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The Construction of Inheritance Law Reform In Indonesia: Questioning the Transfer of Properties through *Wasiat Wājibah* to Non-Muslim Heirs

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Abstract: This article examines the construction of inheritance law reform in the transfer of properties through *wasiat wājibah* to non-Muslim heirs. Questioning the jurisprudence of the Supreme Court which makes *wasiat wājibah* as an alternative in giving inheritance rights to heirs who are prevented from getting an inheritance due to religious differences (non-Muslims). This study is an empirical legal study that examines the decisions of the Supreme Court relating to the transfer of inheritance to non-Muslims. The study concludes that in terms of inheritance law reform is an alternative in changing Islamic law that must be carried out in response to changes in community social conditions. The construction of inheritance law reform in judicial decisions has formulated inheritance law by giving inheritance rights to heirs of different religions (non-Muslims) by means of *wasiat wājibah*. 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 a *wasiat wājibah*, including heirs who are prevented from inheriting due to religious differences. The construction of inheritance law reform on the transfer of inheritance properties with *wasiat wājibah* in the jurisprudence of the Supreme Court of the Republic of Indonesia has exceeded the quantitative limit in granting *wasiat wājibah*. The impression does not pay attention to the signs in the application of *wasiat wājibah* by ignoring the maximum limit. *Wasiat wājibah* as a solution is not unacceptable as inheritance law reform but must still guide the legal media used by considering the basic rules that surround it.

Keywords: *Inheritance law reform, transfer of properties, supreme court, wasiat wājibah, non muslim.*

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Abstrak: Artikel ini mengkaji tentang konstruksi pembaharuan hukum waris dalam peralihan harta melalui wasiat wājibah pada ahli waris non muslim. Menyoal yurisprudensi Mahkamah Agung yang menjadikan wasiat wājibah sebagai alternatif dalam memberikan hak waris kepada ahli waris yang terhalang mendapatkan warisan karena perbedaan agama (non-muslim). Kajian ini merupakan kajian hukum empiris yang menelaah putusan Mahkamah Agung yang berkaitan dengan peralihan harta waris kepada non-muslim. Kajian tersebut menyimpulkan bahwa dalam terminologi pembaharuan hukum waris merupakan alternatif dalam perubahan hukum Islam yang harus dilakukan sebagai respons dalam perubahan kondisi sosial masyarakat. Konstruksi pembaharuan hukum waris dalam putusan peradilan telah memformulasikan hukum waris dengan memberikan hak kewarisan kepada ahli waris beda agama (non muslim) dengan jalan wasiat wājibah. Yurisprudensi Mahkamah Agung RI telah memperluas Pasal 209 Kompilasi Hukum Islam dengan menambahkan pihak yang dapat menerima wasiat wājibah termasuk ahli waris yang terhalang mendapatkan warisan karena perbedaan agama. Konstruksi pembaharuan hukum waris terhadap peralihan harta warisan dengan wasiat wājibah dalam yurisprudensi Mahkamah Agung RI telah melampaui batas kuantitatif dalam pemberian wasiat wājibah. Kesannya tidak memperhatikan rambu-rambu dalam penerapan wasiat wājibah dengan mengabaikan batasan maksimal. Wasiat wājibah sebagai solusi bukan tidak dapat diterima sebagai pembaharuan hukum waris, akan tetapi harus tetap memedomani media hukum yang digunakan dengan mempertimbangkan aturan-aturan dasar yang mengitarinya.

Kata Kunci: Pembaharuan hukum waris, peralihan harta, putusan mahkamah, wasiat wājibah, nonmuslim.

Introduction

The inheritance law has been explained in detail in the Qur'an and is categorized as an exact law.¹ In fact, it does not cause debate because in real terms it is stated in the form of numbers which does not cause multiple interpretations. There are even scholars who call it *qath'i dalalah* or no longer

¹Ahmad Rafiq, *Fiqh Mawaris*, Jakarta: Raja Grafindo Persada, 2002. Mark Cammack, "Islamic Inheritance Law in Indonesia: The Influence of Hazairin Theory of Bilateral Inheritance," *Studia Islamika* 10, No. 1 (2003), p. 97-122. Ahmad Rofii, "Whither Islamic Legal Reasoning? The Law and Judicial Reasoning of the Religious Courts," *Journal of Indonesian Islam* 8, No. 2 (2014), p. 235-262.

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need interpretation.² However, along with the times, the law of inheritance experienced problems in its implementation, so that several legal opinions were born as an inheritance law reform which actually studied inheritance verses with various legal approaches. It was different at the beginning of Islam, the inheritance law was not so important to change because it was more of a da'wah connotation.³ However, in the modern era, there are various problems faced by humans in the transfer of inheritance properties, thus requiring legal certainty that is binding through the judiciary. For this reason, inheritance law as *qath'i ta'abbudi*, requires a new legal construction that is able to accept a rational approach through *ijtihad*.⁴

Inheritance law reform through the judiciary is expected to provide solutions to problems in the field of inheritance. There are many new problems faced, and it is deemed necessary to produce solutions based on legal contextualization. However, inheritance law reform, which was expected as a solution, actually caused problems. The product of the judiciary that has made *wasiat wājibah*, as an alternative to the transfer of properties due to religious differences (non-Muslims). The birth of the jurisprudence of the Supreme Court of the Republic of Indonesia, which has given legitimacy to non-Muslim heirs to obtain their inheritance rights by means of *wasiat wājibah* raises many views. How not, if it is related to the hadith of the Prophet, then the position of non-Muslims (infidels) is considered unable to inherit from each other, even the Compilation of Islamic Law only regulates *wasiat wājibah* for adopted children and adoptive parents, not religious differences (non-Muslims).⁵

Compilation of Islamic Law which is a rational, practical, and actual formulation of inheritance law as a manifestation of an understanding of inheritance law that is easily understood by the public⁶ are still considered to

²Ratu Haika, "Konsep Qath'i dan Zhanni dalam Hukum Kewarisan Islam." *Jurnal Mazahib* 15, No. 2 (2016), p. 182.

³Ahmad Rafiq, *Fiqh Mawaris...*, p. 14-15.

⁴Dena Kurniasari, et.al., "Qath'i dan Zhanni dalam Kewarisan Islam," *Media Syari'ah: Wahana Kajian Hukum Islam dan Pranata Sosial* 22, No. 2 (2021), p. 207.

⁵Rizkal, "Pemberian Hak Waris dalam Hukum Islam Kepada Non-Muslim Berdasarkan Wasiat wajibah: Kajian Putusan Nomor 16K/AG/2010," *Jurnal Yudisial* 9, No. 2 (2016), p. 173-193. Abdul Hadi Ismail, "Pemberian Wasiat Wajibah Kepada Isteri Non Muslim menurut Putusan Mahkamah Agung, No. 16K/AG/2010," *Jurnal Mercatoria* 13, No. 2 (2020), p. 131.

⁶Mohammad Daud Ali, "Asas-asas Hukum Kewarisan dalam Kompilasi Hukum Islam," *Mimbar Hukum* No. 9 Thn. IV (1993), p. 4.

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have negligence in accommodating the needs of the community. Legal formulations carried out through judicial decisions by making *wasiat wājibah* as an alternative to the transfer of rights on the properties of non-Muslim heirs, still have to pay attention to the principles in *wasiat wājibah*. Negligence in inheritance law cannot be used as an excuse, the necessity of providing legal certainty to citizens is the responsibility of the state in finding legal solutions, but it must still be measurable and relevant. Although the compilation of Islamic law is considered as part of the results of the renewal of Islamic law in Indonesia carried out by the state supported by scholars and universities.⁷

The judge's decision is expected to produce a progressive legal product which in essence the laws and regulations are not final, meaning that they still require interpretation and meaning in order to achieve the real legal objectives (*maqāshid al-syari'ah*).⁸ Judicial decisions must accommodate social conditions and are not allergic to social changes, in order to provide benefits to the community.⁹ Islamic law can be developed by considering the times and conditions in a place.¹⁰ However, once again, the inheritance law reform with the *wasiat wājibah* method must have considerations that are in line with the needs of the Indonesian people who are predominantly Muslim and do not implement it universally.

For this reason, the study of inheritance law reform construction in the form of transfer of properties through *wasiat wājibah* to heirs of different religions aims to complement previous studies that still ignore the subjective dimension, so that the reform seems to be final. In line with that, this study will present the interpretation of the meaning of inheritance law reform and a critical study of the jurisprudence of the Supreme Court of the Republic of Indonesia relating to the transfer of properties to non-Muslim heirs. The side of negligence in the jurisprudence of the Supreme Court of the Republic of Indonesia needs to be disclosed, so that inheritance law reform and its application are not applied excessively. The answer to these doubts is the subject of this study while still guiding the proper application of the law.

This study is an empirical legal study, namely the law that occurs in society or the sociology of law by making the decisions of the judiciary as the

⁷ MB. Hooker, "Southeast Asian *Shari'ahs*," *Studia Islamika* 20, No. 2 (2013). p. 183-282. Erie Hariyanto and Made Warka, "The Political Scrimmage of the Religious Court's Law As The Judicial Institution In The Reformation Era in Indonesia," *al-Ihkam: Jurnal Hukum dan Pranata Sosial* 11, No. 1 (2016), p. 178-200.

⁸A. Khisni, *Hukum Waris Islam*, Semarang: Unissula Press, 2013, p. 70.

⁹A. Khisni, *Hukum Waris Islam*... p. 71.

¹⁰Mohammad Daud Ali, *Asas-asas Hukum Kewarisan*... p. 4.

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object of research. The decision of the judiciary is the subject of study in legal studies.¹¹ The decision of the Supreme Court as a judicial institution is related to the granting of inheritance to non-Muslims which is then followed by the lower judicial institutions which in the context of Islamic law are called *wasiat wājibah*.

The Terminology Inheritance Law Reform

The word “reform” in Merriam-Webster dictionary means to improve (someone or something) by removing or correcting faults, problems, etc, as in amendment, correction.¹² When the term reform is embedded with Islamic law, the meaning of reform will experience many views. The term reform in the construction of Islamic law will give birth to several views, this is debated because of the position of the texts as a source of law that has a correct existence.

Harun Nasution viewed that reform is synonymous with modernization, in Arabic it is known as *tajdid*.¹³ For this reason, responding to reform or modernization as a movement, school, thought and effort to change understanding, habits (customs), classical traditions. The aim is to harmonize with new conditions arising from changing conditions and advances in modern science and technology. The emphasis is that Islamic law reform is needed to adapt religious understanding to developments or changes in the modern or recent era.¹⁴

Islamic law reform is defined as a progressive effort to bring about changes in perceptions and established practices of actual interpretations. The reform starts from a clear point of view influenced by social conditions, so Islamic law manifests as a reality that will filter out things that deviate from

¹¹Achmad Ali and Wiwie Heryanti, *Sosiologi Hukum: Kajian Empiris terhadap Pengadilan*, Jakarta: Kencana, 2012, p. 169-208. Zainuddin Ali, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, 2014, p. 30-51.

¹²Merriam-Webster Dictionary (Online), https://www.merriam-webster.com/dictionary/reform?utm_campaign=sd&utm_medium=serp&utm_source=jsonld accessed on 10 October 2021.

¹³*Tajdid* comes from the word "*jaddada*" which means to renew, while "*tajaddada al-syai'*" means to be new. *Tajdid* is also interpreted as an effort to revive, so something that has existed and is lost in its implementation. So *tajdid* means reforming and reviving. See, Amal Fathullah Zarkasyi, "Tajdid dan Modernisasi Pemikiran Islam." *Jurnal Tsaqafah* 9, No.2 (2013), p. 397-402.

¹⁴Harun Nasution, *Pembaharuan dalam Islam: Sejarah Pemikiran dan Gerakan*, Jakarta: Bintang, 1986, p. 11-12.

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actual Islam.¹⁵ Islamic law has different characteristics from other legal systems. Islamic law is sourced from Allah, the Most Holy, so that there is no passion and particular interest in it. The characteristics of Islamic law do not give a burden beyond the limits of ability, so that humans can carry out so that their happiness in life will be achieved.¹⁶

In general, reform can have two meanings, namely reform and modernization. Reform in the sense of reform is to return to the original, while reform in the sense of modernization is that it does not re-excavate but changes only to the surface area by still referring to the views of previous scholars.¹⁷ Madjid added that modernization or reform is a must and can even achieve absolute obligations. It is based on the implementation of the commands and teachings of Allah. However, it must be understood that the modernization in question is modernization which is synonymous with rationality.¹⁸

Abdullah Syafe'i explained that the theory of Islamic law reform formulated four typologies of legal thought, and these four greatly influenced legal reform in Indonesia, including secular, traditionalist, reformist and salafi. First, Secular is a school which holds the view that in enactment of the law it is not absolutely referring to the Sharia. Second, Traditionalist is a school that holds the view that law enforcement only refers to existing legal schools, because it is considered established. Third, Reformist is a legal school which holds that the law is dynamic in nature so that reforms must continue to be carried out that are relevant to the times. And fourth, Salafi is a legal school which holds that the law in its application must return to the legal tradition that prevailed at the time of the Prophet Muhammad (PBUH).¹⁹

The idea of reform gave birth to many variants or patterns used by schools or groups. But the most important thing is that the Islamic reform movement, according to Abdullah that reform is urgent in affirming its absolute truth and return to real ethics. In addition, in particular reaffirming it as the source and basis for the intelligence and welfare of the people. For this

¹⁵Azyumardi Azra, *Akar-Akar Historis Pembaharuan Islam di Indonesia Neo Sufisme Abad Ke 11-12 dalam Tasawuf*, Jakarta: Yayasan Wakaf Paramadina, p. 179.

¹⁶Abdul Manan, *Pembaharuan Hukum Islam di Indonesia*, Jakarta: Raja Grafindo Persada, 2006, p. 94.

¹⁷Darul Aqsho, *Kiai Haji Mas Mansur (1896-1946): Perjuangan dan Pemikiran*, Jakarta: Erlangga, 2005, p. 9-10.

¹⁸Nurcholish Madjid, *Islam, Kemodernan, dan Keindonesiaan*, Jakarta: Mizan Pustaka, 2008, p. 180.

¹⁹Zulhamdi, "Pembaharuan Hukum Islam di Indonesia dan Tokoh-Tokohnya", *Jurnal Ilmiah Islam Futura* 19, No. 2, (2019), p. 241.

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reason, starting from the reform, it becomes a form of Islamic response to actual social realities. On the other hand, it will be a form of effort in providing interpretations in a certain meaning by considering harmony or conformity while still paying attention to the actualization of Islamic principles.²⁰

The idea of reform has become hotly discussed in various academic institutions and major Islamic mass organizations such as Nahdlatul Ulama and Muhammadiyah. The discussion of Islamic law reform in Indonesia has involved various groups. At the end of the discussion, formulating a joint commitment to reform of Islamic law can be accepted or implemented if it does not conflict with the *qath'i* texts (the Qur'an and hadith).²¹

Regarding ideas of reform, Shihab emphasized that in carrying out reforms there are pre-requisites that become provisions in reform. The condition that must be met is that the reform is carried out with an understanding and appreciation of the values contained in the Qur'an, and the ability to use and relate it to historical aspects. So, reform can be carried out with the provision that there is a value, then there is conformity with that value in a historical perspective.²² Adjustment in the historical aspect is to pay attention to *asbabun nuzul* of a verse and *asbabul wurud* of a hadith with the conditions of the legal reform.

With regard to inheritance law reform, it is important to know the terminology of inheritance. In Arabic, the word *waris* is a form of *isim fa'il* which means heir, taken from the word *wariša-yarišu-wiršan* which means to inherit property.²³ The meaning of the word inherit in the Merriam-Webster Dictionary has the meaning to receive from an ancestor as a right or title descendible by law at the ancestor's death; to receive as a devise or legacy. Another term that is more appropriate in referring to this inheritance is: الميراث Etymologically *miraš* means displacement. The meaning of transfer can be in the form of wealth, knowledge, or glory and the transfer can be in the form of individuals or groups. In terminology, *miraš* means the transfer of ownership, the transfer is from the deceased to the living (heirs), and those who move can

²⁰Abdul Karim Sukandi, et. al, *Prof. Dr. Nurcholis Madjid: Jejak Pemikiran dari Pembaharu Sampai Guru Bangsa*, Yogyakarta: Pustaka Pelajar, 2003, p. 332.

²¹Amir Syarifuddin, *Pembaharuan Pemikiran dalam Hukum Islam*, Padang: Angkasa Raya, 1993, p. 135.

²²M. Quraish Shihab, *Membumikan Al-Qur'an: Fungsi dan Peran Wahyu dalam Kehidupan Masyarakat*, Bandung: Mizan, 1992, p. 245-246.

²³Mahmud Yunus, *Kamus Arab Indonesia*, Jakarta: Mahmud Yunus Wa Dzurriyah, 1990, p. 496.

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be in the form of property and rights related to the Shari'a.²⁴ *Al-miras* means the process of transfer, the word *al-miras* comes from the word *Mawaris* which is popularly termed Islamic inheritance law.²⁵

Civil law that applies in Indonesia, including inheritance law is still diverse (pluralism), still does not have a legal unity that can be applied to all Indonesian citizens. The diversity of inheritance law can be seen from the distribution of inheritance law to: (1) inheritance law contained in the Civil Code (BW), Book I Chapter XII to Chapter XVIII from Article 830 to Article 1130, (2) inheritance law contained in customary law, namely in the section on customary inheritance law, and (3) inheritance law contained in Islamic inheritance law, namely the provisions of inheritance law in Islamic jurisprudence called *mawaris* or *faraidh* science.²⁶ In Indonesian context, it is in the form of a Compilation of Islamic Law which is a judicial reference in resolving inheritance disputes.

Departing from the commitment and the idea of reforming Islamic law, the Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI) which is the pinnacle of Islamic law reform in Indonesia.²⁷ The formulation of *fiqh* with Indonesian nuances, which at the same time contains the law of inheritance. However, inheritance law reform in the KHI has not changed until now, it is caused by various social problems of the Indonesian people. This can be compared with the Waqf Law and the Marriage Law, which separately have undergone reform and have a clear position in the legal hierarchy in Indonesia. Therefore, the terminology of inheritance law reform is interpreted as modernization and reformist, namely changes, adjustments or something new (actual) in inheritance law. The new construction of inheritance law in Indonesia still refers to the Compilation of Islamic Law as a result of the product of Islamic law reform at the beginning of the Islamic law reform movement and judicial decisions which became the jurisprudence of Islamic civil law in Indonesia. Several forms of inheritance

²⁴Muhammad Ali Al-Şabuni, *al-Mawarisu fi al-Syari'ah al-Islamiyah fi Dau'i al-Sunnah wa al-Kitab*, Kairo: Dar al-Hadiş, 1985, p. 34.

²⁵Tarmizi, "Inheritance System of Bugis Community in District Tellu Siattinge Bone, South Sulawesi (Perspective of Islamic law)," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 4, No.1 (2020), p. 184.

²⁶Suparman Usman and Yusuf Somawinata, *Fiqh Mawaris, Hukum Kewarisan Islam*, 1st print; Jakarta: Gaya Media, 1977, p. 189.

²⁷Amir Syarifuddin, *Pembaharuan Pemikiran dalam Hukum Islam*, Padang: Angkasa Raya, 1993, p. 135. Euis Nurlelawati, "Change and Continuity: The Kompilasi and Indonesian Islamic Courts" *Studia Islamika* 14, No. 1 (2007), p. 85-112.

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law reform in the jurisprudence of the Supreme Court of the Republic of Indonesia include substitute heirs, customary inheritance (gender equality) and includes *wasiat wājibah* for non-Muslims.

Inheritance Law Reform in The Construction of Judicial Decisions

Legal construction that is built through legal discovery in judge decisions and becomes jurisprudence is a product of legal reform, which is binding and can be a source of law.²⁸ Giving inheritance rights to heirs of different religions, by means of *wasiat wājibah*, is a legal reform in the transfer of properties. This can be seen in Article 209 of the Compilation of Islamic Law (KHI) for the provision of *wasiat wājibah* only to adoptive parents and adopted children provided that the portion does not exceed 1/3 of the inheritance.²⁹

Previously, the provisions regarding the *wasiat wājibah* were still focused on those outlined in Article 209 of the Compilation of Islamic Law. Just to note that the *wasiat wājibah* philosophy is an alternative to the transfer of properties to those who are hindered or do not get an inheritance, in terms of having a close relationship with the inheritor. For this reason, the ultimatum becomes a strong basis for justice seekers who feel that their inheritance rights have been harmed because they are prevented from getting an inheritance. Including non-Muslim heirs who do not get their rights as heirs because of religious differences.

Justice seekers who feel that their rights have been castrated file a lawsuit related to the obstruction of inheritance due to religious differences with the inheritor. Religious differences (non-Muslims) have been understood collectively that classical *fiqh* cannot inherit from each other. So, the reaction of justice seekers to question their inheritance rights is to submit to the court as a form of fulfilling their rights. In this regard, the response in the judiciary is very good because it takes an alternative transfer of properties by way of *wasiat wājibah*, thus giving birth to inheritance law reform through court decisions that are full of considerations of justice values.

²⁸Moh Imron Rosyadi, "Judge Made Law: Fungsi dan Peranan Hakim Dalam Penegakan Hukum di Indonesia." *Al-Hukama': The Indonesian Journal of Islamic Family Law* 3, No. 1 (2013), p. 96.

²⁹Instruksi Presiden No. 1 Tahun 1991 tentang Kompilasi Hukum Islam. Sri Hidayati, "Ketentuan Wasiat Wajibah di Pelbagai Negara Muslim Kontemporer," *Ahkam: Jurnal Ilmu Syariah* 12, No. 1 (2012), p. 81-90.

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The construction of inheritance law reform through court decisions, through *wasiat wājibah* for children and wives who are non-Muslim has been legalized in the decision of the Supreme Court of the Republic of Indonesia Number 368 K/Ag/1995. The decision stipulates that the position of children who change religions has the same position as other children, but children of different religions get inheritance by means of *wasiat wājibah*. The decision also expands the provision of *wasiat wājibah* as regulated in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law Article 209. Strictly speaking, the Compilation of Islamic Law only mentions adopted children and adoptive parents who inherit through *wasiat wājibah*, but the birth of a judicial decision has accommodated religious differences.

The power of granting *wasiat wājibah* rights to children who are not Muslim or of different religions with heirs occurred again in 1999. Through the decision of the Supreme Court of the Republic of Indonesia No. 51 K/Ag/1999,³⁰ which substantially legitimized the granting of *wasiat wājibah* to children who are not Muslim. In the decision of the Supreme Court of the Republic of Indonesia, it is explained that: “Heirs who are not Muslim can still inherit from the inheritance of Islamic inheritor, inheritance is carried out using a *wasiat wājibah*, where the share of children who are not Muslim get the same share as the share of children who are Muslim as heirs.”³¹

The decision of the Supreme Court of the Republic of Indonesia relating to the granting of inheritance rights to children of different religions with the inheritor is the construction of inheritance law reform in Indonesia. Although the decision of the Supreme Court of the Republic of Indonesia in granting inheritance rights to different religions is not in tune with classical *fiqh*. The construction of the reform does not mean that it has no basis, because the decision of the Supreme Court of the Republic of Indonesia puts forward the principle of equal rights. The position of the heirs is considered the same, that is, they are both children even though they are of different religions. This becomes a strong basis so that the Supreme Court of the Republic of Indonesia gives a share to heir who is not of the same religion as the inheritor.

Regarding religious differences, including the position of wives of different religions, it is legal to obtain inheritance rights. This can be seen in 2010 in the Decision of the Supreme Court of the Republic of Indonesia

³⁰Putusan Mahkamah Agung Republik Indonesia Nomor 51 K/Ag/1999.

³¹Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung Tahun 2018*, Jakarta: Biro Hukum dan Humas Badan Urusan Administrasi Mahkamah Agung, 2018, p. 51.

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Number 16 K/Ag/2010.³² The Supreme Court of the Republic of Indonesia has also decided that wives of different religions (non-Muslims) who are married and accompany the testator for 18 years of marriage are also entitled to inherit property through the *wasiat wājibah*. The decision considered the following: “Whereas the marriage of the heir to the Cassation Petitioner has been long enough, namely 18 years, it means that the Cassation Petitioner has also devoted himself to the inheritor, therefore even though the non-Muslim Cassation Petitioner is proper and fair to obtain his rights as a wife to get a share of the inheritance in the form of a *wasiat wājibah* and share of joint assets as in the jurisprudence of the Supreme Court of the Republic of Indonesia and in accordance with a sense of justice”.³³

Consideration of justice that underlies the judicial decision in granting property rights to non-Muslim heirs by means of *wasiat wājibah*. The decision quoted Yusuf Qardhawi's opinion which was used as the basis for the legal considerations taken in strengthening his decision. The interpretation in strengthening it is emphasized that the categorization of non-Muslim heirs as *harbi* infidel³⁴ is not appropriate, because between the heirs and the inheritor of the inheritance coexist in harmony and peace. Although the heir and the inheritor have different beliefs, in reality this is not a problem in establishing a good relationship between the two. Thus, based on that condition, the judge of the court gave inheritance rights to the heirs by means of *wasiat wājibah*.

In connection with the decision, an explanation can be explored that religious difference which is a barrier to inheriting each other have gained legitimacy through the decision of the Supreme Court. The granting of inheritance rights to the wife through the *wasiat wājibah* method is determined by the judge because it is considered that there are wife's rights that must be obtained. Meanwhile, in the way of inheritance, it is considered obstructed, because the wife's religion is different from that of her husband as the inheritor. The judge's consideration clearly considered the 18-year period of togetherness between the heir and the inheritor. In addition, from the aspect of togetherness the wife carries out her obligations as a wife, including serving,

³²Putusan Mahkamah Agung Republik Indonesia Nomor 16 K/Ag/2010.

³³Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung Tahun 2018...* p. 51.

³⁴Kafir harbi is termed for non-Muslims who are reluctant to convert to Islam and do not submit to the policies of Islamic rulers. So, they are called people (non-Muslims) who are hostile and at war with Muslims. See, Afrizal El Adzim Syahputra and Hasanah Khuluqi. "Jizyah Bagi Kafir Dzimmah Perspektif Ulama Klasik dan Kontemporer." *Prosiding Mukhtamar Pemikiran Dosen PMII 1.1* (2021), p. 502.

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caring for the inheritor, so that it is very deserving of justice by obtaining her inheritance rights through *wasiat wājibah*.

The basis for the decision Number 721 K/Ag/2015 dated 19 November 2015, in its consideration the Supreme Court of the Republic of Indonesia stated: “That the inheritor at the time of death were Muslim and left only one heir who embraced Islam, namely the Plaintiff (SM bint ST/wife), while the children of the inheritor (the defendants) were non-Muslims so that they were prevented from being heirs. However, the two non-Muslim children of the inheritor are given a share by way of *wasiat wājibah*.”³⁵

The rules used are in line with the previous decision by considering the opinion of Yusuf al-Qardhawi which gives an interpretation of the position of non-Muslims and Muslims who live side by side peacefully, so they cannot be categorized as *harbi* infidels, including their children who live side by side well. This view is in line with Ibn Hazm's opinion that if the heir does not get anything from his inheritor's property, then the judge must react by giving his share in the form of *wasiat wājibah*. The judge acts as the inheritor by giving inheritance, including to relatives who do not get a share of the property.³⁶

Quoting the considerations of the Supreme Court in Decision Number 721 K/Ag/2015 dated November 19, 2015, the Court gave its considerations by stating the following: “That the Plaintiff's marriage to the late VP bin YP was long enough, namely 17 years, therefore, although the late VP Papilaya bin YP was non-Muslim at the time of marriage, the deceased was worthy and fair to obtain his rights as husband and received half of the joint property. during the marriage according to the jurisprudence of the Supreme Court and according to a sense of justice”.³⁷

Observing the basic considerations in the decision of the Supreme Court which gives the rights of heirs who are prevented from getting an inheritance by means of *wasiat wājibah*. In that decision again consider the sense of justice as a strength in granting the rights of the heirs. Being together for 17 years is not a short time, so the conditions are certainly living in harmony and peace. *Wasiat wājibah* as an alternative in giving inheritance is considered a solution in giving birth to a sense of justice to the heirs who are

³⁵Putusan Mahkamah Agung Republik Indonesia Nomor 721 K/Ag/2015. Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung Tahun 2018...* p. 52.

³⁶Sajuti Thalib, *Hukum Kewarisan Islam di Indonesia*, Jakarta: Bina Aksara, 1981, p. 17.

³⁷Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung Tahun 2018...* p. 52.

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blocked. Ibn Hazm's view is that even though the inheritor does not have a will, it is the judge who must give action to relatives by way of a will.³⁸

In several court decisions that give inheritor rights by way of *wasiat wājibah*, because of religious differences. The consequence that is obtained because of religious differences is that they are prevented from getting inheritance, so they take the way of *wasiat wājibah* to get their rights. Among them the decision of the Yogyakarta Religious Court Number 0042/Pdt.G/2014/PA.Yk³⁹ which was strengthened at the cassation level and gave birth to the decision of the Supreme Court of the Republic of Indonesia Number 218 K/Ag/2016. From these various decisions, there is an assumption that the granting of the rights of heirs who are hindered because of religion, through a court decision gives these rights through the way of *wasiat wājibah*.

Then, with regard to the decision of the *wasiat wājibah* as an alternative in the transfer of properties, it also happened again in 2018. This was stated in the decision of the Supreme Court of the Republic of Indonesia Number 331 K/Ag/2018, one of the reasons for which it was considered was stated in the decision stating that: "...by taking into account the relationship between the Cassation Petitioner and the inheritor during his life which was quite good and harmonious, even the Cassation Petitioner had accompanied the inheritor as his wife in joy and sorrow, even when the inheritor was sick, the Cassation Petitioner continued to care for the inheritor faithfully and always accompanied him until he went to China for treatment, then the Cassation Petitioner who is a non-Muslim should be given a share of the inheritance in the form of a *wasiat wājibah* of 1/4 (quarter) of the inheritance of the inheritor".⁴⁰

Considering several court decisions relating to the transfer of inheritor properties through *wasiat wājibah*, it has been carried out since 1999 until now. Religious status which is a barrier to inheriting each other has taken *wasiat wājibah* as a solution to continue to give property to heirs who are hindered because of religion. The alternative is considered a reform in inheritance law because the substance is that it is hindered from obtaining an inheritance so that a way out is sought, in order to continue to get their rights as heirs. Thus, juridically the transfer of properties through *wasiat wājibah* to

³⁸Rachmad Budiono, *Pembaruan Hukum Kewarisan Islam di Indonesia*, Bandung: PT. Citra Aditya Bakti, 1999, p. 9.

³⁹Putusan Pengadilan Agama Yogyakarta Nomor 0042/Pdt.G/2014/PA.Yk

⁴⁰Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung Tahun 2018...* p. 53.

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heirs of different religions has become the jurisprudence of the Supreme Court and has been carried out consistently.

In the perspective of justice argued by the Court in its decision, it is full of the rhythm of John Rawls' theory of justice that inequalities must be given rules so as to benefit the weak community. Inequality is open to all, meaning that everyone is given equal opportunities, so differences based on race, color and religion must be rejected. Therefore, according to John Rawls the principle of justice must be considered in the enforcement of justice by providing equal rights and opportunities for everyone.⁴¹ On the basis of considerations of justice, the Court argues that it is in line with Rawls, who puts aside religion (belief) between the inheritor and heirs in giving assets through *wasiat wājibah*.

A Critical Study of The Transfer of Properties Through *Wasiat Wājibah* To Non-Muslim Heirs

The construction of inheritance law in Indonesia has become a matter of discussion, *wasiat wājibah* be used as a solution in the provision of inheritance for heirs of different religions (non-Muslims). The emergence of different interpretations in responding to the position of *wasiat wājibah* as a way for the transfer of properties to heirs of different religions. How not, the general understanding that differences in religion or heirs who are apostate will be the reason for the disconnection of the rights of the heirs from the inheritors.

Wasiat wājibah in the Compilation of Islamic Law (KHI) is an alternative in giving inheritance to adopted children. Then in the development of inheritance law in the judiciary, in this case the Supreme Court of the Republic of Indonesia, actually made *wasiat wājibah* as a way to give a share of inheritance for heirs of different religions.⁴² If it is associated with classical *fiqh*, Sunni scholars agree that different religions are a barrier to inheriting each other between heirs and inheritors. This right applies reciprocally, meaning that an heir cannot inherit and does not have the right to inherit.⁴³

⁴¹John Rawls, *Teori Keadilan*, Translated by Uzair Fuzan and Heru Prasetyo, Yogyakarta: Pustaka Pelajar, 2006. See, Pan Mohamad Faiz. "Teori Keadilan John Rawls (John Rawls' Theory of Justice)." *Jurnal Konstitusi* 6, No. 1 (2009), p. 140-143.

⁴²Asep Saepuddin Jahar, *Hukum Keluarga, Pidana dan Bisnis*, Jakarta: Kencana Prenada Media, 2013, p. 94.

⁴³Muhammad Rinaldi Arif, "Pemberian Wasiat Wajibah Terhadap Ahli Waris Beda Agama (Kajian Perbandingan Hukum Antara Hukum Islam dan Putusan Mahkamah Agung Nomor 368. K/AG/1995)." (2017), p. 366.

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The position of heirs who are not of the same religion as the inheritor has become an interesting discussion in the construction of inheritance law in Indonesia, which is predominantly Muslim. Religious differences are a factor that is a barrier to getting inheritance, it has become an agreement of the scholars (*ijma'*) in the issue of inheritance of different religions. The agreement of the scholars in relation to religious differences has become a stipulation not to be able to inherit from each other, whether because he is out of religion (apostasy) or because he is not a Muslim (*ahl dhimmi*), then they cannot inherit each other.⁴⁴

The provisions in the transfer of inheritance, an heir must be free from three things that prevent him from getting an inheritance, this has become the consensus of the scholars, namely, slave status, murder, and different religions.⁴⁵ This is in line with Al-Şabuni's opinion that the cause of the obstruction of inheritance is due to his status as a slave, murder and religious differences.

The infidel status is a factor preventing them from getting inheritance, even their religious status is the reason they cannot inherit each other. So, it is not just one side, infidel status applies to inheritors or heirs, meaning that whether he is an heir or as an inheritor, he cannot inherit each other. This opinion is based on the hadith of the Prophet Muhammad (PBUH), which explains that a Muslim cannot inherit from a non-Muslim, and vice versa, a non-Muslim cannot inherit a Muslim.⁴⁶ This hadith is the guideline for the four Sunni schools of thought to not be able to inherit from each other between Muslims and non-Muslims. Even though there are some scholars who give concessions to the permissibility of inheriting between Muslims and non-Muslims on the grounds of the greatness of Islam.⁴⁷

The construction of inheritance law reform in Indonesia on the granting of inheritance to heirs of different religions (non-Muslims) has gained legitimacy through several judicial decisions which later gave birth to the jurisprudence of the Supreme Court Number 01/Your/Ag/2018. In the jurisprudence of the Supreme Court, it is included in the field of civil religion (inheritance), the sub-classification of *wasiat wājibah*. The jurisprudence

⁴⁴Wahbah Az-Zuhaili, *Al-Fiqhu al-Islamy Wa Adillatuhu, Chapter VIII*, Beirut: Dar al-Fikr, 1989, p. 608.

⁴⁵Fazhur Rahman, *Ilmu Waris*, Bandung: PT. Al-Ma'arif, 1991, p. 79.

⁴⁶Muhammad bin Ismail bin Ibrahim bin al-Mughiroh al-Ju'fi al-Bukhari, *Sahih al-Bukhari*, Vol. VIII, Digital Libery: Maktabah Syamilah, p. 156.

⁴⁷Muhammad Ali Al-Şabuni, *al-Mawarisu fi al-Syari'ah al-Islamiyah fi Dau'i al-Sunnah wa al-Kitab*, Kairo: Dar al-Hadiş, 1985, p. 43.

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relates to the Compilation of Islamic Law with the source of the decision Number 368 K/Ag/1995 with the legal rule that the *wasiat wājibah* contained in Article 209 KHI is also given to heirs of different religions (non-Muslims).

The Supreme Court's jurisprudence in giving inheritance to heirs of different religions has drawn many views. Because the difference in religion is meant is the difference in religion adopted between the inheritor and the heirs cannot inherit each other (Muslims and non-Muslims).⁴⁸ However, the argument built by the Court in granting property rights to heirs of different religions is based on justice. The concept of justice which means that every heir has the same position, so that they still get inheritance rights, but by way of *wasiat wājibah*. This conception expands the meaning in Article 209 of KHI in the provision of *wasiat wājibah*.

As a strength in the court's jurisprudence, that comparing the Court's view with the Prophet's (PBUH) hadith narrated by Osama bin Zaid r.a that "the Muslims do not inherit the infidels, the infidels do not inherit the Muslims".⁴⁹ Some scholars say that the hadith is in *ta'wil* with the hadith which says that "Muslims are not killed just for killing infidels". The meaning of infidel is meant infidel *harbi*, so, non-Muslim (*ahl dhimmi*) is meant non-Muslim who fights alone, not including others.⁵⁰ This is in line with the view of Yusuf al-Qardhawi which was used as the basis for the decision of the Supreme Court. In addition, the conception of Indonesian in customary law and the Civil Code does not make religious differences a barrier to inheritance.⁵¹

In its logic, the Supreme Court's jurisprudence in giving property to heirs of different religions is acceptable. However, the author considers that there have been omissions in several legal sources in determining the jurisprudence. Among them are decision number 721 K/Ag/2015 dated

⁴⁸Khairani, *Wasiat wajibah dalam Pemikiran Hukum Ibnu Hazm*, Banda Aceh: Searfiqh, 2012, p. 58.

⁴⁹Ahmad bin Ali bin Hajar, *Fath al-Bārī*, 1st print; Kairo: Darul Bayan Lit-Turas, 1987, p. 51. See also Al-Bukhari, *Sahih al-Bukhari: Kitab al-Fara'id*, Beirut: Dar al-Fikr, p. 11. See Muslim, *Sahih al-Muslim: Kitab. Fara'id*, ttp: al-Qana'ah, p. 2. See Abu Dawud, *Sunan Abi Dawud*, Beirut: Dar al-Fikr, p. 124.

⁵⁰Yusuf al-Qaradawī, *Fiqh Minoritas: Fatwa Kontemporer terhadap Kehidupan Kaum Muslimin di Tengah Masyarakat Non-Muslim*, translated by Adillah Obid, Jakarta: Zikrul Hakim, 2004, p. 179-181.

⁵¹Wirjono Prodjodikoro, *Hukum Warisan di Indonesia*, Bandung: Sumur Bandung, 1983, p. 19. See also, Idris Ramulyo, *Perbandingan Hukum Kewarisan Islam dengan Kewarisan KUH Perdata*, Jakarta: Sinar Grafika, 2004, p. 90.

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November 19, 2015 giving share of joint property and decision number 51 K/Ag/1999 which substantially states: (“...the share of children who are not Muslim gets the same share as the share of children who are Muslim as heirs). This has exceeded the limit of giving the *wasiat wājibah* set out in Article 209 of the Compilation of Islamic Law and the hadith of the Prophet Muhammad (PBUH).

In this jurisprudence, the rights of non-Muslim heirs have been granted through the *wasiat wājibah*, but unfortunately, in applying the *wasiat wājibah* media, it has violated its provisions. The provision of *wasiat wājibah* as stipulated in Article 209 of the Compilation of Islamic Law, and the hadith of Amir ibn Sa'ad which the scholars use as the basis for the maximum size of wills, which is 1/3. In the hadith narrated by Imam Muslim in substance that the Messenger of Allah (PBUH) recommended giving charity (will) 1/3 and that number is quite a lot.⁵² This means that 1/3 has indeed been *sunnah* in giving a will,⁵³ because more than 1/3 is feared will cause harm.⁵⁴ Meanwhile, the court's decision ignores that provision. This omission results in excessive implementation of the law, meaning that it provides an alternative but breaks through the basic rules by not paying attention to the basic signs in the application of *wasiat wājibah*.

Giving *wasiat wājibah*, but giving the part used is part in the context of inheritance distribution, then of course that way cannot be justified. The judge uses the *wasiat wājibah*, but it exceeds 1/3 even the share of non-Muslim heirs is the same as the size of the inheritance. The simple logic is to give inheritance with *wasiat wājibah* labeling, because the 1/3 *wasiat wājibah* requirement is not guided, it is the inheritance rate that is highlighted. It is feared that such conditions will fall into the categorization of circumventing Islamic Shari'a/circumventing the provisions of Islamic Shari'a (*hilah*) in the categorization of forbidden (*haram*).⁵⁵ Considering the issue of inheritance has been regulated in the texts, so it does not necessarily apply the provisions

⁵²Abu al Husain Muslim ibn al-Hajjaj ibn Muslim al-Qusyairiy, *al-Jami' as- Shahih*, Beirut: Dar al-Fikr, p. 71.

⁵³Haifa Abdullah Ar-Rasyid, *100 Sunnah Nabi SAW yang sering diremehkan*, 3rd print; Solo: Zam-zam, 2016, p. 288.

⁵⁴Departemen Agama, *Ilmu Fiqh*, 2nd print; Jakarta: 2008, p. 181.

⁵⁵*Hilah* is indeed still being debated, but in principle there are things that are forbidden, and some are allowed. *Hilah* which is forbidden is to justify what is forbidden and there are indications of oppression. While what is allowed as a way out does not violate the principles of Islamic law. See, Elimartati, "Hilah Al-Syari'ah Sebagai Upaya dalam Mengujudkan Maqashid Syar'iah." *Juris (Jurnal Ilmiah Syariah)* 9, No. 1 (2017), p. 31.

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that exceed the limits set in the texts. Including religious differences as one of the factors preventing someone from getting an inheritance,⁵⁶ cannot be assigned a different status or given a different label and then grant rights that are in accordance with their rights if they are not hindered.

Hence, based on that view, the provisions stipulated in the jurisprudence of the Supreme Court in the transfer of properties through *wasiat wājibah* to heirs of different religions (non-Muslims) still need to be reviewed. Therefore, responding to criticism of negligence that does not pay attention to signs or norms in the application of *wasiat wājibah*, so that jurisprudence can be referred to in certain cases (casuistic). This means that it does not necessarily mean that religious differences as a barrier to inheritance get a will without regard to the quantity aspect. In principle, the aspect of justice is fulfilled by granting his rights through the media of *wasiat wājibah*, without overriding the rules that apply in the *wasiat wājibah*.

Conclusion

Inheritance law reform is carried out by modernizing and reforming existing rules with some changes and adjustments to the social conditions of Indonesian society. The construction of inheritance law reform in judicial institutions in the form of decisions is carried out by formulating inheritance law based on justice by giving inheritance rights to non-Muslim heirs. The construction of inheritance law reform which has been made into the jurisprudence of the Supreme Court of the Republic of Indonesia has expanded Article 209 of the Compilation of Islamic Law by adding parties who can accept *wasiat wājibah*, including heirs who are prevented from inheriting because they are non-Muslims. The construction of inheritance law reform on the transfer of inheritance properties with *wasiat wājibah* in the jurisprudence of the Supreme Court of the Republic of Indonesia has applied the principle of justice by giving inheritance rights to non-Muslim heirs by means of *wasiat wājibah*. However, it should be criticized in several decisions that are used as references, namely that they have exceeded the maximum limit in granting *wasiat wājibah*. The application of *wasiat wājibah* as an alternative or solution in providing non-Muslim rights by not paying attention to the *wasiat wājibah* signs, including ignoring the maximum limit. *Wasiat wājibah* as a way out in

⁵⁶Ainul Yakin, "Euthanasia Active in Perspective of Islamic Inheritance: An Overview of Islamic Law." *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 4, No. 1 (2020), p. 51.

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granting non-Muslim rights, is not unacceptable as inheritance law reform, but must still be guided by the basic provisions in granting *wasiat wājibah*.

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