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The basis of sociological consideration of the judges in deciding the cases of non-muslim heritist in Indonesia

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Abstract
The purpose of this research is to find out how the judge's thinking in deciding inheritance cases for non-Muslim heirs in Indonesia is related to the determination of compulsory wills. By using the research methods of law *(legal research)*it could be concluded that Islamic law derived from the Quran and Hadith clearly states that religious differences are a barrier to inherit each other. The compilation of Islamic Law which is the reference for the formation of Islamic inheritance law in Indonesia does not explicitly regulate inheritance cases for non-Muslim heirs. This legal vacuum is exploited by judges who have the authority to use their function as *rechtsvinding* or in Islamic law it is called *ijtihad* as an alternative effort to resolve disputes that have not been regulated by positive law by taking into account the values of living law so as to give decisions that are in accordance with the sense of justice in society. Based on Article 209 Compilation of Islamic Law, the portion of the wills must not exceed 1/3 (one third) of the inheritance that is left behind. This is intended to protect the share of the other heirs. However, there are other opinions based on several jurisprudence decisions of the Supreme Court judges No. 368 K / AG / 1995, No. 51 K / AG / 1999 and No. 16 K / AG / 2010 which stipulates that the share of the mandatory will for heirs of different religions is the same as the share of his position as heirs. The part of the mandatory will that is given does not come from the inheritance, but rather from the inheritance. These decisions are issued to fulfill the principle of justice for the heirs who have a real emotional relationship with the heir so that they cannot be damaged by inheritance cases.

Keywords: judge's consideration, islamic inheritance law, different religions

Introduction

Indonesia as a multicultural country has a variety of customs, ethnicities, races, religions and cultures. This is why Bhineka Tunggal Ika which means 'different but still one' pinned as the country's motto so that all Indonesians can live side by side and tolerate one another. This diversity certainly affects the way of life and legal views in everyday life, including the law of inheritance. Inheritance law is a domain in family law which is one of the parts regulated in civil law as a whole. This law of inheritance is closely related to everyday life because all humans will eventually find a legal event in the form of death. The legal consequences that subsequently arise with the occurrence of a legal event of one's death include the management and continuation of the rights and obligations of a person who dies [1]. Currently, inheritance law regulations in Indonesia cannot be ununified and are still plural in nature, where there are several systems of inheritance rules that exist and live side by side in society. The inheritance law consists of conventional civil inheritance law, Islamic inheritance law, and customary inheritance law. Of course, some of these inheritance laws have their own rules in determining the distribution of the inheritance, both in relation to who has the right to inherit and the size of the inheritance obtained. The diversity of inheritance laws is increasingly visible because the applicable customary inheritance laws are not single, but vary according to the form of society and the kinship system of the Indonesian people [2]. This inheritance law pluralism cannot be separated from the legal history of the enactment of civil law in Indonesia. Before Indonesia's independence, there were regulations regarding legal classification and population classification as a result of the legal politics of the Dutch East Indies government at that time. This is stated in Article 131 *jo.* Article 163 Indische Staatregeling (IS) where the Dutch East Indies colonial government divided the population into 3 groups, namely, the European group, the Foreign Eastern group (Chinese and non-Chinese), and the Bumiputera group.

In their daily life, it is possible for a humans to have various problems related to his wealth. Because indirectly the ownership of this property is a requirement to ensure the survival of a human being so that it can run properly. The problem that arises along with the ownership of these assets is when there are two or more parties who feel they have the right and desire to control the property. The mutual claims of several parties on the same object of wealth will lead to disputes. One of the disputed cases that often covers possession of property is inheritance. Problems will arise if a person who dies leaves his wealth to his heirs, but in practice it is hampered by legal regulations. Therefore, Islam has fortified this problem by regulating clearly, systematically, and in detail the inheritance law as stated in the Al-Quran and Hadith. In the future, it is hoped that these rules can be used as a reference to anticipate as well as be a way out of the inheritance problem so as to prevent division between the heirs. In Indonesia these rules are implemented in Presidential Instruction No.1 of 1991 concerning Compilation of Islamic Law (KHI).

Judges in resolving a case are required to know whether there is a legal relationship that forms the basis of the lawsuit in that case. This is done considering that judges need to obtain the truth of legal events that occur more

objectively. Formal truth in proving a civil case does not require a judge to decide a case by using his conviction, it is sufficient to be based on evidence that is considered valid by law. Settlement of cases that only prioritizes formal truth often creates dissatisfaction from the parties. The judge's decision is deemed to be detrimental to the parties' rights which are actually true. So that starting from formal truth is not enough. Therefore it is necessary to seek material truth that tells the real situation in deciding a civil case so that justice in court decisions can be felt by both parties.

What is interesting to study and analyze is that the classical scholars have forbidden a non-Muslim to inherit from a Muslim and vice versa. The Islamic Law Compilation explicitly prohibits the existence of interfaith inheritance, which is in line with the Fatwa Indonesian Ulema Council (MUI) Number 5/ MUNAS VII/ 9/ 2005 concerning Inheritance of Different Religions which forbids the existence of heirs of different religions [3]. This provision is based on the hadith of the Prophet Muhammad SAW which explains that it is not mutually inherited between a Muslim and an infidel. On the other hand, in this case, the Supreme Court, through its decisions, stipulates the share of inheritance for non-Muslim heirs by means of a mandatory will, which is equal to the inheritance share of Muslim heirs. Based on the description above, the distribution of inheritance to heirs of different religions is different from the Islamic inheritance system that is enforced in Indonesia. Therefore, the authors are interested in conducting a study entitled: The Basis of Sociological Consideration of The Judges In Deciding The Cases of Non-Muslim Heritist In Indonesia**.** Based on this title, the author examines and analyzes a research problem, namely: how is the judge's thinking in deciding inheritance cases for non-Muslim heirs in Indonesia in relation to the determination of mandatory wills?

Research Methods

This type of research is normative legal research, namely legal research that places law as a norm system building. The norm system that is built is regarding the principles, norms, rules of legislation, court decisions, agreements, and doctrine (teachings) [4]. The nature of the research used in this research is prescriptive research, which aims to provide an overview or formulate a problem in accordance with existing circumstances or facts. This study uses a statutory approach (*statue approach*) and a*case approach*. The technique of collecting legal materials is carried out through literature study in the form of collection of laws and regulations, legal text books, legal journal articles, and other legal references that are relevant to the research being carried out.

Results and Discussions

Waris comes from the Arabic root word which is the basic word form (*mashdar)* of the word *warisa-yarisu-irsan-mīrāsan* [5]. The meaning is the transfer of something from one person to another or from one people to another [6]. The word *miras*, whose plural form is *mawaris*, means the inheritance of the deceased which will be distributed to their heirs [7]. Many fiqh books use the word *fara'id* which is a synonym for the word *mawaris*. Likewise in the hadith of the Prophet Muhammad, which uses the word *fara'id* to mention inheritance, which means a certain part which is divided according to Islam to all who have the right to receive it and whose parts have been assigned.[8] The law of inheritance is the provisions that govern a person's wealth after death. The law of inheritance regulates the transfer of assets left by a person who dies and the consequences for his heirs [9]. Islamic Inheritance Law is a law that regulates everything related to the transfer of rights and / or obligations to a person's assets after he dies to his heirs based on Islamic law sourced from the Al-Quran and Hadith. According to Hilman Hadikusuma, Islamic inheritance law is the rules that regulate the rights of male and female heirs to share the inheritance of the heirs who died based on the decree of Allah SWT [10]. Meanwhile, Hasbi ash-Shiddieqy defines inheritance law as the study of who gets an inheritance and who does not get it, the level received by each heir, and how it is distributed [11]. According to Amir Syarifuddin, Islamic inheritance law can be interpreted as a set of written rules based on the revelations of Allah and the Sunnah of the Prophet SAW regarding the transfer of property or tangible assets from the dead to the living, which is recognized and believed to be valid and binding for all Muslims [12].

The basis of Islamic inheritance law in Indonesia is regulated in the Compilation of Islamic Law (KHI) which is sourced from the Al-Quran and hadith. The inheritance rules contained in QS An-Nisa 'verses 11 and 12 are spelled out in KHI [13] as follows:

a. The groups of heirs according to Article 174 paragraph (1) KHI consist of:

According to blood relations:

- The male group consists of fathers, sons, brothers, uncles and grandparents.
- The female group consists of mothers, daughters, sisters and grandmothers.

According to the marital relationship consisting of a widower or widow.

The portion of each heir according to Articles 176-182 KHI is:

1. Girls if only one person gets 1/2 (half) of the share, if two or more people together get 2/3 (two thirds) of the share, and if the girl is together with a boy, then the share of the child male 2 (two) versus 1 (one) girl.
2. The father gets 1/3 of the share if the heir does not leave the child, if there is a child, the father gets 1/6 (one sixth) of the share.
3. The mother gets 1/6 (one sixth) of the share if there are children or two or more siblings. If there are no children or two or more siblings, then the mother gets 1/3 (one third) of the portion.
4. The mother gets 1/3 (one third) of the remaining portion after being taken by the widow or widower when together with the father.
5. The widower gets 1/2 (half) of the share if the heir does not leave the child, and if the heir leaves the child, the widower gets 1/4 (quarter) of the share.
6. The widow gets 1/4 (one-fourth) of the share if the heir does not leave the child, and if the heir leaves the child, the widow gets 1/8 (one-eighth) of the share.
7. If a person dies without leaving the child and father, then the brothers and sisters each get 1/6 (one sixth) of the share. If they are two or more people, together they will receive 1/3 (one third) of the share.
8. If a person dies without leaving his child and father,

while he has one biological or sister, he will receive 1/2 (half) of the share. If the sister is together with two or more siblings or siblings, then together they will receive 2/3 (two thirds) of the share. If the sister is together with a sibling or sibling, then the portion of the brother is two to one with the sister.

The rules in Islamic Inheritance Law prevent a person from receiving an inheritance if there are three causes of inheritance barrier, namely murder, religious differences, and slavery. The majority of scholars are of the opinion that as long as there are religious differences between the muwaris and their heirs, between Muslims and non-Muslims, they are prevented from inheriting from each other. Some scholars have added one more thing as an abrogator of the right to inherit, namely murtad (changing religions). People who have left Islam are declared apostates. In this case the scholars made an agreement that apostasy is included in the category of religious differences, therefore apostates cannot inherit Muslims [14]. What is meant by different religions here is that the religion adhered to between muwaris and his heirs is different. Meanwhile, what is meant by different religions can prevent inheritance is the absence of the right to mutually inherit between a Muslim and an infidel (non-Muslim). As the Prophet Muhammad SAW said, narrated by the friend of Usamah bin Zaid, which means "It is not that a Muslim inherits an infidel, nor does a disbeliever inherit a Muslim." (Narrated by: Bukhari and Muslim) [15]. Jumhur Ulama agrees that non-Muslims (kafir) cannot inherit Muslim assets because of the lower status of non-Muslims (kafir) [16].

In this matter, the Fuqaha have agreed that people of different religions cannot inherit each other even though there are reasons for kinship and reasons for marriage. Religious differences are inheritance barriers that can invalidate a person's right to inherit inheritance. In other words, the barriers to inheritance are actions or things that can invalidate a person's right to inherit the inheritance after there are reasons for inheriting [17]. If an heir who has a different religion sometime after the death of the heir then converts to Islam, while the inheritance has not been distributed, then an heir who has just converted to Islam is still prevented from inheriting. The reason for the opening of the right to inherit is since the death of the muwaris, not when the distribution of the inheritance began, where at the time of the death of the heir, he was still in a non-Islamic state (kafir). So, they are in a state of different religions.

All people outside of Islam are considered to be one, there is no differentiation between those who are people of the book and those who are not. Therefore Christian, Jewish, Hindu and Buddhist heirs and others do not inherit from Muslims, and vice versa [18]. The well-known scholars from the Sahabat, Tabi'in and Imam of the Fourth Sect argue that Muslims cannot corrupt the infidels for any reason. Therefore a Muslim husband cannot inherit his wife who is an infidel. This is based on the hadith narrated by Usama bin Zaid above, as well as a narration which explains that when Abu Talib died and left 4 children, namely: Ali, Ja'far, Uqail and Talib. Where, Ali and Ja'far were Muslims while Uqail and Talib were both infidels. Prophet Rasulullah SAW distributed the inheritance of Abu Talib to Uqail and Talib. As for apostates, Muslims can inherit their inheritance. However, if when he apostatizes, his Muslim family dies, he will not get an inheritance. Meanwhile, if he converts to Islam again before the distribution of inheritance, he will get an inheritance. This can lead to conflicts among Muslims themselves, because when an apostate converts to Islam again during the distribution of inheritance, it is feared that the apostate only wants the inheritance of the deceased. And there is a possibility that after he gets the inheritance, he will fall back. According to Imam Ahmad's opinion, he stated that he was really still an infidel and did not have the right to inherit [19]. Imam Asy-Shafi'i also added that people who have apostatized are closer to kufr than to Islam, so that according to him the apostate has kufr [20] so that he is included in the hadith category of the history of Usama bin Zaid's friend above and has the same legal status. Al-Qurtubi and Al-Kiya Al-Harrasi have no different opinion from the general opinion of the scholars above, according to him the status of apostates and infidels in inheritance issues, namely that they are prevented from inheriting from each other with their Muslim heirs. They base their opinion on the hadith of Usamah Ibn Zaid Ibn Kahab which explains the scope of the hadiths to be kafir in general, either because they are kafir because of apostasy or not because of apostasy [21].

In the context of Islamic inheritance law, reform of Islamic family law was first marked by the enactment of Law Number 1 of 1974 concerning Marriage. Several years later, the Compilation of Islamic Law (KHI) was compiled through Presidential Instruction No. 1 of 1991 which materially the rules were then used by the Religious Courts [22] to resolve cases related to the law of marriage, inheritance and waqf. Regarding the inheritance rights of non-Muslims, the Islamic Law Compilation refers more to the opinion of classical scholars who emphasize that religious differences between heirs and heirs become an obstacle to the inheritance process. This can be read in the Compilation of Islamic Law (KHI) in Article 171 (b) which states that: "the heir is a person who at the time of death or who is declared dead based on the decision of the Islamic Court, leaves an heir and inheritance." Then in the KHI with the same Article 171 (c) states that: "an heir is a person who at the time of death has a blood relationship or marital relationship with the heir, is Muslim and is not prevented by law from becoming an heir". The provisions of a person's religion can be determined through his / her identity, this is clear in the KHI in Article 172 which reads: "heirs who are considered to be Muslim if it is known from the identity card or confession or amalah or testimony, while a newborn or an immature child is religious. according to his father or his environment ".

The provisions in the KHI are not explicitly stated that religious differences are a barrier to inheritance, but Article 171 letter (c) of the KHI states that the heir and heirs must be in a state of Muslim religion. If one of them is not a Muslim, then the two of them cannot inherit each other, then in the provisions of inheritance rights are automatically cut off when it comes to religious differences. The rules in the KHI are completely based on the opinions of classical scholars, especially Imam Shafi'i. Even in the Circular of the Bureau of Religious Courts dated February 18, 1958 Number B / 1/735, the material law that is used as a guideline in the fields of KHI law is sourced from 13 (thirteen) books, all of which are Shafi'i Sect [23].

In article 209 of the Compilation of Islamic Law, the term wills is known. Wills is an implementation of a will or a message that must be carried out and addressed to the

person left behind. Initially, a compulsory will arises to solve the problems between the heir and his adopted child and vice versa, the adopted child as the heir and the adoptive parents. The wills are also intended for the heirs or the family, especially the grandchildren who are prevented from receiving the inheritance because their mother or father died before their grandfather or grandmother died, because based on inheritance law there are heirs of an uncle or aunt who are closer to the grandchild. Due to this phenomenon, Abu Muslim Al-Ashfahany argues that a mandatory will is a will that is intended for heirs or relatives who do not receive a share of the inheritance of the person who died, because of an obstacle that is syara '.

The amount of wills is not more than 1/3 of the assets left behind. The concept of 1/3 inheritance is based on the hadith of the Prophet Muhammad through the passage of Sahabat Sa'ad bin Abi Waqash. This hadith is a reference for Egypt, which first enacted the compulsory will in Law Number 71 of 1946. Since August 1, 1946, Egyptians who did not make a will before dying, then the descendants of their children who had died earlier than the heirs were given the compulsory will. which must not exceed 1/3 (one third) of the inheritance of the heir [24]. This regulation was later adopted in the Islamic Inheritance Law in Indonesia as stipulated in article 209 of the Compilation of Islamic Law. The condition for not exceeding 1/3 (one third) of the inheritance is to protect the share of other heirs.

In formal juridical terms, the provisions in the Compilation of Islamic Law, especially in article 209, are understood that the wills is only intended for adopted children and adoptive parents. However, the complexity of society in Indonesia makes judges have to leave the existing formal juridical system, namely by using thefunction *rechtsvinding* which is justified by positive law if there is no governing law. In addition, the Compilation of Islamic Law in article 229 also provides the authority for judges to settle cases by paying close attention to the legal values that live in society so as to provide decisions that are in accordance with a sense of justice. In the legal system in Indonesia, wills including wills are the absolute competence of the Religious Courts based on Law Number 7 of 1989 concerning Religious Courts as amended by Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Courts Religion. In principle, judges have the authority to use their function as *rechtsvinding* or in Islamic law it is called *ijtihad* as an alternative [25]. As regulated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial power [26], judges and constitutional judges in resolving a case are obliged to explore, follow, and understand the legal values and a sense of justice live in society. Academics and / or law enforcers in characterizing a legal problem should refer to the method of reasoning and legal analysis in Jonaedi Efendi's book, known as the IRAC Method (*Issue, Rule, Analysis, and Conclusion)*. IRAC is a process that every legal practitioner must go through in thinking about and examining every legal issue. The IRAC method makes it possible to simplify the complexity of legal problems into a simple formula or formula [27]. The IRAC formula is formed from:

a. Issue; what facts and circumstances have brought the parties to court
b. Rule; what legal rules apply to the legal issue.
c. Analysis; whether these legal rules can be applied to specific facts of the legal issue.
d. Conclusion; how the influence of attitudes or decisions on law enforcement.

There are several *rechtsvinding* or ijtihad regarding mandatory will in jurisprudence that have permanent legal force. For example the decision of the Supreme Court No. 368 K / AG / 1995, Supreme Court decision No. 51 K / AG / 1999 and Supreme Court decision No. 16 K / AG / 2010. In a case decided by decision 368 K / AG / 1995, the Supreme Court decided on the inheritance dispute of a husband and wife couple who had 6 (six) children where one of their daughters had changed religions when their parents passed away. In the first level, one of the girls is veiled (prevented) from obtaining the inheritance of the heir. Then at the appeal level, the judge counters the first-level decision by giving a compulsory will of 1/3 (one third) of the share of girls to girls who change religions. Then at the cassation level, the judge adds the rights of children who change religions with a mandatory will as big as other girls or the position of children who change religions is the same as other girls. In another case, namely the decision of the Supreme Court No. 51 K / AG / 1999 dated 29 September 1999 states that heirs who are not Muslim can still inherit from the inheritance of a Muslim heir. Inheritance is carried out using a mandatory will, where the share of girls who are not Muslim gets the same share as the share of girls as heirs. In addition, there is also a decision of the Supreme Court No. 16 K / AG / 2010 gives the position of non-Muslim wives in the inheritance of Muslim heirs. Wives who are not Muslims receive an inheritance from the heir through a compulsory will, which is equal to the same position as a wife who is Muslim, plus shared assets.

At first glance the decisions mentioned above are not based on Islamic law which comes from the Qur'an and hadith. These decisions appear to be deviating from the Koran and hadith. However, basically these decisions are issued to fulfill the principle of justice for the heirs who have a real emotional relationship with the heirs. The judge guarantees justice for people who have an emotional relationship with the heir through the mandatory will. A child or wife of a different religion who has long lived side by side peacefully and peacefully and has a high level of tolerance with an heir who is Muslim should not be damaged by inheritance matters. The deviation that is done will provide more benefit than its fade. Although the considerations of each judge may vary regarding the amount of wills in each case, there is a principle that becomes the basis for imposing the amount of wills, namely the principle of balance [28]. The legacy must be given on condition that it does not interfere with the position of the other heirs. The portion of the inheritance designated for the recipient of the legacy shall be given at the same degree. Girls who are not Muslim have the same share as girls. Likewise, the position of a wife who is not a Muslim will get the same share as the share of her position as a wife. The Ijtihad carried out by the judge is not imperative but facultative. Where the use of these decisions if there is a dispute and vice versa if there is no dispute then continue to apply Islamic law.

Conclusion

Based on the description stated above, it can be concluded that Islamic law originating from the Al-Qur'an and Hadith clearly states that religious differences are a barrier to mutual inheritance. The compilation of Islamic Law which

is the reference for the formation of Islamic inheritance law in Indonesia does not explicitly regulate inheritance cases for non-Muslim heirs. This legal vacuum is exploited by judges who have the authority to use their function as *rechtsvinding* or in Islamic law it is called *ijtihad* as an alternative effort to resolve disputes that have not been regulated by positive law by taking into account the values of living law so as to give decisions that are in accordance with the sense of justice in society. Based on article 209 of the Compilation of Islamic Law, the portion of the wills must not exceed 1/3 (one third) of the inheritance that is left behind. This is intended to protect the share of the other heirs. However, there are other opinions based on several jurisprudence decisions of the Supreme Court judges No. 368 K / AG / 1995, No. 51 K / AG / 1999 and No. 16 K / AG / 2010 which stipulates that the share of the mandatory will for heirs of different religions is the same as the share of his position as heirs. The part of the mandatory will that is given does not come from the inheritance, but rather from the inheritance. These decisions are issued to fulfill the principle of justice for the heirs who have a real emotional relationship with the heir so that they cannot be damaged by inheritance cases.

The suggestion from this research is that there is a need to renew the regulations in the Islamic Law Compilation (KHI) to regulate the distribution of inheritance to heirs of different religions. The rules of interfaith inheritance in the KHI should not only contain general rules but must be specific provisions with more detailed explanations so that there is no misinterpretation of the existing rules or regulations.

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