emergence of a norm as a process resulting from authority by the Supreme Court as formal law and material law. Primary data was obtained from regulations, laws, decision numbers: 368 K/AG/1995, 51 K/AG/1999, 16 K/AG/2010, 721 K/AG/2015, 218 K/AG/2016 and 331 K/AG/2018. Supreme Court Decision No. 331 K/AG/2018 as well as the Compilation of Islamic Law (KHI) article 209 and regulations governing mandatory wills, secondary, tertiary data obtained from library studies, books, documents, journals and so on that have the same relevance to this research. The analysis process uses a legal logic approach, namely analyzing norms and laws or legislation that apply in depth, radically, systematically, and logically.

Analysis of Legal Considerations in the Provision of Compulsory Wills for Heirs of Different Religions

The Supreme Court's decision on the granting of inheritance to heirs of different religions greatly contributes to the reconstruction of inheritance law in Indonesia, therefore from the perspective of the development of the national legal system, especially in the Islamic inheritance system, the Supreme Court's decision further strengthens and strengthens the Islamic inheritance system in Indonesia which not only considers local wisdom, but also applies the principle of broad kinship so that heirs of different religions Even if it is for the reason of protecting civil rights over their inheritance and for the benefit of the family, their rights are determined through a mandatory will.[11]

The granting of inheritance to heirs of different religions juridically applies the principle of individual ownership that applies to the substance or benefit of certain property, which allows anyone who gets it to use the goods, individuals have the right to receive and use it.[12] Every individual has the right to enjoy his or her property, use it productively, move it and protect it from waste. However, the owner is also subject to certain obligations, such as helping himself and his relatives and paying a number of obligations. Therefore, the inheritance belongs to the heirs in two ways, namely inheritance and will.[13] Inheritance law is a part of family law that determines and reflects the system and form of law that applies in society, therefore in the Islamic inheritance system considers the local wisdom of customs that do not contradict the sharia, as heirs of different religions, adopted children, and adoptive parents obtain inheritance with a compulsory will.[14]

Essentially, the law of inheritance in Islam applies to all Muslims around the world. However, the style of an Islamic country and life in that country or region have different influences on inheritance law, this is due to several factors, including:

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[11] Anugrah Reskiani et al., "Konstruksi Pemikiran Pembaharuan Hukum Kewarisan Islam di Indonesia (Studi Yurisprudensi Mahkamah Agung)," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (June 9, 2022): 39, https://doi.org/10.31958/juris.v21i1.5564; Abdul Chalim et al., "Social Diversity Model: Inheritance of Mutual Collaboration in the Indonesian Hindu-Muslim Society at Tengger, Lumajang," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 18, no. 1 (June 3, 2023): 125–51, https://doi.org/10.19105/al-lhkam.v18i1.7318.

[12] Zainuddin Mappong and Lili Lili, "Right to Self Submission to Western Inheritance Law for the Heirs Of Islamic Religion Whom the Property Leaver Has Different Religion," *Journal of Law and Sustainable Development* 11, no. 2 (July 17, 2023): e423, https://doi.org/10.55908/sdgs.v11i2.423.

[13] Ali Akbar, *The Concept of Ownership in Islam*, (Ushuluddin Journal, Vol XVIII No. 2, July 2012) 131.

[14] M. IdrisRamulyo, *Hukum Kewarisan Islam*, (Jakarta: IND-HILL, CO, 1984) 1.

First: although Islam has basically regulated the legal basis of inheritance in detail in the Qur'an, if there is any doubt the meaning has been explained by the Prophet. However, in terms of practical implementation, there are problems contained in the Qur'an and have not yet been explained by the Prophet, so that the law becomes open.

Second: that legal science, including Islamic law, in which inheritance law is located, is classified as a social science and not an exact science. Therefore, inheritance law is a place where there is a possibility of disagreement among the jurists themselves, especially regarding verses that allow for more interpretation than that.[15]

The Supreme Court's ruling on compulsory wills for heirs of different religions includes developing a bilateral principle in Islamic inheritance law, that a person receives inheritance rights from both relatives, namely from female and male descendants. The basis of the inheritance has 2 (two) dimensions of mutual inheritance in the Qur'an surah Al-Nisa, surah 4 verses 7, 11, 12, and 176, namely: (1) between the child and his parents, and (2) between siblings if the heir does not have children and parents. This is described as follows:

First: The dimension is inherited between the child and his parents. In the Qur'an, surah Al-Nisa verse 7 emphasizes that men and women are entitled to inheritance from their mothers. Likewise, in the line of law of surah Al-Nisa verse 11 it is emphasized that girls have the right to receive inheritance from their parents as is the case with boys with the ratio of one son equal to two daughters. Thus, in the line of law of surah An-Nisa/4 verse 11, it is affirmed that fathers and mothers are entitled to inheritance from their children, both male and female, in the amount of one-sixth, if the heir leaves the child.[16]

Second: The dimension of mutual inheritance between siblings also occurs when the heir has no descendants or parents. The position of a brother as an heir in the law of the Qur'an surah An-Nisa (4) verse 12, stipulates that if a man dies and has a brother, then his brother (brother or sister) is entitled to his inheritance. Likewise, the legal line of Surah An-Nisa (4) verse 12, if the heir who dies becomes extinct and has a relative, then his brother (male or female) is entitled to receive his inheritance. In addition, the legal line of the Qur'an surah An-Nisa (4) verse 176 affirms that a man who has no children, while he has a sister, his sister who is the one who is the one who has the right to receive his inheritance. Likewise, if a man has no children, while he has a brother, his brother is entitled to receive his inheritance. So for heirs of different religions are prevented from obtaining inheritance through inheritance provisions, therefore the distribution is through the way of a compulsory will. This is what is meant by the development of the bilateral principle of kinship system.[17]

In the perspective of the individual principle, each heir (individually) is entitled to his share without being tied to other heirs (as is the case with collective heirs found in the provisions of customary law).[18] Like the custom of the Minangkabau people in West

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[15] Eman Suparman, *HukumWaris Indonesia: Dalam Perspektif Islam,* Adat, dan BW, (Bandung: PT RefikaAditama, 2007)13.

[16] Suhrawardi Lubis dan Komis Simanjuntak, *Hukum Waris Islam Lengkap dan Praktis,* (Cetakan kedua Jakarta, Rajawali Press, 2001) 40.

[17] Abdul Ghofur Anshori, *Filsafat Hukum Kewarisan Islam*, 34-35.

[18] Wasdikin et al., "Asas Hukum Kewarisan Islam Sebagai Parameter Dalam Menyelesaikan Masalah Waris"; Eko Setiawan, "Penerapan Wasiat Wajibah Menurut Kompilasi Hukum Islam (KHI)

Sumatra. Thus, the share obtained by the heirs from the heirs' property is owned individually, and the other heirs have nothing to do with the share they obtain, so that each individual heir is free to determine (have full rights) over the share he obtains.[19] Similarly with heirs of different religions, therefore the Supreme Court Decision develops the principle of indivual which is also related to the principle of justice in question, there must be a balance between the rights obtained by a person from the inheritance and the obligation or burden of living expenses that he must fulfill in accordance with the provisions of sharia, therefore the heirs must not accept the will, while the heirs of different religions receive a will but must not exceed two-thirds of the inheritance.[20]

The Influence of the Panel of Judges' Decision on the Evolution of National Inheritance Law

In relation to the Supreme Court Decision, it is because the Supreme Court is an actor of judicial power as referred to in the Constitution of the Republic of Indonesia in 1945. The composition of the Court's leadership based on Article 5 of Law Number 5 of 2004 consists of leaders, member judges, clerks, and a secretary. The leaders and judges of the Supreme Court are the supreme court justices and the supreme court justices at most 60 people. The leadership of the Supreme Court consists of a chairman, 2 (two) vice chairmen, and several young chairmen. The Deputy Chief Justice of the Supreme Court consists of the deputy chairman of the judicial division and the deputy chairman of the non-judicial division. The deputy chairman of the judicial division is in charge of the junior chairman of civil affairs, the deputy chairman of the criminal division, the young chairman of religion, the young chairman of the military, and the deputy chairman of state administration. In each field, the Supreme Court can specialize in certain areas of law chaired by a young chairman. The deputy chairman for non-judicial affairs is in charge of the junior chairman of coaching and the young chairman of supervision. The term of office of the Chairman, Vice Chairman, and Deputy Chief Justice of the Supreme Court is 5 (five) years. The composition of the leadership of the Supreme Court based on Law Number 5 of 2004 has changed with the existence of a room system in the Supreme Court.

Based on the Decree of the Chief Justice of the Supreme Court Number 50 A/SK/KMA/IV/2013 dated April 1, 2013 concerning Changes in the Nomenclature of the Leadership Elements of the Supreme Court of the Republic of Indonesia, the composition of the leadership of the Supreme Court has changed. The change in the nomenclature of the Supreme Court's leadership elements based on the decree is to change the designation of the young chairman to the chairman of the chamber. The designation of the young chairman which was determined based on the Supreme Court Law Number 14 of 1985 which has been amended by Law Number 5 of 2004 and the Second Amendment by Law Number 3 of 2009

Dalam Kajian Normatif Yuridis," *Muslim Heritage* 2, no. 1 (August 16, 2017): 43–62, https://doi.org/10.21154/muslimheritage.v2i1.1045.

[19] Ridwan, "Gender Equality in Islamic Inheritance Law: Rereading Muhammad Shahrur's Thought," *Al-Manahij: Jurnal Kajian Hukum Islam* 16, no. 2 (November 25, 2022): 181–92, https://doi.org/10.24090/mnh.v16i2.6916; Abdul Qodir Zaelani et al., "An Implementation of the Joint Inheritance Division of Ethnic Groups in Lampung, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 3 (July 14, 2023): 1373, https://doi.org/10.22373/sjhk.v7i3.9125.

[20] Zainuddin Ali, *Pelaksanaan Hukum Waris di Indonesia*, 58.

is identical to the Team System which since October 1, 2011 has been abandoned. The change in the designation from Junior Chairman to Chairman of the Chamber is considered to reflect the role and responsibility of the leadership in maintaining legal unity through the implementation of the chamber system.

In addition to changing the nomenclature, the Decree of the Chief Justice of the Supreme Court Number 50 A/SK/KMA/IV/2013 dated April 1, 2013 also stipulates the leadership of the Supreme Court consisting of a Chief Justice of the Supreme Court, two deputy chairmen consisting of the Deputy Chief Justice of the Supreme Court for Judicial Affairs, the Chief Justice of the Supreme Court for Non-Judicial Affairs, and 7 (seven) Chairmen of the Chamber consisting of the Chairman of the Criminal Chamber, Chairman of the Civil Chamber, Chairman of the Religious Chamber, Chairman of the Military Chamber, Chairman of the State Administration Chamber, Chairman of the Coaching Chamber, and Chairman of the Supervision Chamber. Based on this policy, the special criminal deputy chairman and the special civil deputy chairman who were originally part of the Supreme Court's leadership element were abolished.

The 1945 Constitution of the Republic of Indonesia stipulates that the Supreme Court and the judiciary under it in the general judiciary, religious courts, military courts, and state administrative courts are independent actors of judicial power, in addition to the Constitutional Court, to administer justice in order to uphold law and justice. In addition, the Supreme Court has the authority to adjudicate at the cassation level, examine laws and regulations under the law, and other powers granted by law.[21]

This law contains amendments to various substances of Law No. 14 of 1985 concerning the Supreme Court. The amendment, in addition to being adjusted to the policy direction that has been stipulated in the Constitution of the Republic of Indonesia in 1945, is also based on the new Law on Judicial Power which replaces Law No. 14 of 1970 concerning the Principal Provisions of Judicial Power as amended by Law No. 35 of 1999 concerning Amendments to Law No. 14 of 1970 concerning the Principal Provisions of Judicial Power Justice.[22] Namely Law Number 48 of 2009.

Various substances of changes in this Law include the affirmation of the position of the Supreme Court as an actor of judicial power, the conditions for being appointed as a supreme judge, as well as several substances related to procedural law, especially in carrying out duties and authorities in examining and deciding at the cassation level and in exercising the right of test against laws and regulations under the law. This restriction is not only intended to reduce the tendency of each case to be submitted to the Supreme Court but also intended to encourage the improvement of the quality of first-instance court decisions and appellate courts in accordance with the values of law and justice in society. With the increase in the scope of duties and responsibilities of the Supreme Court, including in the field of regulation and management of organizational, administrative, and financial issues of the judiciary under the Supreme Court, the organization of the Supreme Court also needs to be adjusted.[23]

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21 Suparman Jassin, *Sejarah Peradilan Agama,* (Pustaka Setia, Bandung, 2016) 58.
22 Suparman Jassin, *History of Religious Justice,* (Pustaka Setia, Bandung, 2016) 59.
23 Suparman Jassin, *Sejarah Peradilan Agama,* (Pustaka Setia, Bandung, 2016) 59.

With the power or authority mandated by the applicable laws and regulations, the Supreme Court as the highest judicial institution that accepts cassation cases has the authority to decide on the granting of inheritance to heirs of different religions by way of a compulsory will, so that the decision that has permanent legal force becomes jurisprudence.

Impact of Religious and Cultural Diversity on Inheritance Law Decisions

The development of the Supreme Court's decision from a normative juridical point of view into jurisprudence that fills the legal void, because in the Compilation of Islamic Law there is no regulation regarding mandatory wills for heirs of different religions, there are only mandatory wills for adopted children and adoptive parents, so the decision is a legal discovery from the Supreme Court.

The Supreme Court's decision as jurisprudence used by judges in the Religious Court is a normative juridical reason that is easier for similar cases. Thus, the Supreme Court's decision can be understood as shaping national law. The Supreme Court's decision in the Islamic legal system is seen as one of the shaping of national law. Many laws in Indonesia have contained Islamic law or made Islamic law the main material, thus making Islamic law an integral part of national law or positive law.

Regarding inheritance of different religions, there is not a single verse found in the Qur'an that clearly and expressly prohibits it.[24] The legal basis that clearly and expressly prohibits inheritance of different religions is found in the hadith narrated by Bukhari, where the Prophet PBUH said: "Muslims do not inherit from disbelievers, and disbelievers do not inherit from Muslims"[25]. The hadith is also narrated by Muslim, Tirmizi, Abu Dawud, Ibn Majah, Ahmad, Malik, and Ad-Darimi. According to Riadi, in terms of sanad (series of narration) the hadith is a valid hadith, but in terms of matan (content) the validity of the hadith is doubtful, because Mu'adz bin Jabal once decided a case, in which the inheritance of the Jewish heir was given to the Muslim heir.[26] Regarding the hadith that prohibits inheritance of different religions, some companions such as Mu'adz, Mu'awiyah, Hasan, Ibn Hanafiyah, Muhammad bin Ali bin Husayn, and Masruq argue that Muslims can inherit from non-Muslims, but not the other way around. This opinion is based on the hadith: "Islam is high and not exceeded"[27].

In Islamic inheritance law, inheritance barrier means actions or things that can abort a person's right to inherit along with the existence of the causes and conditions for inheritance. These inheritance barriers include: *first*, slavery, classical scholars agree that slaves do not have the right to inherit because they are considered incapable of taking care of their property. Everything that a slave owned directly belonged to his master, this is based on the

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[24] 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 (May 9, 2023): 650, https://doi.org/10.22373/sjhk.v7i2.8852; Mursyid Djawas et al., "The Construction of Islamic Inheritance Law: A Comparative Study of the Islamic Jurisprudence and the Compilation of Islamic Law," *Juris: Jurnal Ilmiah Syariah* 21, no. 2 (2022): 207–19, https://doi.org/10.31958/juris.v21i2.7495.

[25] Shahih Bukhari, *Kitab Faraidh*, Hadis No. 6267.

[26] E. Riadi. *Dinamika Putusan Mahkamah Agung Republik Indonesia dalam Bidang Perdata Islam* (Jakarta: Gramata Publishing, 2011), 284.

[27] Wahbah Az-Zuhaili, *Kitab al-Fiqh 'ala Mazahib Al-Arba'ah* (Damaskus: Dar Al-Fikr, 1985), 263.

narration of the Qur'an in Qs. An-Nahl (16): 75.[28] *Second*, murder, the classical jurists agree that murder is an inheritance barrier for the murderer to the inheritance of the person he has killed. This is based on the words of the Prophet who said: "*There is nothing for the killer of the right of inheritance*"[29]. *Third*, religious differences, this third barrier provision is based on the hadith of the Prophet who said: "*Do not inherit a Muslim to a disbeliever, and do not inherit a disbeliever to a Muslim*"[30].

Islamic law is an option for the Muslim community because implementing Islamic law is worship. Worship is not just worship but also a form of effort to get closer to Allah SWT by doing His commands and staying away from His prohibitions, and not only in the form of rituals but can also be in the form of other good activities and are pleased with Allah SWT.[31] Islamic sharia clarified by fiqh has regulated legal issues in quite detail. The rules are used as a guide by Muslims in resolving problems that arise related to legal issues. Therefore, in Islamic countries or countries where the majority of the population is Muslim, laws have emerged to regulate legal problems in their respective countries.[32]

The implementation of Islamic law that applies to Muslims can be divided into two, namely Islamic law that applies formally juridically and Islamic law that applies normatively. Islamic law that applies formally juridically is Islamic law that regulates the relationship between humans and other humans and regulates the relationship between humans and objects in society called the term muamalah. This Islamic law is a positive law because it is appointed by laws and regulations. Islamic law, which applies formally juridically, requires the help of state administrators to carry it out perfectly by, for example, establishing a Religious Court which is one of the elements in the national judicial system. The normatively applicable Islamic law is Islamic law that has social sanctions. Its implementation depends on the strength and weakness of the awareness of the Muslim community in adhering to this normative Islamic law. Islamic law like this does not require the help of state administrators to implement it.[33]

In order to enforce Islamic law which is formal juridical, the Indonesian government has made laws and regulations, such as: Government Regulation No. 45 of 1957, concerning the Stipulation of Regulations on Religious Courts Outside Java and Madura, Law No. 19 of 1964, concerning the Provisions of the Principal Provisions of Judicial Power, Law No. 14 of 1970, concerning the Provisions of the Principal Provisions of Judicial Power, Law No. 1 of 1974, about Marriage and Law No. 7 of 1989, concerning Religious Justice. With a law like this, it is hoped that problems related to Islamic law, especially civil matters, can be resolved

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[28] Fathur Rahman. *Ilmu Waris* (Bandung: Al-Ma'rif, 1981), Cet. Ke-2, 122.

[29] Al-Imam al-Bukhori, *Al-Jami' Shahih al-Bukhori*, IV: 165, hadist riwayat an-Nasa'i dan ad-Daruqutni dari Amir bin Syu'aib.

[30] Al-Imam al-Bukhori, hadist riwayat al-Bukhori dari Usamah bin Zaid.

[31] Diana Farid et al., "Interfaith Marriage: Subjectivity of the Judge in Determination of No. 454/Pdt.p/2018 Surakarta District Court," *Al-Istinbath : Jurnal Hukum Islam* 7, no. 2 (December 1, 2022): 347–62, https://doi.org/10.29240/jhi.v7i2.4574.

[32] E. Elfia, Surwati Surwati, and Yan Fajri, "Kewarisan Beda Agama Di Nagari Persiapan Bancah Kariang Kecamatan Kinali Kabupaten Pasaman Barat," *Al-Istinbath : Jurnal Hukum Islam* 6, no. 2 (November 11, 2021): 341, https://doi.org/10.29240/jhi.v6i2.3479.

[33] Mario Julyano dan Aditya Yuli Sulistyawan, *Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum*, (Jurnal Crepido Vol. 1 Nomor 1, Juli 2019) 14.

formally juridically. From some of these laws, it can be understood that Islamic legal issues related to civil affairs must be resolved through the Religious Court.

The Supreme Court's decision is expected to unite the insights of Religious Court judges in Indonesia in solving inheritance problems. In addition, it can fulfill the principle of balanced benefits and justice, overcome various problems of khilafiyah (differences of opinion) to ensure legal certainty, and be able to guarantee raw materials and play an active role in the development of national laws.

The development of Islamic Law through jurisprudence with two considerations why this project is held, which are as follows:

1. In accordance with the regulatory function of the Supreme Court of the Republic of Indonesia towards the course of justice in all judicial environments in Indonesia, especially in the Religious Justice environment;
2. Through jurisprudence, the Supreme Court provides the best solution and benefits to be the starting point for establishing a new law.[34]

The development of law cannot be separated from the environment of the ever-evolving era because law usually arises as an answer given to legal problems or sues the dominant legal thought in certain situations and conditions, therefore even though theoretically the law proposes universal thinking, in the process of its development will pay attention to the development of the times wisely.

In the context of the national legal system, there are several views, as stated by Otje Salman, which are as follows:

First, the view supported by three arguments, namely the view that the law is a system that can in principle be predicted from accurate knowledge of the condition of the system. The behavior of the system is determined entirely by the smallest parts of the system, legal theory is able to explain the problem as it is without attachment to people (observers) this picture conveys that legal theory is deterministic, reductionist and realistic, which is further known as system theory.[35]

Analyzing the development of the legal system in law enforcement, some parties propose legal system reform, namely changes that will occur in the structure, substance, or culture of the law. With the implementation of legal reform in Indonesia, in reality, Indonesia is faced with the view that the national legal system is not effective in the community due to the weak law enforcement process and the lack of growth of national legal awareness in the community. The national legal system, which is supposed to serve as a guideline for behavior in society, faces the fact that there is always a gap between the substance of positive law formulated (*rule of law*) and what is carried out by the community (*social behavior*). Therefore, the national legal system, which is then referred to as positive law, receives various views and inputs from research and comparison with other countries in the field of law so that the law enacted is more or can achieve the most fundamental legal goal, namely legal certainty and justice, as well as its usefulness.

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[34] Munawir Sadzali, *Peradilan Agama dan Kompilasi Hukum Islam*, dalam Mufti AM, *Pembaharuan Hukum dalam Kompilasi Hukum Islam di Indonesia*, (Manado: Jurnal al-Syir'ah), 73. dalam Edi Gunawan, *Eksistensi Hukum Islam di Indonesia*, 10.

[35] Otje Salman, *Teori Hukum*, (Bandung: Refika Aditama, 2005), 47.

In the Pancasila legal system, that is, all legal systems with all their sub-systems must refer to the five precepts in Pancasila contained in the Preamble to the 1945 Constitution of the Republic of Indonesia as the state constitution. Therefore, all provisions of laws and regulations that apply formally and materially must contain the values of the One Godhead, just and civilized humanity, Indonesian unity, populism led by wisdom in representative deliberations, and social justice for all Indonesian people.[36]

The Supreme Court's decision is part of the formal law applied in deciding cases in the Religious Court, also provides certainty in legal decisions that are only based on normatively applicable laws, meaning according to the provisions of applicable laws and regulations that regulate definitively and logically.

In order to realize legal justice, legal certainty must be implemented as an effort to achieve the goal of law, namely justice itself. The realization of legal certainty is law enforcement with the principles of equality and equality. Law enforcement to all human beings with *the principle of equalily before the law.* In this way, legal certainty will be obtained. The law is not sharp downwards blunt upwards, but the law is sharp in every direction, meaning that anyone who violates it will face the same before the law. Laws without the value of certainty lose their substance and do not benefit universal human values.[37]

The limitation of legal certainty is limited by several provisions, namely: (1) there are consistent and accessible rules; (2) Governing agencies, especially law enforcement and/or the government, always apply the rule of law consistently, obediently, and only obey the applicable law; (3) In principle, all communities behave in accordance with the applicable law; (4) Judges and all pre-court institutions and other law enforcement officials always adhere to guidelines, consistently adhere only to legal norms that apply independently and do not take sides other than the law. Therefore, judges and law enforcers are the guarantors of legal certainty, so that only the law has the power to uphold justice for all cases in the judicial process.[38]

According to John Rawls, freedom and equality are elements that are a core part of the theory of justice. Rawls asserted that freedom and equality should not be sacrificed for the sake of social or economic gain, however large the benefits that can be obtained from that angle. Rawls believed that an equal treatment for all members of society accommodated in formal justice or also called regulatory justice actually contained a recognition of freedom and equality for all people.[39]

According to Jhon Rawls, the principle of justice departs from the more general concept of justice which is divided into two concepts, namely f*irst*, freedom placed on a parallel with other values does not give a special place to freedom. Justice is rooted in the principle of rights, not in the principle of benefits.

Second, justice does not always mean that everyone should always get the same amount; justice does not always mean that everyone should be treated equally without regard and thus the general concept of justice of important differences that objectively exist

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[36] Budiono Kusumohamidjojo, *Filsafat Hukum Problematika Ketertiban Yang Adil,* (Jakarta: Raja Grasindo, 2004), 94.

[37] L.j Van Apeldoorn dalam Shidarta, *Moralitas Profesi Hukum Suatu Tawaran Kerangka Berfikir*, (Bandung : Refika Aditama, 2006), 82-83.

[38] Satjipto Rahardjo, *Ilmu Hukum*, (Bandung : Citra Aditya Bakti, 2000) 3.

[39] John.Rawls, *A Theory of Justice* (Massachussets : The Bellnap Press of Havard University. 1971), 59.

in each individual; inequality in the distribution of social values is always justified as long as the policy is pursued in order to guarantee and bring benefits to all people.[40]

Thus, in relation to this Supreme Court Decision, in the perspective of legal justice it gives place and respects the right of everyone to enjoy a decent life as a human being, including the most disadvantaged. According to Rawls, the power in fairness lies in the demand that inequality is justified to the extent that it also benefits all parties and at the same time gives priority to freedom. These are two basic demands that are fulfilled and thus also distinguish the concept of justice as Fairness from the theories formulated in the breath of intuitionism in the theological horizon. To ensure the effectiveness of the two principles of justice, according to Abdul Ghafur, Rawls emphasized that both must be regulated in an order called serial order. With such arrangements, Rawls asserted that basic rights and freedoms could not be exchanged for social and economic gains. This means that the second principle of justice can only be placed and applied if the first principle of justice has been fulfilled. This means that the application and implementation of the second principle of justice must not contradict the first principle of justice. Thus, basic rights and freedoms in the concept of justice have the main priority over social and economic benefits. Thus, justice is a synthesis between individual freedom and equality. So through the Supreme Court, the state must be able to guarantee the freedom and equality of all citizens. This theory was stated by John Locke, Rousseau, and Immanuel Kant who taught justice, equality, and freedom. [41]

Conclusion

The results of this study obtained the conclusion that the dynamics of religious court decisions regarding mandatory wills for heirs of different religions are very diverse, some are granted and some are rejected, the consideration depends on the sitting of the case that becomes a dispute in the religious court, while the granting of a compulsory will for heirs of different religions refers to the opinion of Yusuf Qardhawi who allows it on the condition that it is a will and the different religion in question is not a dzimmi infidel. As a result, this decision becomes jurisprudence as part of the source of law for judges at the level below the Supreme Court.

In addition, the contribution of the Supreme Court's decision on compulsory wills for heirs of different religions to the national legal system, namely: (1) Establishing quality jurisprudence on its content which in principle is different from the previous view, so that it can be accepted as a standard, meaning that jurisprudence is not a fixed source of law; (2) Providing challenges to judges to explore new laws to find answers for litigants with the background that there are no laws and regulations regulating it or even if there are still multiple interpretations such as the case of compulsory wills for heirs of different religions; (3) Making jurisprudence part of a fixed source of law so that it can be made into law; (4) Adding articles to the Compilation of Islamic Law, if it cannot be legislated into an additional article on Islamic inheritance.

So that the decision of the religious court regarding this matter can become permanent jurisprudence so that it is submitted as a new article in the KHI to fill in the existing article regarding mandatory wills for heirs of different religions.

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[40] *John.Rawls, A Theory of Justice*, 60.

[41] Abdul Ghafur Anshari, *Filsafat Hukum, Sejarah, Aliran dan Pemaknaan*, 52.

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