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## **Construction of Modern Islamic Inheritance Law based on *Ijtihad* of the Judges at the Religious Court of Pontianak, West Kalimantan**

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**Abstract:** This article is motivated by the asymmetry connection between the growing discourses and applications of Islamic inheritance law in the Pontianak society and religious court decisions. In contrast, the decision of the religious court (*Peradilan Agama*, the Indonesian term, abbreviated for PA) must be implemented. This is an empirical legal study employing a legal sociology methodology. In-depth interviews, analysis of PA decision documents, and Focus Group Discussions (FGD) with Pontianak PA judges were used to collect data. This study concludes that the construction of inheritance law by Pontianak PA judges employing the legal discovery method is more influential in terms of adhering to jurisprudence and evaluating inheritance provisions contained in fiqh texts. The judge's legal reasoning is based on socio-cultural reasoning, which examines the relationship between rights and family responsibilities in society. Among the inheritance provisions of the judge's *ijtihad* construction is 1) the restriction on substitute successors does not apply only to second-degree descendants, but to all descendants. 2) Daughters become the *asabah* in inheritance even if they are not accompanied by males or sons. 3) Children of unrecorded marriages have the right to maintenance and obligatory wills from their fathers. The novel finding of this study is that, according to the sociology of law, local traditions in the application of inheritance law occupy a strategic position and contribute significantly to the manner in which judges construct law in court decisions, particularly Islamic inheritance

**Keywords:** Contemporary, Islamic law, Islamic family law, Islamic inheritance, and religious justices

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**Abstrak:** Artikel ini dilatarbelakangi oleh ketidaksinkronan antara diskursus dan penerapan hukum kewarisan Islam yang tumbuh dan berkembang dalam masyarakat Pontianak dengan putusan-putusan pengadilan agama. Disisi lain, putusan pengadilan agama (PA) bersifat mengikat untuk dilaksanakan. Kajian ini merupakan penelitian hukum empiris dengan menggunakan pendekatan sosiologi hukum. Data dikumpulkan melalui wawancara mendalam, analisis dokumen putusan PA, dan Focus Group Discussion (FGD) dengan hakim PA Pontianak. Penelitian ini menyimpulkan bahwa konstruksi hukum kewarisan yang dilakukan oleh hakim PA Pontianak dengan menggunakan metode penemuan hukum lebih dominan mengikuti yurisprudensi dan mentarjih ketentuan waris sebagaimana yang terdapat dalam kitab-kitab fiqh. Dalil-dalil penalaran hukum yang ditempuh hakim adalah dalil penalaran sosio-kultural, hubungan hak dan tanggung jawab kekeluargaan dalam masyarakat. Diantara ketentuan waris dari konstruksi ijtihad hakim adalah 1) batasan ahli waris pengganti tidak terbatas pada keturunan derajat kedua saja, tetapi semua keturunan. 2) Anak perempuan menjadi ahli waris *aşabah* meskipun tidak bersama anak laki-laki. 3) perkawinan yang tidak tercatat, berhak untuk memperoleh nafkah dan wasiat wajibah dari ayahnya. Temuan baru dari penelitian ini bahwa secara sosiologi hukum, tradisi lokal dalam penerapan hukum waris menempati posisi strategis dan memberikan kontribusi signifikan bagi cara berpikir hakim dalam mengkonstruksi hukum dalam putusan-putusan pengadilan khususnya kewarisan Islam.

**Kata Kunci:** Kontemporer, hukum Islam, hukum keluarga Islam, kewarisan Islam, hakim agama

## Introduction

Each region's evolution and application of Islamic inheritance law has distinctive characteristics. This is because it intersects with the varied interpretations of certain issues and sociocultural circumstances. In Pontianak, the discourse on Islamic inheritance law evolves and develops in accordance with specific rules in the Qur'an and Hadith, which are in fact associated with the Shafi'i school of thought.<sup>1</sup> Regarding the application of Islamic inheritance, however, the opinion of the majority of scholars has been accorded greater space and importance in the contemporary societies. In the case of heirs consisting of a father, a mother, and a spouse or a father, a mother, and a wife, according to *jumhur ulama* (the Council of the *Ulama*), the mother's share is not one-third, but one-third of the remainder. In fact, the Qur'an and Hadith regulate the father's share and the mother's share such that the mother's share is one-third if the

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<sup>1</sup> Al-Imām Taqīyuddīn Abī Bakrī Ibn Muhammad al-Husainī, *Kifāyah al-Akhyār fī Hal Ghāyah al-Ikhtisār*, Vol. 1 (Beirut-Lebanon: Dār al-Kutub al-Ilmiyah, 2001M/1422H), p. 439–4590.

decedent has no children, whereas the father's share is *asabah* (the remainder) (QS. An-Nisa/4: 12).

It requires different treatment, when the successors consist of a husband, mother, several maternal siblings, and several biological brothers. According to *Jumhur* scholars (Council of scholars), a sibling receives 1/6 if there is a single sibling and 1/3 if there are multiple siblings (QS. An-Nisa/4: 12), and according to QS. An-Nisa/4 176. The majority of academics concur that QS. an-Nisa/4:12 for brothers and sisters, and QS. An-Nisa verse 176 for siblings.<sup>2</sup> However, under various circumstances, the majority of scholars' opinions are inconsistent. Specifically, when the beneficiaries of an inheritance are a husband, a mother, several maternal siblings, and several biological brothers. According to the Qur'an, the husband receives one-half (3 parts), the mother receives one-sixth (1 part), three brothers and sisters receive one-third (2 parts), and three biological brothers receive *asabah* (the remainder part). Following the opinion of Umar bin Khattab, the majority of scholars argued that siblings, both mother and siblings, received one-third of the share equally.<sup>3</sup>

The two inheritance cases described above demonstrate that scholars have divergent approaches to resolving these cases. This distinction has emerged since the time of the Prophet's companions. followed by *tabi'in* and *tabi'ut tabi'in*. For instance, Imam Malik and Imam Shafi'i followed Umar's opinion in resolving the second case,<sup>4</sup> whereas Abu Hanifah and Ahmad bin Hambal rejected Umar's opinion and adhered to the verses and hadith texts.<sup>5</sup>

In Indonesia, Islamic inheritance law is codified as the Compilation of Islamic Law (KHI), in accordance with Presidential Instruction No. 1 from 1991. Inheritance law is located in the second book of KHI (Compilation of the Islamic Law) in this Presidential Instruction. The purpose of the Compilation of Islamic Law is to ensure that religious judges can readily decide on a community-filed inheritance case and have the same viewpoints when deciding a law. With the establishment of the KHI, judges can investigate, hear, and decide Islamic inheritance law cases in accordance with the KHI's articles.<sup>6</sup> In other words, the judge's ruling on Islamic inheritance must refer to KHI. However, if someone submits an inheritance case that is not materially governed by the KHI, the court cannot refuse to examine the case.

Article 10 of Law No. 48 of 2009 Concerning Judicial Authority states: "The court may not refuse to examine, try, and to decide on a case, just because

<sup>2</sup> Sayyid Sabiq, *Fikih Sunnah 14*, (Bandung: Al-Ma'arif, 2007), p. 272–74.

<sup>3</sup> Ibn Qudamah, *al-Mughni*, Vol. VI (Kairo: Maktabah Al-Qahirah, 1970), p. 279–280.

<sup>4</sup> Ibn Qudamah, *al-Mughni*, Vol. VI, p. 279–80.

<sup>5</sup> Ibn Qudamah, *al-Mughni*.

<sup>6</sup> Yusuf Somawinata, "Hukum Kewarisan dalam Kompilasi Hukum Islam (KHI) di Indonesia," *Al-Qalam* 26, No. 1 (2009), p. 129–49. Instruksi Presiden No. 1 tahun 1991 tentang Kompilasi Hukum Islam.

laws concerning a particular issue are not found or are unclear".<sup>7</sup> This provision means that the judge is the primary component of the court, as the executor of judicial authority is obliged to determine the law of a case even if there are no or unclear legal provisions. Article 5 (1) of Law No. 48 of 2009 stipulates that "Judges and Constitutional Justices are obliged to investigate, follow, and comprehend the prevailing societal legal values and sense of justice."

Referring to the preceding description, contemporary Islamic inheritance in the construction of the *ijtihad* of religious judges is a fascinating and imperative topic that requires in-depth investigation. Previous researchers have conducted research on inheritance; Effendi,<sup>8</sup> Fajri,<sup>9</sup> Khisni<sup>10</sup> are some researchers focusing on this particular issues. Effendi analyzes contemporary family law issues pertaining to Islamic inheritance that are decided by the Indonesian religious courts. This study employs *ushul fiqh* as its methodological and analytic framework. Fajri discussed the inheritance of grandchildren, whereas Khisni discussed hereditary inheritance (*far'un*) in religious tribunals in general, without limiting his discussion to particular regions. Similar inheritance-related research to that which will be conducted by Jalaluddin.<sup>11</sup> Jalaluddin's investigation led him to the following conclusion: Firstly, the Qur'an and Sunnah accord reciprocal inheritance rights to sons and daughters, fathers and mothers, and brothers and sisters. However, Islamic inheritance law (*fiqh*) determines patrilineally the alignment of other relatives who are not directly related to the heir, including relatives of *aṣḥab al-furūd*, *aṣabah* and *ẓawil al-arḥām*. Second, there is no compelling evidence supporting the patrilineality of inheritance law. Patrilineality of *aṣḥab al-furūd* patrilineality *'urfi* to the Arab kinship system. In the meantime, the patrilineality of the heirs who are entitled to receive the remainder or a portion of which the amount is unknown is based on the hadith regarding the distribution of the remainder to "*awla rajul*," which is defined as a male whose relationship with the heir does not pass through the female, which is known as *'asabah*'. In other words, the fuqaha' constructed the patrilineality of Islamic inheritance law by adopting the Arab kinship system as its model. Thirdly, the patrilineal construction in Islamic inheritance law is the result of interpreting the texts in isolation, without considering other verses pertaining to relations between relatives and inheritance principles. When constructing the generalized structure

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<sup>7</sup>Undang-Undang No 48 Tahun 2009 Tentang Kekuasaan Kehakiman.

<sup>8</sup>Satria Effendi M. Zein, *Problematika Hukum Keluarga Islam Kontemporer: Analisis Pendekatan Ushululiyah*, (Jakarta: Prenada Media, 2004).

<sup>9</sup>Azwar Fajri, "Ijtihad Tentang Kewarisan Cucu Dalam Hukum Islam di Indonesia," *Jurnal Ilmiah Islam Futura* 11, No. 2 (2012), p. 100-122.

<sup>10</sup>Akhmad Khisni, "Ijtihad Hakim Peradilan Agama Bidang Hukum Kewarisan dan Kontribusinya Terhadap Hukum Nasional", *Jurnal Hukum: IUS QUIA IUSTUM* 18, (2011), p. 146-163.

<sup>11</sup>Akhmad Jalaluddin, "Corak Patrilineal dalam Hukum Kewarisan Islam Sunni," *Jurnal Penelitian* 6, no. 1 (2009).

of heirs, the *fuqaha* rely on an extratextual source known as *'urf*, which is the patrilineal kinship system of Arabs. In fact, the *'urf* contradicts the text, which mandates a bilateral kinship system.<sup>12</sup>

The author was inspired by Jalaludin's research to develop a research design related to the formation of judges' thought processes in addressing inheritance issues not regulated by KHI. If Jalaluddin's research concludes that patrilineal construction is due to the formation of *urf* in the Arab society and the incomplete comprehension of texts, patrilineal construction is not a result of patrilineal thought *per se*. Consequently, this study will investigate the construction of judges' thought processes in light of scholarly debates, inheritance-related jurisprudence, their relationship to local traditions, and local people's practices in implementing Islamic inheritance, so that new Islamic constructions that are culturally and historically relevant can be discovered.

A religious judge is a "*mujtahid*" because, in the absence of a law governing the settlement of inheritance disputes, he or she must engage in *ijtihad* to discover the law and determine an issue. Judges are required to apply other sources of law, such as jurisprudence, doctrines, treaties, customs, and unwritten law, when determining the law.<sup>13</sup> In the Islamic law, a jurist is required to examine laws based on Islamic law's sources, namely the Qur'an, Hadith, Ijma, and Ijtihad. Therefore, the renewal of Islamic inheritance law is likely to emanate from religious judges whose *ijtihad* decisions are legally enforceable and must be carried out by the community. In addition, it is the responsibility of justices to enforce Islamic criminal and civil law.<sup>14</sup>

Based on the preceding context, this article seeks to examine: 1) The method by which judges at the Pontianak Religious Court discover inheritance law. 2) The arguments for inheritance law reasoning used by the Pontianak Religious Court Judge in constructing inheritance provisions that are not regulated in the KHI; and 3) a description of the inheritance provisions resulting from Pontianak Religious Court judges' legal reasoning.

This is an empirical legal study employing a legal sociology methodology.<sup>15</sup> Using in-depth interviews, document analysis of the decisions of the Religious Courts, and Focus Group Discussions (FGD) to collect data. The

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<sup>12</sup>Akhmad Jalaluddin, "Corak Patrilineal dalam Hukum Kewarisan Islam Sunni," *Jurnal Penelitian* 6, no. 1 (2009).

<sup>13</sup>Anshoruddin, et.al., *Teknik Pemeriksaan Perkara Gugat Waris Bagi Hakim Peradilan Agama* (Yogyakarta: UII Press, 2016).

<sup>14</sup> Abdul Halim Talli, et.al., "Application of the Principle of Truth to Judiciary Institutions: Discourse Judges at the Makassar Religious High Court, Indonesia," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 7, No. 1 (2023). Euis Nurlaewati and Arskal Salim, "Gendering the Islamic Judiciary: Female Judges in the Religious Courts of Indonesia," *Al-Jami'ah: Journal of Islamic Studies* 15, No. 1 (2013).

<sup>15</sup>Achmad Ali dan Wiwie Heryani, *Sosiologi Hukum: Kajian Empiris terhadap Pengadilan*, (Jakarta: Kencana, 2015).

examined Religious Court decisions span the years 2010 to 2018. Analysis of data involving stages of reduction, analytical descriptions, and deriving conclusions. At the descriptive-analytic stage, a comparative-correlational technique employing an analytical-critical technique is applied.

### Methods of Legal Discovery in Establishing Inheritance

In analyzing and deciding inheritance cases in Pontianak, religious judges are governed by the Compilation of the Islamic Law (KHI). In inheritance cases that are not explicitly addressed in the KHI, the KHI remains a criterion for the Pontianak PA judge to issue new legislation. For instance, if the heir leaves only daughters as heirs, one or more individuals may receive the entire inheritance through *rad* even if there are no males. According to the judge, the remaining property was returned to the daughter by *rad*.<sup>16</sup> If a daughter is accompanied by a wife or spouse, she receives *asabah*. In this case, the PA judge interprets "*aulad*" in QS. According to An-nisa 11-12, females have the right to be *asabah* even if they are not accompanied by boys or sons.<sup>17</sup>

The decision of the Pontianak Religious Judge was reinforced by the Religious Court's determination of inheritance No. 105/pdt.P/2014/PA.ptk. In determining the inheritance of the Religious Court No. 105/pdt.P/2014/PA.ptk, it was determined that his wife and two daughters would receive the inheritance. This decision indicates that the entire inheritance will be divided between the wife and two daughters. Using the legal formula in KHI, there are still five shares of assets remaining in this case. Refer to the following table for the inheritance portion calculation:

**Table 1: Daughter and Wife Distribution Based on the KHI**

Heirs	<i>fard</i>	
Wife	1/8	3 Share
2 daughters	2/3	16 Share
	am. 24	Total: 19 share
		Remains: 5 Share

The preceding information raises the question of who is entitled to the residual five shares of assets. When a judge declares five portions as *rad*, the remaining property is returned to the beneficiaries. In this instance, the recipients of the *rad* are daughters who are successors with a familial relationship. Thus, the daughters' share becomes 21 shares. This occurred when the Pontianak Religious

<sup>16</sup> Interview with Hasanuddin, the judge at the Pontianak Religious Court, Nopember, 2016.

<sup>17</sup> Interview with Hasanuddin, the judge at the Pontianak Religious Court, Nopember, 2016.

Judge merged the concept of *rad* from KHI article 174, paragraph 2, with the concept of *fiqh* proposed by the preponderance of scholars. In fact, the majority of scholars agree that the remaining assets are returned to *aṣḥābul furūd* instead of husbands and wives.<sup>18</sup> This *radd* system was first proposed by Umar bin Khattab, Ali bin Abi Talib, Ibn Mas'ud, and Ibn Abbas, who were subsequently followed by Imams Abu Hanifah, Abu Yusuf, Muhammad bin Hassan al-Karkhi, and Imam Ahmad.<sup>19</sup>

On the basis of the preceding information, it can be concluded that religious judges used a combination of the KHI's articles, the opinions of the majority of scholars, and the Pontianak community's tradition of applying inheritance law to discover inheritance laws not contained in the KHI. This indicates that judges implement the law discovery method by interpreting the articles in the KHI, connecting with the opinions of academics, and incorporating societal inheritance traditions. This was one of the judges' attempts to discover inheritance laws germane to the sociocultural development of the Pontianak community, despite the fact that the resulting legal conclusions differed from those of the KHI.

Using *tahqīq al-Manāṭ* theory Darmawan argued that in *ijtihad*, the discovery and application of inheritance law must comprise two criteria: truth (*ṣāliḥ lizzāṭihi*) and decency (*ṣāliḥ lighairihi*). Righteousness in the sense that the law has a *sharia*-compliant foundation must be examined, while "appropriateness" in the sense of the law's applicability must be examined when the law intersects with human, sociocultural, temporal, and territorial differences. According to Darmawan, the two criteria must coexist without negating one another.<sup>20</sup>

Other methods employed by judges for discovering inheritance law include tracing inheritance-related jurisprudence, national meeting outcomes, and *fiqh* books. In this context, jurisprudence refers to the decisions made by previous judges to handle an inheritance case that is not governed by law or KHI and has permanent legal force, which is then used as a guide by other judges to resolve similar cases. Numerous varieties of jurisprudence are frequently employed by Pennsylvania judges, including 1). Permanent jurisprudence refers to a judge's decision that results from the same succession of decisions and is used as the basis for deciding a case. 2). Non-permanent jurisprudence is a previous judge's decision that is not used as a trial premise. 3) semi-judicial jurisprudence, or all court decisions based on an applicant's request that apply only to the applicant,

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<sup>18</sup> Teungku Muhammad Hasbi Ash-Shiddieqy, *Fiqh Mawaris* (Semarang: Pustaka Rizki Putra, 2010), p. 204.

<sup>19</sup> Al-Imām Muhammad bin Idrīs Al-Syāfī, *aL-Umm*, vol. 5 (Beirut: Dār al-Wafā', 2001M/1422H), p. 159–60.

<sup>20</sup> Darmawan, "Tahqīq al-Manāṭ dalam Pembaruan Hukum Kewarisan Islam di Indonesia," *al-Daulah: Jurnal Hukum dan Perundangan Islam* 8, no. 1 (2018), p. 165–193.

such as determining a child's status. 4). Administrative law, specifically SEMA (Supreme Court Circular Letter), which only applies administratively and is binding within the court's jurisdiction.<sup>21</sup>

Religious Judges use jurisprudence as their primary guide when determining inheritance law. The judge's argument emphasized jurisprudence, as jurisprudence is a law that can unite justices from the trial court to the appellate court to the court of cassation. According to him, judges, high court judges, and chief justices guide jurisprudence when deciding cases. Consequently, jurisprudence is the most popular option for justices at the Pontianak PA when deciding inheritance cases not covered by the KHI. This is done by the judges in order to protect themselves in the event of a party appeal.<sup>22</sup>

The results of the National Working Meeting serve as a guide for judges when deciding cases, as they represent the consensus reached by judges at a national work meeting. Thus, the legal standing of the results of the national meeting is strengthened. In deciding inheritance cases, judges tend to prioritize the outcomes of the national meeting over the laws contained in *fiqh* texts.

The judges also use the technique of tracing the opinions and arguments of the *fuqaha* as a second method. The judges disagreed on whether jurisprudence or the opinion of the *fuqaha* should be prioritized as a source of material law. Some Pontianak Religious Judges believe that judges are not obliged to decide analogous cases in accordance with the law. However, judges must discover a law that provides justice for the society and is more consistent with *mawaris* fiqh (*Fiqh* on inheritance). According to religious judges who regard jurisprudence as non-binding, judges must be able to comprehend the condition of their society, in the sense that they must comprehend the prevailing inheritance law tendencies. Thus, the judge's decision is closer to the community's religious culture.<sup>23</sup>

In determining the law, *the ahlu al-madinah* scholars employ the legal discovery method adopted by religious judges, which is based on a comprehension of inheritance laws that are typically applicable in the local community. This method is known as *ahlu al-Madinah* custom as a legal source<sup>24</sup>. The custom of *ahlu al-Madinah* is regarded as a source of law by the ulema of *ahlu al-Madinah* because it is a habit that is consistently practiced by the local community. This is identical to when religious judges determine legal cases by

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<sup>21</sup> Interview with Agus Purwanto and Hasanuddin, the Religious Court Judge of Pontianak, Nopember 2016.

<sup>22</sup> Interview with Agus Purwanto and Hasanuddin, the Religious Court Judge of Pontianak, Nopember, 2016.

<sup>23</sup> Interviewed with Agus Purwanto and Hasanuddin, the Religious Court Judge of Pontianak, Nopember, 2016.

<sup>24</sup> Muhammad Hasan, "Model Pengembangan Hukum Islam Berbasis Kedaerahan: Kajian Terhadap Ijma' Ahl Al-Madinah Dan Implikasinya," *Ulumuna* 19, No. 1 (2015), p. 159–80.

examining the litigants' common legal practices. This method of law extraction provides greater legal justice for litigants.

### Legal Argumentation in the Formation of Inheritance Law

The application of legal reasoning propositions by Religious Court judges can be categorized into two categories. In the first group, the Pontianak Religious Court Judge stated that the heir's daughter conceals the heir's siblings (male and female) and uncle. This group disputes the hadith text that states a brother receives *asabah* if he is with a daughter. In the second group, some judges are essentially uncertain about applying the concept of the first group. For instance, one of the judges in this second group stated: "the decision that the daughter of the heir conceals the heir's siblings (male and female) and the heir's uncle must be taken because of a higher court. (Religious High Court/PTA and Supreme Court/MA tend to think this way), if the court of first instance does not apply a decision as such".<sup>25</sup> Furthermore, this group argues that the fact children conceal their siblings (males and females) and uncles is regulated in KHI article 174 paragraph 2 which states:

- (1) according to biological relationship: the male group consists of fathers, sons, brothers, uncles, and grandfathers; and the female group consists of mothers, daughters, and the sister of the grandmother. b) according to marital relations: widowers or widows.
- (2) If there are no other successors, only children, fathers, mothers, widows, and widowers are eligible to inherit.

This article specifies that only children, fathers, mothers, widows or widowers are entitled to inheritance if all heirs are present. However, article 174 paragraph 2 KHI only specifies that other heirs do not receive an inheritance if cumulatively there are children, fathers, mothers, widows or widowers. What if, for instance, there are only fathers, mothers, widows/widowers, children, widows/widowers, or only daughters? In other words, this article does not regulate females specifically. The problem of females is addressed in other articles, including article 176 if girls are accompanied by boys. In addition, KHI does not regulate in detail the position of daughters who reside with their siblings (male and female).

The existence of one or more daughters in *fiqh* does not completely eliminate brothers or sisters. The existence of daughters in the books of *fiqh* only reduces the share of a half sister or sibling from 12 if alone or 2/3 if 2 people become *asabah maal ghairi*. However, the presence of daughters does not prevent brothers from the same father/siblings from obtaining *asabah binnafsi* at all. This opinion of the *fiqh* ulama is based on the Prophet Muhammad's tradition, as the following:

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<sup>25</sup> FGD with judges at the Pontianak Religious Court, October, 2016.

... فَضَى النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لِأَبْنَةِ التَّصْنُفِ وَلِأَبْنَةِ ابْنِ السُّدُسِ تَكْمِلَةَ التَّلْتَيْنِ وَمَا بَقِيَ فَلِأُخْتٍ

Meaning: The Prophet decreed that daughters would receive half, the granddaughter of the son would receive one sixth as a complement to two-thirds, and the remainder would go to the sister (Narrated by Bukhari).”<sup>26</sup>

Based on the preceding analysis, it is clear that the Pontianak Religious Court rejected the concept of *mawaris fiqh* contained in the books regarding inheritance, and in fact disregard the hadith narrated by Bukhari as stated above. The arguments for legal reasoning that appear to be prioritized by the Pontianak Religious Court judges are that the concept of inheritance law developed by the judges is a *Mawaris* concept that is in accordance with the socio-cultural conditions of the family prevalent in Indonesia, which may differ from the *Mawaris fiqh*. On the other hand, when the judge constructs legal reasoning that brothers (*akh*) and sisters (*ukht*) are veiled by girls, it demonstrates that the judge's legal reasoning employs the argument of the importance of sustainability of the relationship between the heir and the inheritor's rights and obligations. This is due to the fact that when parents were still alive, the rights and responsibilities of parents towards children (male and female) under the Islamic family law concept in Indonesia were greater for children and descendants than for siblings.

In addition to the legal arguments cited above, the judge's reasoning can also be supported by a number of inheritance decisions found in the decisions of the Religious Courts:

### 1. Decisions of PA no.54/pdt.P/2014/PA.ptk

This ruling determines who receives the inheritance: (1) Son of son (*ibn ibn*). (2) Female offspring of a male (*bint al-ibn*). (3) Men from women (*ibn al-bint*). (4) Child of a child (*bint al-bint*). KHI does not regulate the inheritance of grandchildren or offspring (*ibn al-ibn*, *bint al-bint*, *ibn al-bint*, and *bint al-bint*), whether male or female. This indicates that the judge must consult additional resources in order to resolve the inheritance case. In accordance with PA decision number 54/pdt.P/2014/PA.ptk, male and female grandchildren of female descendants (*ibn al-bint* and *bint al-bint*) receive an inheritance share. In contrast, the concept of *fiqh Mawaris* restricts inheritance to daughters and sons of male descendants (*ibn ibn* and *bint al-ibn*). *Ibn al-bint* and *bint al-bint* will not inherit if there is an *ashab al-furd* or an heir to an *ashabah*, according to scholars. *Fiqh*

<sup>26</sup> Al-Bukhari, *Shahih Bukhari*, Vol. III (Mesir: Mustafa al-Babi al-Halabi, 1345).

scholars categorize Ibn al-bint and bint al-bint *dhawīl arḥām*. This group of heirs inherits in the absence of the heirs ashaba and *ashab al-furd*.<sup>27</sup>

Sons from daughters (*ibn al-bint*) and daughters from daughters (*bint al-bint*) do not inherit because they are included in *ẓawīl arḥām*. According to the majority of scholars. Scholars disagree on the permissibility of *ẓawīl arḥām* inheriting but they agree that awl arm does not inherit when there are *aṣabah* and *aṣḥāb al-furūd*.<sup>28</sup> In the matter of inheritance at PA Pontianak No. 54/pdt.P/2014/PA.Ptk *aṣḥābul furūd* dan *aṣabah* are the heirs. Sons of sons (*ibn ibn*) and daughters of sons (*bint al-ibn*) *aṣabah* and *aṣḥābul furūd*. The majority of scholars concur that sons of sons (*ibn ibn*) and daughters of sons (*bint al-ibn*) obtain the *aṣabah bin nafs* dan *aṣabah maal ghair* share,<sup>29</sup> while sons of daughters (*ibn al-bint*) and daughters of daughters (*bint al-bint*) are not entitled to an inheritance share..

In making inheritance decisions, the Pontianak Religious Court did not consider the opinion of the council of scholars, according to the arguments presented above. In this instance, the judge of the Pontianak Religious Court prioritized bilateral inheritance distribution. Therefore, each male and female heir receives an equal share of the inheritance, both at the level of offspring and grandchildren. In other words, the Pontianak Religious Court's judges prioritized the socio-cultural circumstances of the Pontianak people, who did not distinguish between male and female descendants.

In the 1980s, Hazairin proposed the theory of bilateral inheritance distribution by valuing *mawāllī*. According to Hazairin, the primary distinction between patrilineal ahlussunnah and the bilateral system is that in the bilateral system, sisters always receive nothing in the case of sisters and their daughters or granddaughters because they belong to a minority group, whereas granddaughters always receive a share as *mawāllī*. In addition, there is no distinction between male and female progeny or *mawāllī* descendants of sons and daughters.<sup>30</sup> According to Hazairin, the status of granddaughters and grandsons of daughters (*bint al-bint* and *ibn al-bint*) is equivalent to that of granddaughters and grandsons of sons (*ibn al-ibn* and *bint al-ibn*).<sup>31</sup>

<sup>27</sup> Maryam Ahmad ad-Dāghistānī, *al-Mawārīth fī al-Sharī'ah al-Islāmiyyah 'alā Madhāhib al-Arba'ah wa al-'Amala 'alaih fī al-Muḥakam al-Miṣriyah* (Mesir: Jami'ah al-Azhar, 2001), p. 78–80.

<sup>28</sup> Wahbah Al-Zuhaylī, *Al-Fiqh Al-Islāmī Wa Adillatuh*, Vol. VIII (Beirut- Libanon, 1985), p. 382–89.

<sup>29</sup> Wahbah Al-Zuhaylī, *Al-Fiqh Al-Islāmī*, Vol. VIII, p. 332–335.

<sup>30</sup> Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadith* (Jakarta: Tintamas, 1981), p.113–14.

<sup>31</sup> Abdul Ghafur Anshori, *Filsafat Hukum Kewarisan Islam; Konsep Kewarisan Bilateral Hazairin*, 2 ed. (Yogyakarta: UII Press, 2010). Nurul Huda, "Keberadaan Mawali Hukum Kewarisan Bilateral," *Suhuf XVIII*, no. 2 (2006).

The legal argument for the judge's decision regarding the inheritance issue is based on the socio-cultural condition of the community, according to the preceding analysis. The Pontianak Religious Court did not make a distinction between male and female descendants, as well as grandsons of sons or daughters, because they took into account the condition of society, in which parents' responsibilities while they were still alive tended to be more focused on their offspring than on their relatives or nephews. There is no distinction between male and female lineage regarding responsibility for progeny. It is conceivable that this argument for reasoning was also influenced by the previous judge's decision, as Khisni stated that the Supreme Court of the Republic of Indonesia placed daughters as heirs who can receive asabah who conceal both male and female relatives<sup>32</sup>. On the other hand, it is likely that Hazairin contributed to the judges' deliberation. According to Huda, it was Hazairin who placed female progeny on an equal footing with male offspring,<sup>33</sup> or so says Cammack.<sup>34</sup> In the context of Islamic legal thought, Fazlur Rahman's double-movement theory presents the arguments for socio-cultural reasoning<sup>35</sup> This theory, according to Muttaqin, has led Fazlur Rahman to conclude that the inheritance ratio between sons and daughters should be reduced from 2:1 to 1:1<sup>36</sup>

Based on the analysis of the Religious Court's decision no. 54/pdt.P/2014/PA, it is also possible to conclude that the legal reasoning of the judges was based on the continuity of the relationship of rights and obligations between the heir and the heir as determined by family law while the heir was still alive. The author reaches this conclusion as a result of the fact that in Pontianak's community system, in the course of life, descendants (children and grandchildren) are given greater responsibility than relatives. Consequently, the judge's decision regarding inheritance is a legal *ijtihad* based on the social system's conditions and the principle of continuing rights and obligations while still alive. The author also assumes that Arto's opinion, which states, "Inheritance is essentially a continuation of the relationship between the heir and the heir while they are still alive," influences the judge's *ijtihad* reasoning. It is also conceivable that Arto's legal *Ijtihad* argument comprises a substantial proportion of the legal reasoning of religious judges in Pontianak.<sup>37</sup>

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<sup>32</sup> Akhmad Khisni, *Ijtihad Hakim Peradilan Agama...*, p. p. 146-163.

<sup>33</sup> Nurul Huda, "Keberadaan Mawali Hukum Kewarisan Bilateral," *Suhuf XVIII*, no. 2 (2006).

<sup>34</sup> Mark Cammack, "Islamic Inheritance Law in Indonesia: The Influence of Hazairin's Theory of Bilateral Inheritance," *Studia Islamika* 10, no. 1 (2003).

<sup>35</sup> Fazlur Rahman, *Islam* (Bandung: Pustaka, 2000).

<sup>36</sup> Labib Muttaqin, "Aplikasi Teori Double Movement Fazlur Rahman Terhadap Doktrin Kewarisan Islam Klasik," *Al-Manahij: Jurnal Kajian Hukum Islam* 7, no. 2 (2013), p. 119-126.

<sup>37</sup> A. Mukti Arto, *Pembaruan Hukum Islam Melalui Putusan Hakim* (Yogyakarta: Pustaka Pelajar, 2015), p. 210-211.

## 2. Religious Court Decision No. 136/pdt.P/2014/PA.Ptk

In this decision, a biological brother's (*ibn akh al-syaqīq*) four daughters received the entire inheritance. This decision differs from the scholarly consensus regarding the Mawaris concept. According to fiqh, the four offspring are known as *ẓawīl arḥām*. According to the majority of scholars, *aṣḥābul furūd* dan *aṣabah* receive their share of the inheritance when there are no successors. In other words, it is clear from the judge's decision that he or she adhered to the bilateral principle by not discriminating between male and female lineage. According to Nurlaelawati's analysis, religious court judges do not always refer to the KHI when deciding cases; rather, they occasionally refer to fiqh texts in order to create public benefit and justice for the disputing parties or one of the disputing parties. Thus, resulting in decisions that vary from court to court, even in the same case.<sup>38</sup>

Hakim did not distinguish between the lines of *ẓawīl arḥām*, *aṣḥābul furūd* atau *aṣabah*. Thus, the female lineage or the *ẓawīl arḥām* line has rights as successors, despite the existence of male heirs *aṣḥāb al-furūd* atau *aṣabah*. On the basis of the preceding description, it can be concluded that the arguments for the legal reasoning of Religious Judges in Pontianak are as follows: First, the concept of marriage in family law is adapted to the socio-cultural conditions and actual family culture of Pontianak. The bilateral sociological condition of the Pontianak community serves as the premise for legal reasoning in determining the inheritance share. Third, the postulate of reasoning that inheritance is a continuation of the relationship of rights and responsibilities between the inheritors and the heirs; therefore, the heirs who are entitled to inheritance are people who, according to family law, had a relationship of rights and responsibilities with the heir while both were still alive.

### Religious Court Judges' Legal Construction in Determining Islamic Inheritance

The provisions for inheritance based on the legal reasoning of the Religious Judge of Pontianak include daughters, regardless of whether one or more conceal their brothers. The results of this reasoning demonstrate that daughters hold a stronger position than siblings in the eyes of observers. This reasoning demonstrates that the judge recognizes that, while the parents are alive, the child bears sole responsibility for their actions.

The next conclusion of the Pontianak Religious Judge's legal reasoning is that substitute heirs are heirs who take the place of their deceased parents and siblings (heirs of the first degree). The progeny include, for example, granddaughters on the male line (*bint al-ibn*), grandsons on the male line (*ibn-*

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<sup>38</sup> Euis Nurlaelawati, "Menuju Kesetaraan dalam Aturan Kewarisan Islam Indonesia: Kedudukan Anak Perempuan versus Saudara Kandung," *Jurnal Indo-Islamika* 2, no. 1 (2012), p. 83.

ibn), granddaughters on the female line (bint al-bint), and grandsons on the female line. (ibn al-bint). In other terms, there were no uncles because their fathers had all passed away. In accordance with the bequest decree no. 241/pdt.P/2014/PA.ptk. Regarding the issue of substitute successors, the Pontianak Religious Court judges held divergent views. There is a group of judges who consider the case to be a substitute heir, while other judges do not. In this case, all heirs are equal (same grandson), whereas substitute heirs should not be equal. For instance, if the heirs consist of daughters and granddaughters on the male line, then the granddaughter of the male line becomes the successor heir (replacing her father, who had died first). This legal reasoning is distinct from fiqh Mawaris, which prohibits inheritance for the descendants of daughters whose mothers predeceased the heirs if there are sons or two daughters. This contrasts with Anita's analysis, which links KHI and BW. Anita explained that the position of substitute successors in KHI, in principle, is to replace the right to life of a person who was replaced while still alive, and is not restricted in terms of inheritance. In principle, changing a position in KHI is identical to changing a position in the BW concept (western civil inheritance law), which implies that changing a position involves not only inheritance but also the right to life of the individual who has been replaced.<sup>39</sup>

In this case, all heirs are equal (same grandson), whereas substitute heirs should not be equal. For instance, if the heirs consist of daughters and granddaughters on the male line, then the granddaughter of the male line becomes the successor heir (replacing her father, who had died first). This legal reasoning is distinct from fiqh Mawaris, which prohibits inheritance for the descendants of daughters whose mothers predeceased the heirs if there are sons or two daughters. This contrasts with Anita's analysis, which links KHI and BW. Anita explained that the position of substitute successors in KHI, in principle, is to replace the right to life of a person who was replaced while still alive, and is not restricted in terms of inheritance. In principle, changing a position in KHI is identical to changing a position in the BW concept (western civil inheritance law), which implies that changing a position involves not only inheritance but also the right to life of the individual who has been replaced.<sup>40</sup>

The other conclusion of the Pontianak Religious Judges' legal reasoning is that there are divergent opinions regarding the limitation of substitute successors mentioned in Article 185 KHI. Some judges believe that substitute successors are limited to second-generation descendants or grandchildren. Others maintain that the successor heir comprises all descendants, not just those of the second generation. The group of judges who believe that substitute heirs are

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<sup>39</sup> FGD with judges of the Religious Court in Pontianak, October 2016.

<sup>40</sup> Anita Anita, "Analisis Hukum terhadap Penetapan Ahl Waris Pengganti Menurut KHI (Kompilasi Hukum Islam)," *Al-Qanun: Jurnal Pemikiran dan Pembaharuan Hukum Islam* 21, No. 2 (2018), p. 351.

limited to descendants of the second generation or grandchildren cited KHI's statement that "If the heir dies before the inheritor, his position may be filled by his son." This group of judges agrees with Arto's assertion that the replacement successors mentioned in Article 185 KHI are limited to descendants of the second degree or grandson.<sup>41</sup>

The Supreme Court circular letter states that substitute heirs are the "descendants" of the heir. Judges who view substitute heirs as all descendants and not confined to a certain degree have their own explanations for this statement. "Alternate heirs are heirs regulated in Article 185 KHI, namely heirs descended from heirs mentioned in Article 174 KHI, including descendants of sons or daughters, descended from a brother or sister, descended from an uncle, descended from grandparents, namely aunts and their descendants," states the Guideline for the Implementation of Duties and Administration of the Religious Courts<sup>42</sup>.

The conclusion of the Pontianak Religious Judge's legal reasoning is that females inherit *asabah* even if they are alone without having any sons. Hasanuddin asserts that one of the Pontianak PA judges interpreted the word *aulād* as boys and females in surah an-Nisa verse 11 of the Qur'an. He stated that because males and girls have the same status as children, they are both entitled to *asabah*.<sup>43</sup> This type of legal reasoning is distinct from legal reasoning that prioritizes KHI. In KHI, if the heir leaves no other successors, one or more daughters can receive the entire inheritance through *rad* if there are no other heirs.

The conclusion of the next judge's legal reasoning is that a child born out of an unrecorded marriage has the right to receive a livelihood and an obligatory will from his father. The judge reasoned that children have the right to be protected by their unregistered parents. Such reasoning by judges is pertinent to the October 31, 2012, Decision of the National Working Meeting of the Supreme Court of the Republic of Indonesia Commission II on Religious Courts. This means that the results of the justices' reasoning may be compromised by the decision of the Supreme Court's National Working Meeting. Nevertheless, based on the results of this reasoning, the religious jurist argued that parents must continue to provide protection, not because it is registered or not, but because it is an Islamic obligation. In addition, the KHI's provisions regarding the obligatory will do not prohibit the issuance of such wills to unregistered minors.<sup>44</sup>

In the aforementioned context, it is consistent with the ethos of KHI and the argument that a living law influences the social structure of the society,

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<sup>41</sup> A. Mukti Arto, *Pembaruan Hukum Islam...*, p. 223.

<sup>42</sup> Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama*, Buku II (Direktorat Jenderal Badan Peradilan Agama, 2013), p. 159–160.

<sup>43</sup> Interviewed with Agus Purwanto and Hasanuddin, the Religious Court Judge of Pontianak, Nopember, 2016.

<sup>44</sup> FGD with Judges of the Religious Court in Pontianak, October, 2016.

including matters of inheritance. Thus, the construction and paradigm of justices in deciding court cases are influenced by the indigenous knowledge of Indonesian society.<sup>45</sup>

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### **Conclusion**

Referring to the preceding discussions, it can be concluded that there are indications of a paradigm shift from juridical-normative to juridical-sociological reasoning among religious judges. Specifically, the findings indicate that religious judges combine the articles contained in the KHI with the opinions of the majority of scholars and the tradition of applying inheritance law that has developed in Pontianak society to determine inheritance law. This indicates that the sociocultural religion of the Pontianak community influences the inheritance decisions of religious judges. Second, the reasons for the legal reasoning of Pontianak Religious Court judges in constructing inheritance provisions that are not regulated in the KHI are as follows: 1) The construction of inheritance is adapted to the construction of the real conditions of family law that apply in society; and 2) The construction of inheritance is adapted to the construction of the real conditions of family law that apply in society. 2) Because the sociological condition of the Pontianak community is bilateral, the inheritance decision must take bilateral considerations into account. 3) The relationship of rights and obligations between the heir and the heir under family law must be maintained while both parties are still alive. 4) According to family law, heirs are those who have a relationship of rights and responsibilities with the heir while they are still alive. Thirdly, the provisions for inheritance resulting from the legal reasoning of the Pontianak Religious Court judges are as follows: 1) substitute heirs are heirs who supplant the position of their parents despite the fact that all of their parents have passed away; and 2) the heirs of the heirs of the heirs. 2) The Pontianak Religious Court's justices hold differing opinions regarding the limitation of substitute heirs as described in article 185 KHI. Some justices believe that substitute heirs are limited to descendants or grandchildren of the second generation. Others hold that the successor heir includes all descendants, not just

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<sup>45</sup>Mursyid Djawas, et.al., "The Contruction of Islamic Inheritance Law: A Comparative Study of The Islamic Jurisprudence and The Compilation of Islamic Law," *Juris: Jurnal Ilmiah Syari'ah* 21, No. 2 (2022).

those of the second generation. 3) Daughters inherit asabah even if they are not accompanied by males. 4) a marriage that has not been registered by an authorized official is entitled to maintenance and a will from his father.

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