

Mandatory Will Making for Non-Muslims: As a Reconstruction of Islamic Family Law in Indonesia

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Abstract

Normatively, there is no provision in granting a mandatory will for non-Muslims. This legal vacuum encourages the Supreme Court to grant inheritance to non-Muslims through a mandatory will. 3 (three) Supreme Court cassation decisions grant mandatory wills to non-Muslim heirs. This decision is inconsistent with Islamic law and positive law in Indonesia. The provisions of mandatory wills in KHI article 209 are only intended for adopted children and adoptive parents. Islamic law prohibits non-Muslim heirs from inheriting property from a Muslim testator. This study aims to reconstruct the mandatory will law in Indonesia. This study is a field and library research, using a qualitative approach. Data were collected through interviews with 3 (three) Supreme Court Judges who tried and decided the case. The data were supported by 3 (three) Supreme Court Decisions, namely No. 368 K/AG/1995, No. 51 K/AG/1999, No. 16K/AG/2010, and Compilation of Islamic Law (KHI), Civil Code (KUHPdt). Data analysis using Miles and Huberman analysis. The results of the study indicate that there are no legal provisions for heirs for non-Muslims through mandatory wills in the KHI, KUHPdt or Islamic law. 3 (Three) Supreme Court Decisions that allow heirs for non-Muslims through mandatory wills are decisions that are responsive to social conditions, equality and justice in society. Therefore, it is necessary to reconstruct Article 209 Paragraph (3) of the KHI to be illegitimate children, stepchildren and children of different religions with the testator who do not receive a will are given a mandatory will of up to 1/3 of the testator's inheritance. This reconstruction can be a consideration for the government in renewing inheritance law in Indonesia.

1. Introduction

Positive legal provisions that explicitly do not provide mandatory testamentary rights to non-Muslim heirs to obtain a share from Muslim heirs. However, there is an implicit loophole in the Compilation of Islamic Law (KHI) interpreted that non-Muslim heirs obtain a share from Muslim heirs through mandatory wills or other provisions, in the field of Islamic inheritance law. Several Islamic legal experts define a will as a voluntary grant of property rights carried out after the testator dies. In civil law, wills are divided into four: holographic wills, general wills or open wills made by a notary, secret wills (*superscriptie*), and emergency wills. Wills in the Islamic legal system in Indonesia have not been materially regulated in a law such as western inheritance in the Western Civil Code. Wills are only regulated in the Compilation of Islamic Law (hereinafter abbreviated as KHI) as contained in Presidential Instruction No. 1 of 1991. Wills are regulated in Chapter V, namely Articles 194 to 209 of the KHI and in *fiqh* books.

Article 171 letter f of the KHI states that a will is the gift of an object from the testator to another person or institution that will be valid after the testator dies. Articles 194 to 208 regulate ordinary wills, while Article 209 regulates wills that are specifically given to adopted children or adoptive parents. The concept of a will of property in Islam is intended for distant relatives or relatives who do not receive inheritance rights and also for other people. From this understanding, the theory of legal reasoning on the law of wills developed until it reached reasoning about its legal position, and finally concerning the *wajibah* will.

The *wajibah* will in Indonesia began to be known since 1991 along with the enactment of the Compilation of Islamic Law or KHI, which is a manifestation of the agreement of Islamic legal experts in Indonesia. It can be understood that the *wajibah* will is a new product of will law in Islamic law in Indonesia. The Indonesian KHI has its own provisions on the concept of *wajibah* wills, namely limiting the people who are entitled to receive *wajibah* wills to only adopted children and adoptive parents. On the other hand, in Islamic Inheritance Law, there are things that can hinder heirs, namely different religions, murder, and slavery as explained in Article 171 point c of the KHI. This is in accordance with the principles of Islamic inheritance law, Muslims cannot inherit from non-Muslims and vice versa.

Distribution of inheritance to heirs of different religions often occurs in Indonesia considering the diverse conditions of Indonesian society and consists of various ethnic, religious, and racial backgrounds. In addition,

Indonesian society also has a fairly high level of religious tolerance so that the differences that exist do not become obstacles in community life. The distribution of mandatory wills in Indonesia, the Supreme Court panel of judges is of the opinion that family members of different religions can obtain heirs through wills or mandatory wills, based on the idea that the ruler must protect the rights of the community. Therefore, the ruler must issue the heir's share of the deceased as a will even though he has never done so.

Supreme Court Decision No. 368 K / AG / 1995 and Supreme Court Decision No. 16K / AG / 2010 have determined that a child who converts has the same position as other children but not as an heir, the child receives a mandatory will, namely inheritance given to the adopted child of the testator, and the adopted child cannot be an heir. From the perspective of judges and Islamic law, because children who convert and adopted children cannot be heirs, the judge's decision is basically that the heirs receive a portion through a mandatory will.

In addition, in Supreme Court Decision No. 51 K/AG/1999, the Supreme Court is of the opinion that a non-Muslim wife who has married the deceased has the right to receive an inheritance through the provisions of a mandatory will. The judge in this case in the case document decided in accordance with Islamic Law because the wife of the deceased husband has valid evidence of a mandatory will to receive an inheritance, which means she has the right to receive an inheritance in accordance with the provisions of a mandatory will and this is of course relevant to Islamic law.

Based on the arguments above, the judge has the right to deviate from the provisions of the legislation, but the purpose of the deviation is to achieve social justice. The judge must reach a clear and intelligent legal consideration by considering all aspects of the law. The judge's decision is the basis for decision-making in similar cases, which is called case law, and the goal is to avoid inconsistencies in decisions taken by judges in the same case.

Based on the Three cassation decisions of the Supreme Court of the Republic of Indonesia, Decision No. 368K/AG/1995, Decision No. 51K/SG/1999, and Decision No. 16 K/AG/2010 provide mandatory wills to non-Muslim heirs, by considering the philosophical values of inheritance and sociological values of Indonesian culture. In these decisions, there is a discrepancy between normative Islamic law and positive law legislation in Indonesia. With this background, this study focuses on the reconstruction of mandatory wills in Article 209 Paragraph (3) of the Compilation of Islamic Law (KHI). There have been several previous studies on mandatory wills. Asni Zubair, for example,

stated that 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 receive mandatory wills, including heirs who are prevented from inheriting due to differences in religion. The construction of the renewal of inheritance law regarding the transfer of inheritance assets with mandatory wills in the jurisprudence of the Supreme Court of the Republic of Indonesia has exceeded the quantitative limits in the granting of mandatory wills.

Suwarti in her article argued that the Supreme Court judge ruled that a non-Muslim widow was entitled to receive an inheritance from her Muslim husband based on the provisions of the *wajibah* will, considering that the widow had been married to the deceased for 18 years. Referring to the *wajibah* will to provide an inheritance to non-Muslim heirs does not violate Islamic law, where the maximum amount is 1/3 of the inheritance.

Furthermore, Aden Rosadi stated that the construction of inheritance through the *wajibah* will in article 209 of the Compilation of Islamic Law is given to adopted children and adoptive parents considering the special relationship between the adopted child and the adoptive parents in terms of emotional closeness and to obtain benefits and justice. In addition, the reconstruction of the *wajibah* will is given to non-Muslims considering that the non-Muslim wife has lived in harmony and is devoted to her husband, and the judge decides on the will to realize the true benefits and justice to maintain the integrity of the family without conflicting with the provisions of Islamic law.

In contrast to the aforementioned studies, this paper aims to provide an in-depth elaboration of *wajibah* wills in 3 (three) Supreme Court Cassation decisions. The substance in this article uses Gustav Redbruch's theory of legal objectives which has never been done by previous researchers who limited their research by analyzing the judge's considerations in granting *wajibah* wills for non-Muslims. Therefore, the novelty of this article is to reconstruct the *wajibah* will law in family law in Indonesia.

2. Research Method

Field research and supported by library research, using a qualitative approach. The use of this research design is to obtain in-depth and comprehensive data related to the reconstruction of the law of mandatory wills for non-Muslims. The primary data source of this research was excavated through in-depth interviews with 3 (three) Supreme Court Judges who tried and decided on mandatory wills for non-Muslims. The data is strengthened by 3 (three) Supreme Court Cassation Decisions, namely No. 368 K / AG / 1995,

No. 51 K / AG / 1999, No. 16K / AG / 2010, and the Compilation of Islamic Law (KHI), the Civil Code (KUHPdt) as primary legal materials, and literature reviews related to mandatory wills as secondary legal materials. Data were analyzed qualitatively, using the inductive thinking method. Analyzed using Gustav Redbruch's theory of legal objectives.

3. Results and Discussion

Supreme Court Decision on Mandatory Wills for Non-Muslims

a. Supreme Court Decision No.368K/ AG/1995

This decision is based on the rejected District Court decision and continued with the rejected Religious Court decision on the grounds that in the study of fiqh, namely the views of the scholars and the KHI which are the reference for judges in deciding cases, it does not provide a basis for the permissibility of non-Muslims to receive a share of the inheritance from a Muslim or vice versa.

In the Supreme Court decision No. 368 K/AG/1995, it was stated that non-Muslim heirs receive a share of the inheritance of a Muslim testator based on a mandatory will equal to the share of the Muslim heir, but in this decision non-Muslim heirs are not declared as heirs. This is as stated by the chairman of the Taufiq Trial, below:

"Non-Muslim heirs are entitled to a share of the inheritance of a Muslim testator based on a mandatory will equal to the share of the Muslim heir equal to a Muslim daughter of the testator." (Interview excerpt, February 9, 2024-translation).

In this case, the testator left 6 children, one of whom was a Christian. To resolve the inheritance division problem, one of the children of the testator filed a lawsuit and asked the South Jakarta Religious Court to determine the legitimate heir. The plaintiff believed that his sibling who was of a different religion was not entitled to receive inheritance rights because he had changed religions. Finally, at the cassation level at the Supreme Court, the panel of judges decided that the non-Muslim child of the testator was still entitled to receive a portion of his parents' assets based on the *wajibah* will. Which amount is the same as the portion of other female heirs.

b. Supreme Court Decision No. 368K/ AG/1995

The Supreme Court's decision in this case was based on the evidence of the relevant letters, considering that from the letters the cassation respondent as the original plaintiff had sued the cassation applicant as the original defendants before the Yogyakarta Religious Court, in essence on the grounds that Murtadi Hendro Lesono died on November 17, 1995, leaving behind a wife named Jazilah Murtadi Hendro Lesono (the original plaintiff) without leaving any children.

That the heir was Muslim, then the inheritance distribution was carried out using the Islamic distribution method, and did not use customary law or other religious laws. Meanwhile, the wife who should have been the heir who did not leave any children, as stipulated in Article 180 of the KHI, stated that the widow gets 1/4 of the share, if she does not leave any children, while the original plaintiff's right is 1/3 of the share, in the KHI it is emphasized that the wife did not receive the inheritance, because she was Christian (non-Muslim).

This decision was rejected, then an appeal was filed to the Yogyakarta High Religious Court with its decision dated June 24, 1998 AD, coinciding with the 29th of Safar 1419 H. No. 007/Pdt.G/1998/PTA.Yk. The High Religious Court also rejected it, which was then continued with an appeal to the Supreme Court.

In the Supreme Court decision No. 51 K/AG/1999, it is explained that non-Muslim heirs are declared as heirs of Muslim heirs and receive the same share as Muslim heirs based on a mandatory will, in this decision it is stated that non-Muslim heirs are considered as heirs.

This is as conveyed by the chairman of the Chalib Sarbini Session, below:

"This decision was decided based on humanitarian and social humanitarian values, in order to uphold the values of substantive justice". (Interview excerpt, February 9, 2024-translation).

The human values and social values in question are that the wife is the person who is closest to her husband, she has the right to receive an inheritance because during his life the deceased was always with his wife and even when he was sick he took care of her. It might be different when a wife has been away from her husband for a long time "not with him, leaving him, then the husband dies and asks for an inheritance.

c. Supreme Court Decision No. 16 K/AG/2010

On Wednesday, April 30, 2010, the panel of judges chaired by Andi Syamsu Alam, with members Rifyal Ka'bah, and Mukhtar Zamzami, issued decision No. 16K/AG/2010. This Supreme Court decision contains the determination of the granting of inheritance rights to a non-Muslim heir. This is as per Supreme Court Decision No. 16 K/AG/2010, which grants inheritance rights to a wife who has a different religion from her husband.

This is as conveyed by the chairman of the trial, Andi Syamsu Alam, below:

"Giving a portion of the inheritance to Evie Lany Mosinta who is a Christian from the inheritance of her husband Muhammad Armaya bin Renreng who is a Muslim." Interview excerpt, February 9, 2024-translation).

The main issue is to state that Muhammad Armaya bin Renreng, had died on

May 22, 2008. The Supreme Court granted the cassation from the Applicant for the cassation, Evie Lany Mosinta, in order to annul the Makasar High Court Decision No.: 59/Pdt.G./2009/PTA.Mks. This decision actually originated from the Makasar Religious Court Decision No.: 732/Pdt.G/2008/PA.Mks, whose decision stated that it rejected the defendant's exception.

In the decision, it is stated that M. Armaya bin Renreng (MAR) married Evie Lany Mosinta (ELM) on November 1, 1990 and was officially registered in the civil registry. During their marriage, they did not have any children. When MAR died, he was still a Muslim, while ELM was still a Christian. The deceased left behind an inheritance and 5 heirs, namely: his biological mother, 3 biological sisters and 1 biological brother.

The contents of the Supreme Court's decision in this inheritance dispute case include:

1. Determining the joint property between MAR and ELM at 1/2 part and 1/2 part.
2. ELM is entitled to receive inheritance from 1/2 of MAR's assets together with the 5 heirs above, so the distribution is (the principal is 60);
3. The biological mother receives 10/60 of the share.
4. ELM receives 15/60 or 1/4 of the share.
5. The 3 female siblings each receive 7/60 of the share.
6. The male siblings receive 14/60 of the share.

The reasons underlying the Supreme Court's decision to grant inheritance to ELM, who is not of the same religion as MAR, are:

1. The legal reason that their marriage is valid and recorded in the civil registry so that it refers to civil law.
2. ELM as MAR's wife has served her husband for approximately 18 years.
3. Scholars such as Yusuf al-Qordhawi have issued a fatwa that non-Muslims can inherit a Muslim.
4. The Supreme Court considers this to be a mandatory will.

In Supreme Court Decision No. 368 K/AG/1995, No. 51 K/AG/1999 and No. 16 K/AG/2010 stated that non-Muslim heirs receive a portion of the inheritance of a Muslim heir based on a *wajibah* will. This decision is considered controversial because it is considered to be outside the normative rules as stipulated in the KHI.

Forms of Divorce in Islamic Law

A mandatory will is a will intended for heirs or relatives who do not receive a share of the deceased's inheritance, due to a sharia obstacle. Suparman in his book *Fiqh Mawaris (Islamic Inheritance Law)*, defines a mandatory will as a will whose implementation is not influenced or does not depend on the will or desire of the deceased. The provisions of the obligatory will are the result of *ijtihad ulama'* in interpreting QS: al-Baqarah: 180.

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِن تَرَكَ خَيْرًا الْوَصِيَّةُ لِلْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

Meaning: "It is prescribed for you, when death comes to one of you, if he leaves behind a great deal of wealth, to make a bequest to his parents and relatives in a just manner, (this is) an obligation upon the pious (Q.S. al-Baqarah: 180)

Some scholars, in interpreting verse 180 of the letter al-Baqarah above, are of the opinion that a bequest (to parents and relatives) which was originally obligatory, until now this obligation still remains and is enforced, so that granting mandatory wills to walidain and aqrabin who receive a share (receipt) can be applied and implemented.

A mandatory will must fulfill two conditions; First, it is the person who is obliged to accept the will, not the heir. If he is entitled to receive even a small inheritance, it is not obligatory to make a will for him. Second, the person who died, neither grandfather nor grandmother, has not given to the child who must be made a will, the amount that was bequeathed in another way, such as a gift, for example.

In connection with the obligatory will for non-Muslim heirs, the author explains the views of a number of ulama who do not agree with this view. In other words, the jumhur agreed that the law of wills is sunnah so that no will is mandatory. The evidence for a will is found in the letter of al-Baqarah verse 180 which means "It is obligatory upon you, when death comes to one of you, if he leaves behind a great deal of wealth, to make a will for his parents and close relatives in a just manner, (This is) an obligation upon the pious people."

The argument used is that the word kutiba in the verse above has been abrogated by the Mawaris verses which have explained the share of each heir such as parents and close relatives with definite provisions. So that a will which was originally obligatory becomes sunnah.

Furthermore, it has become a qath'i sharia provision that there are groups who are prevented from receiving inheritance due to slavery, murder and differences in religion. Thus, when there is a family whose members are not all Muslim, then they must accept the consequences, namely not being able to inherit from each other and not receiving inheritance unless the heir has previously made a will or has given a gift to the heir concerned. However, if the testator does not make a will before he dies, then a mandatory will to the non-Muslim heirs is not necessary, according to the majority of scholars.

The provision on religious differences is the difference in religion between the testator and the heirs, meaning that a Muslim does not inherit from a non-Muslim,

and vice versa, a non-Muslim does not inherit from a Muslim. This provision is based on the sound of a hadith of the Prophet Muhammad:

عن أسامة بن رضى الله عنه ان النبى صلى الله عليه وسلم قال: لا يرث المسلم الكافر ولا يرث الكافر المسلم

Meaning: "*From Usamah bin Zaid ra, that the Messenger of Allah said, "Muslims do not inherit from unbelievers and unbelievers will not inherit from Muslims."* (HR. Bukhari).

Even though wills are permitted in Islam, there are also limits that must not be violated, for example, someone who is supposed to inherit will no longer be allowed to get a will. Likewise, a grandfather or grandmother can give a will to their grandson, in which case the grandson is not the heir, because his father is in awe of him.

Scholars from the Shafi'iyah, Hanafiyah and Hanabilah circles have established the permissibility of obligatory wills for non-Muslims, provided that the non-Muslims are not kafir harbi (i.e. non-Muslims who are hostile), in addition to the condition that they are not kafir harbi, and also do not exceed 1/3 of their inheritance.

Harbi infidels are prohibited from receiving a will, because it is feared that they will control their property, besides it will violate the purpose of achieving sharia law, namely establishing kinship relations between relatives. This should not exceed one third, because one third is too much of the existing property, and is not excessive.

The concept of 1/3 (one third) of inheritance is based on the hadith of Sa'ad bin Abi Waqash, a friend of the Prophet. Sa'ad bin Abi Waqash. When he was sick, he was visited by the Prophet, asking, "I have a lot of property but only have one woman who inherits. I will just give two-thirds of my property in charity." The Prophet replied, "Don't." "Half?" asked Sa'ad again. The Prophet answered again with "Don't." "What if one third?" asked Sa'ad again. The Prophet answered, "The large amount of one third is actually better if you leave your child in a state of sufficiency."

There are scholars who are of the opinion, including followers of the Hanafi school, regarding the hadith of the Prophet, which was narrated from Usamah bin Zaid, which reads: "A Muslim does not inherit an infidel, and an infidel also does not inherit a Muslim", can be interpreted with the hadith which reads: "A Muslim is not killed just for killing an infidel", what is meant by an infidel is an infidel, so a Muslim should not give an inheritance to an infidel who is truly fighting Muslims. because of the severance of ties between the two in terms of inheritance rights, it is only reserved for harbi infidels, while for munafiq, apostates and

dhimmi it does not apply.

If we return to the goal of law, it is benefit in the form of realizing justice, legal certainty and benefits. The principles of *maslahah* are that a benefit can be achieved as long as it does not conflict with sharia law. The sharia law in question is a rule found in the texts, both the Qur'an and hadith. In the case of a mandatory will, this is a matter of *muamalah* and not a matter of faith, the permission of a will to a non-Muslim is other than a *harbi kafir*.

The benefit must be general, and not for personal gain, this is done in order to maintain the kinship relationship that has been carried out so far, the relationship of adoptive parents to the child they have raised since childhood, cared for, fostered and educated until they are adults, even they reciprocate by caring for the parents, so in this case it is very unfair socially if the child does not get a will. The principle of benefit is to make it easy and not difficult, in this case Islamic law must be flexible, responsive, and progressive in responding to emerging matters, in this case a mandatory will to a non-Muslim.

From the explanation above, it can be seen that in relation to the law of a Muslim inheriting a non-Muslim, the opinions of the scholars are divided into two. First, those who absolutely reject it, whether a Muslim inherits a *kafir* or vice versa. This opinion is based on the textual interpretation of the hadith above. Second, those who allow a Muslim to inherit a non-Muslim and forbid the opposite. This is based on the analogy of the permissibility of marriage between a Muslim man and a non-Muslim woman.

Construction of Mandatory Will Law in the Perspective of Positive Law in Indonesia

The term will can mean wisdom, magical powers, the last message of a deceased person, taken from *washaitu-ushi al-syai'a* (I connect something). In sharia, a will is a gift of objects, receivables, or benefits by a person to another person with the provision that the person who is given the will owns the gift after the death of the person who made the will.

A will is a statement of will by a person regarding what is done with his property after death, or is a message from a person to another person to take care of his property according to his message after his death. So, a will is a *tasaruf* for inherited property that will be carried out after the death of the person who made the will, and is valid after the person who made the will dies.

a. According to the Compilation of Islamic Law (KHI)

Wills in the Islamic legal system in Indonesia have not been regulated materially in a law like Western inheritance in the Civil Code (KUHPdt). Wills are only

regulated in the KHI as contained in Presidential Instruction No. 1 of 1991. Wills are regulated in Chapter V, namely Articles 194 to 209. Articles 194 to 208 regulate ordinary wills, while Article 209 regulates wills that are specifically given to adopted children or adoptive parents. In the treasury of Islamic law, this unusual will is called a *wajibah* will.

A *wajibah* will implicitly contains the elements stated in Article 209 of the KHI, namely:

1. The legal subject is the adopted child towards the adoptive parents or vice versa, the adoptive parents towards the adopted child.
2. Not given or stated by the testator to the recipient of the will but is carried out by the state.
3. The share of the recipient of the will is as much as possible or may not exceed 1/3 (one third) of the testator's inheritance.

The mandatory will in Article 209 KHI arises to resolve problems between the heir and his adopted child and vice versa, the adopted child as heir and his adoptive parents.

b. According to the Civil Code (KUHPdt)

A will (testament) is a statement from someone about what they want after they die. In principle, such a statement comes from only one party (*eenzijdig*) and can be withdrawn at any time by the person who made it. A will (testament) must not conflict with the law. Restrictions on statements in a will are important, especially in terms of the absolute share of inheritance rights (*legitime portie*).

A person who makes a will (testament) must have a rational mind, meaning he must not have a memory problem or be a person who has a serious illness, so that he cannot think regularly (Article 895 of the Criminal Code), and must be at least 18 years old (Article 897 of the Criminal Code).

Then the conditions for the validity of a will are regulated in articles 888, 890 and 893 of the Criminal Code. such as a will must be understandable or enforceable or not contrary to morality, not contain false reasons (meaning if the testator knew the false reasons, he would not have made it), and the will will be void if made due to coercion, and trickery.

The elements of a mandatory will are:

1. The element of a will is "in the form of a deed", where the will must indicate a writing, something written. Given that a will has broad consequences and only comes into effect after the testator dies, a will is bound by strict conditions. Doesn't a new will become a problem after the person who made it dies and therefore can no longer be asked about what was actually desired.

2. Contains a statement of the last will which means a unilateral legal action". A unilateral legal action is an action or statement by one person alone is enough for the desired legal consequences to arise.
3. "What happens after he dies", meaning that a new will comes into effect and has legal consequences when the testator dies.

Types of wills according to their contents are divided into:

1. Wills containing *erfstelling* or wills appointing heirs, namely wills with the name of the person making the will, giving to one or more, all or part (1/2 or 1/3) of his wealth, if he dies. The person appointed (appointed) is called *testamentaire erfgenaam*, which means heir according to the will and is the same as an heir according to law, or based on or under a general title (*onder algemene titel*).
2. Wills containing grants (*legaat*), namely a gift to one or several people in the form of one or several specific objects, goods of a certain type for example: all movable objects, usufruct rights (*vruchtgebruik*), for example all or part of the inheritance, another right to the estate for example: giving one or several specific objects from the estate. The person who receives the legacy is called a legatee, he is not an heir, so he does not replace the rights and obligations of the deceased, is not required to pay his debts, and the legatee receives an inheritance under a special title.

Sometimes a legatee who receives several objects is required to give one of the objects to another person designated in the will (*testament*). The provision of an object that must be collected from the legatee is called a *sublegaat*.

According to Article 931 of the Civil Code, a will according to its form is divided into:

1. Holographic will (*olografis testament*), which is a will written by the hand of the person who will leave the inheritance itself (*eigen handing*) and must be submitted to a notary for storage (Article 932 paragraphs 1 and 2 of the Civil Code). This submission must be made a deed called a storage deed (*deed van depot*) which is signed by the will maker, notary and 2 witnesses who attended the event. Submission to a notary can be done openly or secretly (in an envelope), if closed then the opening is done by the Inheritance Office (BHP) and a verbal process is made.
2. General will (*Openbare testament*), made by a notary (Article 938 and 939 paragraph (1) of the Civil Code). The person who will leave an inheritance appears before the notary and states his will. The notary will write and be attended by 2 witnesses. This form is the most common and best because the notary can supervise the contents and provide advice on the contents.

3. Secret will, made by the giver or another person then signed by the testator, and must be submitted personally to the notary with 4 witnesses, in a closed and sealed state (Article 940 of the Civil Code).

Based on the explanation above, it can be understood that the provisions of the will in the Civil Code provide normative rules on how a will can be made. A will can be given to anyone desired by the testator without exception as long as it does not violate the legitime portie which is an absolute part, namely all parts of the inheritance that must be given to the heirs. As stated in Article 931 of the Civil Code, legitime portie is a certain part of the inheritance that cannot be removed by the person who left the inheritance. This part cannot be given to another person, either by means of a regular gift or by a will. People who receive this part are called legitimaris. This shows that a person may make a will regarding his property to another person who does not have an inheritance relationship with the testator as long as he does not ignore the rights of the heirs regarding the inheritance. The Criminal Code does not specifically explain the criteria for people who may receive a will, this shows that whoever is appointed by the testator through his will has the right to receive the will, regardless of the religion and social status of the recipient of the will. In other words, if a testator bequeaths his assets to a Muslim, according to the Criminal Code, his will is still considered valid and must be obeyed.

Reconstruction of Mandatory Will Law as a Reform of Family Law in Indonesia

The problem of interfaith inheritance or mandatory wills for non-Muslims is not much different from the problem of adopted children, and this is a real condition of Indonesian society for a long time. Indonesia consists of various tribes and religions. The existence of different religions has existed since ancient times and has not been a barrier for Indonesian society to live side by side, while religious differences even within the family environment are not a foreign thing in Indonesia. Indonesian society has made a social agreement to live in harmony, peace, respect each other, and not degrade human dignity on any basis whatsoever, whether because of differences in tribe, culture or religion. Religious differences are part of human rights, the state prohibits all forms of discriminatory actions by stating that; "everyone has the right to be free from discriminatory treatment on any basis and has the right to receive discriminatory protection.

The problem in this study will be analyzed using Gustav Redbruch's theory of legal objectives, Gustav Radbruch stated that in legal objectives it is necessary to use the principle of priority of three basic values that are the objectives of the law. namely justice, certainty, benefit.

Justice is the glue of civilized social order. Law is created so that every

individual member of society and state administrators take the necessary actions to maintain social ties and achieve the goals of life together or vice versa so as not to take actions that can damage the order of justice.

This Supreme Court decision shows that there are several important parts that have not been fully accommodated in the KHI, which ultimately gives rise to many interpretations of these provisions, especially related to mandatory wills intended for non-Muslim heirs. If this is not immediately anticipated, then problems related to inheritance disputes of different religions will always be endless and unresolved polemics.

If this problem is submitted to the legal realm, it will also go through a complicated and time-consuming process, especially if it has to go through the process of filing an appeal to the Supreme Court. Not all people want to bring their inheritance disputes to court, besides being ignorant, they also consider that inheritance issues are merely an internal family matter, which sooner or later can be resolved by the family members themselves. This condition, if it continues, will eventually cause prolonged conflict in society, and can damage the social order of life in society. Therefore, legal certainty is needed regarding the problem of interfaith inheritance.

There should be no assumption that there has been a legal vacuum, because the justice expected by society is not merely justice based on normative rules alone, judges must conduct *ijtihad* (*rechtsvinding*) to find such justice. And in fact, this *rechtsvinding* does not always have to be carried out by the panel of judges in the *judex juris* court but also when tried in the *judex facti* court.

In the case of mandatory wills, the KHI includes and applies that mandatory wills are intended for adopted children, but not for heirs of different religions. This is where the author attempts to reinterpret the rules on mandatory wills in a broader sense. That the application of mandatory wills can also be applied to heirs who are hindered because they have different religions because their positions are both considered not heirs. So he is like an adopted child who is hindered from receiving an inheritance or as a legitimate heir of the testator.

The Supreme Court's decision to grant mandatory wills to children or relatives of the testator who adhere to religions other than Islam is a decision that is responsive to social conditions, equality and justice in society. The practice of non-Muslim inheritance through mandatory wills in Indonesia can be a solution that can be implemented.

In addition, the principles of justice that must also be fulfilled are the principles of freedom, peace, togetherness (democracy) and tolerance. Thus, justice is a value that cannot be negotiated because only with justice is there a

guarantee of protection for individual interests as well as a guarantee of social order. In a just atmosphere, there is no conflict between personal interests and common interests. And to guarantee justice, fair rules are formed. Likewise, the KHI which has regulated the rights of adopted children to the property of their adoptive parents was formed to provide justice. The highest justice is justice that comes from noble values (religion) to achieve common welfare, and for that justice must be upheld. Thus, justice in community life is usually referred to as moral justice, social justice and legal justice. Although moral, social and legal justice can be distinguished, in practice they cannot be separated. Because the three justices actually lead to the implementation of individual rights and obligations in their social interactions. The Qur'an itself has determined that humans have equal rights and obligations between the same sex and fellow humans. The difference between humans is only the variety of efforts and work in the context of the great task of humans, namely as servants who serve only Allah SWT and at the same time become His caliphs to prosper all creatures, so that there is no injustice on earth.

Furthermore, Gustav Radbruch explained that the second barometer of the purpose of law is legal certainty, According to Radbruch, legal certainty is the main requirement for law, namely, so that the law becomes positive, in the sense that it applies with certainty. The law must be obeyed, thus the law is truly positive. The law must have certainty, for that reason the law must be in the form of written regulations. However, it is very important to understand that the law cannot exhaust the law.

Legal certainty as one of the purposes of law can be said to be part of an effort to realize the purpose of law. The real form of legal certainty is the implementation or enforcement of the law against an action regardless of who does it. With legal certainty, everyone can estimate what will be experienced if they take certain legal actions. Certainty is needed to realize the principle of equality before the law.

The ambiguity of the rules regarding the status of adopted children opens up opportunities for *ijtihad* for judges to interpret and even find laws (*rechtsvinding*) that are justified by positive law, by considering social conditions and principles of justice in society.

When compared to the status of adopted children who basically have no relationship whatsoever with the testator, this relationship occurs because of the will of the adoptive parents and/or the child's original parents which is strengthened by a court decision. Although they do not have blood relations (*nasab*), marital relations, it is not explained whether they must be of the same religion as the testator, adopted children are still given a portion of the inheritance in the form of a mandatory will (*wasiat wajibah*).

If for humanitarian reasons an adopted child is given a *wajibah* will, ideally this provision also accommodates illegitimate children, stepchildren and children of different religions from the testator, because although the three statuses of children (illegitimate, stepchildren and different religions) are clearly prevented from becoming heirs, their social status is very close and attached to the testator. Therefore, to create justice in society, it is necessary to emphasize the status of illegitimate children, stepchildren and children of different religions from the heir in Indonesian inheritance law (KHI) as well as the status of adopted children.

Ideally, the three statuses of children (illegitimate, stepchildren and different religions) are given a portion of the inheritance in the same way as adopted children, namely through a mandatory will. This does not mean making the child's status an heir, but if it is not forced (obliged) it is feared that it will cause conflict in the family, especially when dealing with heirs who are selfish and greedy.

The description above shows that there are still many gaps in the KHI that must be fixed, so that normatively it can accommodate all issues related to inheritance disputes and mandatory wills. For example, the status of children (illegitimate, stepchildren and different religions) as previously explained. Therefore, it is necessary to carry out legal reconstruction of the mandatory will rules.

Furthermore, Gustav Radbruch explained that the third barometer of the purpose of law is the benefit of the law. To see a particular policy or action brings benefits or useful results or, conversely, losses to the people involved. The existence of benefits that arise is a form of achieving the objectives of the law.

The formulation for the provision of mandatory wills to non-Muslim heirs is a policy that can provide legal benefits for those seeking justice to obtain their rights in the form of inheritance. If you look at the concept of mandatory wills in the KHI, that those who can receive mandatory wills are adopted children and adoptive parents, then it is the same as an obstacle to inheritance in normative Islamic law. The formulation in the KHI is a progressive breakthrough to create a value of justice. Non-Muslim heirs should be accommodated, this will create benefits for people seeking justice in the form of obtaining their inheritance rights.

Based on this analysis, the legal objective of Gustav Redbruch, in order to achieve the objectives of the law, the elements of justice, certainty, and legal benefits must be fulfilled, so as done by the Supreme Court in its decision regarding interfaith inheritance disputes. Carrying out a new interpretation of

the provisions in the KHI, so as to produce a new understanding of these provisions. Reinterpretation of the narrow-minded rule on mandatory wills for non-Muslims, then used as a basis for determining an inheritance dispute, this is a form of *rechtsvinding*, and this decision can be used as jurisprudence for other law enforcers (judges) when resolving similar inheritance cases or as a reference for judges to be able to carry out forms of renewal, especially in the field of inheritance and wills. In addition to the need for judges' *ijtihad* in finding new laws (*rechtsvinding*) regarding the provisions of the rules related to mandatory wills based on the KHI, there are other things that are also important factors so that problems related to mandatory wills, especially for heirs who have different religions from the testator, the status of stepchildren and the status of illegitimate children, do not become endless polemics in society. It is important to clarify these statuses in normative rules. As an idea that is a solution to the problem of the status of this heir, the researcher tries to reformulate the provisions of Article 209 as follows:

- 1) The inheritance of adopted children is divided based on Articles 176 to 193 above, while adoptive parents who do not receive a will are given a mandatory will of up to 1/3 of the adopted child's inheritance.
- 2) Adopted children who do not receive a will are given a mandatory will of up to 1/3 of the adoptive parents' inheritance.
- 3) Children born out of wedlock, stepchildren and children of a different religion from the testator who do not receive a will are given a mandatory will of up to 1/3 of the testator's inheritance.

With the addition of the formulation of Article 209, it is hoped that it can be a reference for judges in deciding cases related to the status of illegitimate children, stepchildren and children of different religions quickly and accurately, so that they do not drag on in a long and lengthy legal process. That legal problems continue to occur in society. This requires a quick and fair resolution, this can be realized if the supporting facilities exist and work optimally, these facilities are the existence of regulations and law enforcement officers. Although the rules governing inheritance and wills are regulated in the Compilation of Islamic Law (KHI) issued based on Presidential Instruction No. 1 of 1991, not yet in the form of a law, it does not mean that legal certainty and justice are far from expectations. Because the law is actually always in the status of law in the making and is not final, therefore the components of the legal structure greatly determine the process of law in the making.

4. Conclusion

The Supreme Court's Cassation Decision No. 368 K/AG/1995, No. 51 K/AG/1999 and No. 16 K/AG/2010, allowing non-Muslim heirs to receive part

of the inheritance through a mandatory will is considering the philosophical and sociological aspects where religion distinguishes the boundaries between beliefs (aqidah) between Muslims and non-Muslims, but Islam does not limit muamalah between Muslims and non-Muslims, so in this context a mandatory will is part of muamalah and not aqidah. Based on this, it is necessary to reconstruct Article 209 Paragraph (3) of the KHI, so that illegitimate children, stepchildren and children of different religions from the testator who do not receive a will are given a mandatory will of up to 1/3 of the testator's inheritance. In accordance with its limitations, this study suggests that the government is expected to make changes to inheritance law in Indonesia.

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