

# Justice for Non-Muslims in Islamic Courts: Interfaith Inheritance Distribution

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**Keywords:** Interfaith Inheritance, *Wasiyya al Wajiba*, Non-Muslims, Islamic Court, Justice.

**Abstract:** In dealing with the complexity of inheritance distribution cases involving Muslim and non-Muslims, judges in the Indonesian Religious Courts have used the method of *wasiyya al wajiba* or obligatory bequest. This means that non-Muslim successors can obtain the share from their deceased relatives' property through the obligatory bequest. One of the jurisprudence used is the Supreme Court Decision No. 368 K/AG/1995. By examining jurisprudences and Religious Court decisions pertaining to the interfaith inheritance cases, this paper found out that the judges' decision to grant non-Muslims with *wasiyya al wajiba* is based on the notion of *maslaha* and by considering the good relationship between the deceased and the successors, which are not Muslims. Apart from that, one of the decisions also granted non-Muslim successors with the status of substitute heirs, which are usually given to Muslim successors. These methods are chosen as judges' caution in dealing with the complexity of Muslim inheritance system. Despite the emerging controversies, this scheme is still one of the safest choices in resolving this sensitive issue.

## 1 INTRODUCTION

In the past, Indonesian people were able to choose three legal options to deal with inheritance disputes: Islamic law, customary law, and civil law. Based on the Law No. 7/1989 on Judicature Act. Inheritance cases was in the absolute authority of the Religious Courts (Islamic courts in Indonesia). However, the law mentions that the litigants can choose between the Religious Courts or the General Courts. With the law No. 3/2006 on the Amendment of the Religious Judicature Act of 1989, Muslims can only resolve inheritance disputes in the Religious courts. The idea of eliminating the options came from Muslim leaders and Islamic judges who thought that the options would make the all-inclusive legitimacy of the Religious Courts unrecognisable. (Salim, 2015) Consequently, religions become the determinant factor of which courts to be chosen to settle inheritance cases. Shall one of the parties (the heirs or the deceased) is a Muslim, then the case should be brought to the Religious Courts.

The complexity comes when the dispute involving both Muslim and non-Muslims in one

family. Based on the *hadith* from Bukhari that the Prophet Muhammad once said: "A Muslim does not inherit from an unbeliever, and an unbeliever does not inherit from a Muslim". (www.sahihbukhari.com) This *hadith* has become the basis of the Compilation of Islamic Law Article 171 b and c, stating that the heirs and the deceased should be Muslims. If one of them is not a Muslim; she or he cannot inherit each other. Apart from that, the National Meeting of the Supreme Court in 1985 decided that if the heirs and the deceased religions are different, then the case should be resolved based on the religion of the deceased. As the Compilation of Islamic Law is the basis for judges in decision making, it had been impossible for them to grant non-Muslims their rights to inheritance. (Maharani & Cahyaningsih, 2018) Moreover, in 2005, MUI issued a Fatwa No. 5/ MUNAS VII/9/2005, stating that non-Muslims are banned from Muslims' inheritance, except using *wasiyya* (bequest) or *hiba* (gift).

## 2 MATERIALS AND METHODS

Materials used in this paper are decisions and stipulations issued by the Indonesian Religious Courts, either the first instance Religious Courts or High Religious Courts, and the jurisprudence with regards to the issue of interfaith inheritance. Among those decisions and stipulations is Decision No. 176/Pdt.G/2009/PA.Sgu; Decision No. 17/Pdt.G/2012 PTA PTK; and Decision No. 0009/Pdt.G/2015/PTA.Mdo. Meanwhile, the jurisprudence is the Supreme Court Decision No. 16 K/ AG/2010. Those materials are carefully examined reveal the Religious Court judges' discretion and consideration in resolving inheritance cases involving Muslims and Non-Muslims.

## 3 RESULTS

**Wasiyya al Wajiba: Justice in Interfaith Inheritance.** With the plurality of Indonesian society, that provision may not be fair in the interfaith inheritance disputes. This because, the kinship relation between Muslims and Muslims does not happen overnight, and the good relationship between Muslims and Non-Muslim is likely to develop, by loving, caring and being good to each other. In 1995, the Supreme Court of Indonesia produced a landmark decision on an inheritance case involving Muslims and Non-Muslims for the first time. It was the Supreme Court Decision No. 368 K/AG/1995 dated 1998, which has become a jurisprudence for the Religious Court judges to deal with interreligious inheritance cases. Another landmark decision that also becomes jurisprudence is Supreme Court Decision No. 16 K/ AG/2010.

The Decision No. 368 was begun with the dissatisfaction of a party, who was Christian, about the Decision of 377/Pdt.G/1993/PA-JK. In this early decision, the first instance Religious Court prevented a woman from obtaining her parent's estate because of her religion. She saw this decision unfair because she was a Christian, and did not want to follow Islamic law. With the provision that non-Muslim and Muslim cannot inherit each other, her status as an heir should be eliminated. Objecting to the decision, she went for an appeal. In the appeal, the high court examined the case more carefully. In the appeal trial, the judges decided that she was entitled to her deceased parents' estate through *wasiyya al wajiba* (obligatory bequest), amounting  $\frac{3}{4}$  of a daughter share (Decision No.

14/Pdt.G/1994/PTA.JK). Still dissatisfied with the decision, she went to cassation. In the cassation, the judges strengthened the appeal decision and changed the amount of the share to  $\frac{3}{4}$  of the estate, similar to the share of a daughter (Decision No. 368 K/AG/1995).(Lukito, 2013)

In Decision No. 176/Pdt.G/2009/PA.Sgu, the plaintiff, was the wife of the deceased. During their marriage, they do not have a child. The deceased was a Muslim convert. After his conversion, he registered his marriage in the Office of Religious Affairs (*Kantor Urusan Agama*). Meanwhile, the defendants were parents and a relative to the deceased, who were non-Muslims. This case was brought to the court because the defendants possessed all property left by the deceased. In the Religious Court of Sanggau, the judges resolved the case in the Islamic way of inheritance distribution. Considering the defendants are granted the property through *wasiyya al wajiba*. Meanwhile, the wife became the sole heir (*ahl waris*) of the deceased. The non-Muslim successors obtained  $\frac{1}{3}$  of the property or 33.33% of it. The rest of the property after that to be distributed to the heirs. In this case, the wife was the sole heir of the deceased, and she obtained  $\frac{1}{4}$  and the rest of  $\frac{3}{4}$  of the inheritance. This case is taken to the appeal. In the appeal decision, the judges confirmed and supported the Sanggau first instance court No. 176/Pdt.G/2009/PA.Sgu that granted non-Muslims to obtain  $\frac{1}{3}$  of the estate through *wasiyya al wajiba*. When this case was brought to the cassation by the non-Muslims to gain more shares, the Supreme Court refused the cassation (Decision No. 402 K/AG/2013) as they considered that the first instance Religious Court has already given a proper decision.

In granting *wasiyya al wajiba*, the judges refer to the notion from Ibn Hazm, At-Tabari, and Muhammad Rasid Rida in *al Fiqh al Islam wa Adillatuhu* Chapter VIII, page 122, stating that non-Muslims are allowed to obtain the property share from a Muslim deceased through *wasiyya al wajiba*. Apart from that, the judges mentioned the possible disputes caused by unjust decision due to the negligence of the existence of non-Muslim relatives in the inheritance cases. The decision mentions:

... It is a just and humane attitude by giving non-Muslims their rights from the property of the deceased through *wasiyya al wajiba*, in order to avoid social disputes among those who have different religions by considering the principle of humanity. This

*means that all human are similar in the perspective of universal humanity. Maslaha (public good) is the aim of the law in Islam as mentioned in the Quran Sura Al-Baqara verse 180.*

Apart from giving *wasiyya al wajiba*, there is also a case where the judges entitle the status of a substitute heir to a non-Muslim grandchild. This is illustrated in the Decision of High Court of Manado No. Pdt.G/2015/PTA.Mdo. This decision revoked the previous decision issued by Kotamobagu Religious Court No. 128/Pdt.G/2015/PA.Ktg. In this decision, the judges ignored the existence of the deceased's offspring who are not Muslims, and they eliminated from obtaining inheritance shares. Apart from being non-Muslims, another reason to exclude them was that their father, who was the son of the deceased passed away earlier. In the appeal, the judges saw the case differently. The consideration is as follow:

*“Among the wisdom of inheritance, according to Al Jurjani in his work Hikmatu Tashri’ wa Falsafatuhu page 269, which becomes the basis of this decision, is to love each other (ta’aluf), to help each other (ta’awun), and to give benefits to relatives (itsaal al manfaat ila alqarib). If religious differences hampered the inheritance division, Muslim legal experts argue for the entitlement of wasiya al wajiba as mentioned in the book of al Fiqh al Islami Waadillatuhu, chapter 8, page 122 ... Considering those reasons, children of AK who were prevented from becoming legitimate heirs to him due to the Christianity should obtain the share of inheritance through the means of wasiya al wajiba. This includes SK, who legally can be the substitute of her father (ZK), who passed away earlier before the deceased (AK).”*

In the Supreme Court Decision No. 16 K/AG/2010, the defendant is a Christian woman, whose husband died and was a Muslim. The plaintiffs are the mother and siblings of the husband. The plaintiffs requested the share of the deceased estate as they are the legal heirs of the deceased. In the first instance Religious Court of Makassar, the court decided that the heirs of the deceased are the mother and the siblings. Meanwhile, the wife did not get any of the estate because of her status as a non-Muslim. She only got the estate from the joint property of the deceased and her. Responding to this decision, she brought the case to the appeal.

However, the appeal only strengthened the first instance court decision (see Decision No. 59/Pdt/G/2009/PTA/MKS). Finally, she brought the case to the cassation. In the cassation, the judges sought that the wife has a right to obtain her husband's estate, which is not her part in the joint property. With her being a non-Muslim, she cannot get the status of *ahl waris*. Therefore, the judges granted her the estate through *wasiyya al wajiba*. In this case, she obtained  $\frac{1}{4}$  of the total estate, after reduced with the joint property. This share is in accordance with the share of a wife who does not have any child. It is mentioned that *wasiyya al wajiba* is granted to a non-Muslim successor due to the long and good relationship between her and the deceased. They were husband and wife for eighteen years. This decision quoted Yusuf Qardhawi on the notion that a non-Muslims who maintain a good relationship with Muslims cannot be categorized as *kafir harb*.

Controversies in Interfaith Inheritance. Controversies of interfaith inheritance have emerged among Islamic judges and scholars. Not all of them agree with this kind of decision because it is considered against the provision of both Muslim and non-Muslim cannot inherit each other. For example, Masrum M. Noor, a judge from Banten High Court, in his article entitled “*Ahli Waris Beda Agama Tidak Patut Mendapat Warisan Walaupun Melalui Wasiat Wajibah*” (Heirs from Different Religion Ought Not to Obtain Inheritance even through Wasiyya al Wajiba) insists that the use of *wasiyya al wajiba* can lead to the manipulation of Islamic law, and against the hadith saying that both parties cannot inherit each other. Noor also quoted Habiburrahman's study, which according to him was the first Chief of Justice that see that *wasiyya al wajiba* provision for non-Muslims heirs problematic, because it is not based on the definitive proofs (*dalala al qat'iy*), but based on human's engineering.(M. Noor)

Also, Muhammad Rinaldi Arif, in his article entitled “*Pemberian Wasiat Wajibah terhadap Ahli Waris Beda Agama (Kajian Hukum antara Hukum Islam dan Putusan MA No. 368.K/AG/1995)*” (The Entitlement of Wasiyya al Wajiba to the Heirs for Different Religion (Study of Islamic Law and Supreme Court Decision No. 368.K/AG/1995), maintains that the provision of *wasiyya al wajiba* in the interfaith inheritance has not resulted in justice for Muslims as determined by Qur'an and Sunna because the judges did not give clear explanations to base their argument.(Rinaldi, 2017) Therefore, it is crucial to explain the reasons

behind judges' discretion in granting non-Muslims *wasiyya al wajiba* in the interfaith inheritance cases. (Rinaldi, 2017)

Questions. The question after that are: why is *wasiyya al wajiba* chosen to deal with the interfaith inheritance cases? What are judges' consideration and discretion in granting *wasiyya al wajiba*?

## 4 DISCUSSION

*Wasiyya al wajiba*, or obligatory bequest, is a bequest given to the heirs or relatives who are not legally entitled to distributable estates according to Islamic inheritance law. For example, a mother or father gives a bequest to the children who are not Muslims. This is done because their religion becomes the barrier for them to receive inheritance from their Muslim parent. Another example is a grandchild who is, according to Islamic inheritance law, not entitled to his/her grandparent's estate because of the existence of the uncle. If the grandchild is considered important for the deceased, he/she can obtain the estate through *wasiyya al wajiba*. The practice of *wasiyya al wajiba* does not depend on the will of the deceased. This means that without any proves that the deceased grant the *wasiyya* to his/her relatives, the *wasiyya* can still be distributable. (Usman, 1997)

In discussing Islamic inheritance, the status of the property of the deceased should be clear. There are two types of estates: total estate or *harta peninggalan*; and distributable estate. This distributable estate is called *harta waris* (inheritance), which is the remain of the total estate after being reduced by the deceased unpaid debts and *wasiyya*. Therefore, *Wasiyya al wajiba* is taken from the total estate left by the deceased. Another matter is about the status of the successors. In Islamic inheritance law, not all successors gain the status of heirs (*ahl waris*) or those who are entitled to the distributable estate. Being a non-Muslim is one of the cause that forbid someone to become an heir (*ahl waris*) of a Muslim. Therefore, they cannot obtain the estate as an heir.

The notion of *wasiyya* is also in accordance with the *hadith* of the Prophet Muhammad saying that *wasiyya* is not for *ahl waris*. This means that the *wasiyya* for those who are outside the heirs of the deceased. The provision about *wasiyya* involving non-Muslims is discussed by Abdurrahman Al-Jaziri from the Hanafi *madzhab* (Islamic school of thoughts). Al-Jaziri maintains that those who can receive *wasiyya* are Muslims and non-Muslims,

which in this contexts are *dimmi*, or Non-Muslims who live peacefully side by side with Muslims. However, Al-Jaziri also mentioned that the *wasiyya* should not be entitled to apostles, or those who convert from Islam to other religions. (Jaziri, 1982)

As for *wasiyya al wajiba*, this notion involves authority in its implementation. This is because, the *wasiyya al wajiba* is granted to the successor without the knowledge of the deceased, or without a written evidence from the deceased. Because the implementation of *wasiyya al wajiba* involving law and authority, this matter is considered *qadaiyya* (legal-related matter). There are different opinions about the practice of *wasiyya al wajiba* among the *ulama*. *Jumhur* argued that the implementation of *wasiyya al wajiba* is optional. On the other hand, *Ibn Hazm*, *Abu Ja'far Muhammad bin Jarir al-Tabari*, *Abu Bakr ibn Abd al Aziz* argued that *wasiyya al wajiba* is compulsory for the heirs that are forbidden to obtain inheritance. They based their argument with *sura Al-Baqara* verse 180, "Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous." (Alam & Fauzan, 2008)

In Muslim countries, such as Egypt, Morocco, Syria, and Tunis, the notion of *wasiyya al wajiba* is in their state law. (Somawinata, 2008) In Indonesia, the term *wasiyya al wajiba* can be found in the article of 209 of the Compilation of Islamic Law. The article states (1) The estate of adopted children is distributable based on the Article 176 to Article 193, as for the adopted parents who are not entitled to the *wasiyya*, are given *wasiyya al wajiba* amounting no more than 1/3 of the estate. (2) For the adopted children who do not obtain *wasiyya* from his adopted parents, they are given *wasiyya al wajiba* at the maximum of 1/3 of the adopted parents' estate. The entitlement of *wasiyya al wajiba* to the adopted children in the Compilation of Islamic Law is the limited adaptation of customary law to Islamic law. This notion is chosen considering that there has been a legal transfer of responsibility from the biological parents to the adoption parents, as is mentioned in Article 171 on the General Provisions of Inheritance. (Alam & Fauzan, 2008), (Ali, 1997) From methodological aspects, the practice of *wasiyya al wajiba* in the compilation of Islamic law is a disputable matter (*ijtihad*). Judges apply *wasiyya al wajiba* based on the principle of *maslaha al mursala* to promote justice and public interests among Indonesia Muslim society. (Somawinata, 2008)

The examination of court decisions and stipulations may not always be easy to find judges' consideration. This is because the decisions and stipulations often do not include clear judges' reasons before reaching the final decisions. This also applies to the decisions and stipulation pertaining to the interfaith inheritance. Based on the examination of early decisions on this issue, Ratno Lukito maintains that the exclusion of Islamic legal reasons in the decisions might be intentional because of the judges' avoidance to confront the Islamic legal sources, which excludes a non-Muslim from being an heir to a Muslim. (Lukito, 2013) It is reasonable because the inheritance is one of the sensitive issues among Muslims. This is due to some clear explanation of the matters in the Qur'an. For some, what is stipulated in the Quran about inheritance is undisputable. Verses in *Sura Annisa* are among them.

There are not many sources discussing the issue of interfaith inheritance in other Muslim countries. This might be because of the strict conformation to the notion that Muslims and non-Muslims do not inherit each other. In Malaysia, the *fatwa* institutions forbid the inheritance distribution between Muslims and non-Muslims, following the abovementioned hadith. However, in some special case, where the non-Muslim was the mother to the deceased, she was granted the proportion of the property as a compassionate gift. This gift was given to the mother through *bait al mal*. In other cases, people can resolve this matter through customs and traditions. The *fatwa* institution allows this practice as honour the living customs and traditions and seeing it as the implementation of *maslaha* (expediency). (Hassan, et.al, 2014)

Viewing the reasons proposed by the judges in the above explanation, the predominant reason in granting *wasiyya al wajiba* for non-Muslims is *maslaha* (public good) and *humanity*. In the Guideline for the Task Implementation and Administration of the Religious Courts, Book II (*Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama, Buku II*) mentions that the basis in giving *wasiyya al wajiba* for non-Muslims is the principle of egalitarianism. (Direktorat Jenderal Peradilan Agama, 2013) In this case, the meaning of egalitarianism is that they see all successors have rights to the property of the deceased. It does not mean, however, that they can have a similar amount of the share, because of the notion that Muslims and non-Muslims cannot inherit each other.

Moreover, the Compilation of Islamic Law Chapter V on *Wasiyya* (bequest) does not mention

that those who obtain *wasiyya* should be a Muslim. This becomes one of the reasons for the judges to give the non-Muslims *wasiyya al wajiba* share because this way they do not violate the notion that forbids inheritance distribution to those who have different religions. Therefore, it is considered the safest way to give non-Muslims their rights over their deceased Muslim relatives. This can be seen as a progressive interpretation of Islamic law, considering that the Compilation of Islamic Law mentions that *wasiyya al wajiba* is given to adopted children (Article 209). (Kompilasi hukum Islam, 2004)

Furthermore, the judges considered the long-time good relationship between the two parties. The common practice of *wasiyya al wajiba* is applied to adopted children. In this case, the judges might see that the blood relationship between the deceased and the heirs is even more than the adopted children. So it might be unjust to ignore their relationship, or even to ignore the existence of the Non-Muslim heirs. In this case, the judges analogized non-Muslims with *kafir dhimmi* or those who maintain a good relationship with Muslims.

Resolving this type of case might not be easy for the Religious Court judges as it is vulnerable to controversies. This is comparable with the controversy of possible equal share for men and women as is proposed by Hazairin and Munawir Sadzali. (Cammack, 2003) However, ignoring non-Muslims in the practice of interfaith inheritance is not possible. The Religious Court judges unavoidably should face the complexity of modern society. As is maintained by Cammack that inheritance law in Indonesia is the complex combination of social and ideological forces; and the law should demonstrate its adaptability with these two forces. (Cammack, 2003) To use Ratno Lukito's term, the practice of *wasiyya al wajiba* is a mean of "bridging the unbridgeable". (Lukito, 2013)

## 5 CONCLUSION

To conclude, in dealing with the interfaith inheritance cases, started from 1995 the Indonesia Religious Courts judges has accommodated the rights of non-Muslims. This is marked with the Decision No. 368.K/AG/1995 that has become jurisprudence to resolve respective cases ever since. To serve justice for non-Muslims, the judges granted non-Muslims their rights to their testator's inheritance through *wasiyya al wajiba*. If a non-Muslim heir passed away before his/her testator, the

judges could also grant his/ her children a *wasiyya al wajiba* by considering them substitute heirs. In this type of case, the judges considered the consanguinity and long-time good relationship between the deceased and the testators. This is a progressive interpretation of Islamic law, conducted by the principle of *maslaha* by considering the value of humanity.

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