

# THE BASIS OF JUDGES 'CONSIDERATIONS ON DECISIONS OF DIFFERENT RELIGIOUS HERITAGE IN ISLAMIC LAW PERSPECTIVE

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**Abstract:** *Giving inheritance to heirs of different religions is considered a violation of Islamic law, because it is considered not to maintain Islam. property owned by Muslims should be used as a way to worship, not given to non-Muslims. In the settlement of the case of the Pengadilan Tinggi Agama Palembang, decision Number 05/Pdt.G/2015/PTA.Plg, referring to the Yurisprudensi Mahkamah Agung Number: 51K / AG / 1999, which basically states that heirs who are not Muslim can still get assets from the heir Those who are Muslims based on the "WasiatWajibah" which share the same as the part of the daughter of some heirs, so that non-Muslim children are entitled to a share of the inheritance of a Muslim heir as recipients of the obligatory will. What has been decided by the judge to decide the case has deviated from the rules of Islamic law because of the issue of inheritance disputes with Muslim heirs who must comply with the rules of Islamic Inheritance Law.*

**Keywords:** *Inheritance; Islamic Inheritance Law; Inheritance of Different Religions.*

## The Introduction

Inheritance law concerns right, both the rights of Allah and human rights because it reflects an attitude to create justice among human beings, especially those who are Muslims. The purpose of the existence of inheritance law in Islam is to create justice, provide benefits and stay away from evil.

Talking about the distribution of inheritance means talking about faraidh or inheritance and also means talking about the transfer of property from the dead to the living. Thus fiqh mawaris contains provisions based on Allah's revelation which regulates the transfer of property from someone who has died to someone who is still alive (Amir Syarifuddin, 2003: 147).

The Islamic Shari'ah has stipulated the rules of mawaris above the best, clearest and fairest rules because Islam recognizes one's ownership of property, whether he is male or female through a way that is justified by shari'ah, as Islam recognizes the transfer of something that is owned by someone when his life to his heir after death, whether the heir is male or female, without distinguishing between small children or adults.

Problems regarding Islamic inheritance in Indonesia other than in the Al-Qur'an and Sunnah as well as inheritance hadits are also regulated in Book II of Kompilasi Hukum Islam.

Article 171 of the KHI No. 1 of 1991 stipulates that inheritance law is a law that regulates the transfer of ownership rights to the inheritance (tirkah) of the inheritor, determines who has the right to become heirs and how much of each. Inheritance is property left by the heir, either in the form of objects that belong to him or his rights. Inheritance is the inheritance plus part of the joint assets after being used for the needs of the heir during illness to death, the cost of managing the body (tajhiz), debt payments and gifts for relatives (Focus Media Editorial Team, 2014: 56).

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In connection with the information above, in Islamic inheritance law there are provisions for obstacles to receiving inheritance. Obstacles to receiving an inheritance are things that cause the heir to lose the right to inherit from the inheritor's inheritance. There are three things that can hinder the scholars, namely 1). Murder, 2). Different religions, 3). Slavery, and what the scholars did not agree on was 4). Different Countries (Muslich Maruzi, 1981: 13).

The distribution of inheritance according to Islamic law is in accordance with the instructions of the Al-Qur'an and hadiths, with positive and constructive aims to save Muslims from disgraceful acts, namely taking and consuming the rights of others in an unrighteous way. The certainty of the part of each heir in the Koran is legally binding for every Muslim person. The composition of the share of each heir is the fairest part, viewed vertically or horizontally. Especially regarding the entire inheritance property, there are provisions concerning certain parts that can be inherited by a person (Sudarsono, 1992: 288).

In relation to inheritance from a family of different religions, this indicates that there are family members who are Muslim and family members who are non-Muslim. In this condition there is contact with the issue of interfaith inheritance if the heir dies. In Islamic law it has been determined that different religions can be a barrier to inheritance.

The emergence of inheritance disputes, conditions of different religions as a barrier (*mamnu*) to receive an inheritance, in this case often becomes a conflict between the heirs. This fact has existed in the history of mankind until now. At the Pengadilan Tinggi Agama has decided case Number 05 / Pdt.G / 2015 / PTA.Plg, which gives inheritance rights to heirs of different religions by means of the principle of "Wasiat Wajibah", whereas in Islamic law it has been determined that heirs who are different religions become a barrier in terms of inheritance. This matter becomes interesting to be studied in this research. The occurrence of claims for inheritance in Pengadilan, both the Pengadilan Agama and the Pengadilan Negeri, shows this phenomenon.

## Research Methods

The method used in this research is the Normative Approach Method aimed at obtaining theoretical matters through library studies. This study uses secondary data. Secondary data is data obtained from existing sources in the library. Secondary data consists of primary legal materials, secondary legal materials and tertiary legal materials.

## Discussion and Results

### Position of Inheritance to Different Religions in Islamic Inheritance Law

What is meant by different religions is the difference between the religions of the heir and the heirs, meaning that a Muslim does not inherit from a non-Muslim, and vice versa, a non-Muslim does not inherit of a Muslim.

What is meant by religious differences is the difference between the religions of the person who inherits and the person who is inherited. For example, if the religion of the person inheriting is kafir, while the one who is inherited is Muslim, then the kafir cannot inherit the inheritance of Muslims (Dian Khairul Umam, 2006: 134 and Ahmad Azhar Basyir, 2004: 21-22).

Hanafiyah, Malik'yah, Syafi'iyah and Hanabilah scholars agree that religious differences between heirs and heirs become a barrier to receiving an inheritance. A Muslim cannot inherit an infidel and on the other hand an infidel cannot inherit a Muslim, either because of blood relationship (*qarabah*) or marriage (husband and wife). This provision is based on a hadith from Usamah ibn Zaid according to the history of Al Bukhori, Muslim, Abu Dawud, At Tirmidhi and Ibn Majah which means the following:

حَدَّثَنَا أَبُو عَاصِمٍ عَنْ ابْنِ جُرَيْجٍ عَنْ ابْنِ شَهَابٍ عَنْ عَلِيِّ بْنِ حُسَيْنٍ عَنْ عَمْرِو بْنِ  
عُثْمَانَ عَنْ أُسَامَةَ بْنِ زَيْدٍ رَضِيَ اللَّهُ عَنْهُمَا أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لَا يَرِثُ  
الْمُسْلِمُ الْكَافِرَ وَلَا الْكَافِرُ الْمُسْلِمَ

*From Usamah bin Zaid, actually the Prophet sallallaahu 'alaihiwasallam. Said: Muslims do not inherit kafirs, and infidels do not inherit Muslims. (Muttafaq 'alaih) (Al-Imam Abu Abdillah Muhammad ibn Ismail ibn al-Mugirah ibn Bardizbah al-Bukhari, 1990: 194 and Sayid al-Iman Muhammad ibn Ismail ash-San'ani, 1960: 98).*

This hadith implies that there is no inheritance between Muslims and infidels, and vice versa. Prophet Muhammad sallallaahu 'alaihiwasallam himself practiced inheritance sharing, where religious differences were used as a barrier to inheritance. When his uncle, Abu Talib, was a person who was quite instrumental in the struggle of the Prophet Muhammad sallallaahu 'alaihiwasallam. died before converting to Islam, by the Prophet Muhammad sallallaahu 'alaihiwasallam his inheritance was only distributed to his children who were still infidels, namely Uqail and Talib. Meanwhile, his children who had converted to Islam, namely 'Ali and Ja'far, were not given any part (Fatchur Rahman, 1981: 12).

According to al-Uthaimin, there are no exceptions in this problem because the argument that shows the prohibition of mutual inheritance between followers of different religions is general, and there is no single authentic argument that excludes it. It's just that if a hypocrisy is not clear, then we are obliged to punish him *zahir*, that is he is considered a Muslim, so that he has the right to receive the inheritance of his Muslim so that he has the right to receive the inheritance of his Muslim relatives and vice versa. However, if his hypocrisy is tolerated, then what is true is that he cannot inherit each other between him and his Muslim relatives (Atho'llah, 2013: 28).

Mutjahid scholars agree on the basis of these texts, that close family (even biological children) who are not Muslim / Muslim are not heirs. This is in line with J. Kamal Farza's statement as quoted by the Professor of the University of Indonesia, M Tahir Azhary, who argues that: Religious differences should prevent a person from obtaining inheritance rights. At least, that is the principle of Islamic law. There is the Prophet's Sunnah, not inheriting a believer from an unbeliever, and vice versa (Habiburrahman,

2011: 208).

According to al-Ghazzi, "there are seven people who cannot receive an inheritance because they are blocked, one of whom is an expert in two religions (different religions). So a Muslim cannot inherit an infidel and vice versa"<sup>2</sup>. Different religions that become an obstacle to inheritance are between the heirs and al-muwarriis, one of whom is Muslim, the other is not Muslim. For example, the heir is Muslim, muwarriisnya Christian, or vice versa. That is the agreement of the majority of scholars. So if someone dies who is a Buddhist, the heir is Hindu among they have no impediment to inherit. Likewise, it is not included in the meaning of different religions, Muslims of different schools, one Sunny and Shiite.

In Article 173 Kompilasi Hukum Islam, it is stated that a person is prevented from becoming an heir if a judge who has legal force continues to state that "a person is prevented from becoming an heir if a judge's decision has permanent legal force is convicted of:

- a. blamed for murdering or attempting to kill or severely maltreat the heirs;
- b. slanderous has filed a complaint that the heir has committed a crime punishable by a sentence of 5 years in prison or a harsher sentence".

The exclusion of non-Muslims as a barrier to inheritance in the Kompilasi Hukum Islam is clearly an intent, not a mistake, because if it is impossible for 24 years it will not be corrected. There is a systematic desire on the part of those who want such a formulation, which turns out to be a very influential juridical argument in the decision-making process in the Pengadilan Agama.

In Kompilasi Hukum Islam Article 174 paragraph (1), it is stated that:

(1) The groups of heirs consist of:

- a. According to blood relations:
  - male groups consist of: father, son, brother, uncle and grandfather.
  - the female group consists of: mothers, daughters, sisters and grandmothers.
- b. According to the marital relationship, it consists of: a widower or a widow.

Definition of an heir according to Article 171 letter c Kompilasi Hukum Islam which requires that they be Muslim. The article states that: An heir is a person who at the time of his death has a blood relationship or marital relationship with the heir, is Muslim and is not prevented by law from becoming an heir.

### **Review of Islamic Law on the Decision of the Pengadilan Tinggi Agama Number 05/Pdt.G/2015/PTA.Plg**

Legal considerations in the Decision of the Pengadilan Agama and the Pengadilan Tinggi Agama Number 05 / Pdt.G / 2015 / PTA.Plg which stipulates children Non-Muslim (descendants) have the right to obtain a mandatory will from their deceased parents (father) if they are linked to Islamic inheritance in Article 2 and 49 paragraph (1) Undang-undang

<sup>2</sup>Syekh Muhammad Ibn Qasim Al-Ghazzi, Fath Al-Qarib Al-Mujib, Dar Al-Ihya Al-Kitab, Al-Arabiah, Indonesia, Tth, Hlm.6.

Number 7 of 1989 concerning Peradilan Agama which have been amended by Undang-undang Number 3 2006 and the second amendment to Undang-undang Number 50 of 2009 concerning the Second Amendment of Undang-undang Number 7 of 1989 concerning the Peradilan Agama, which reads "the personal principle of Islam is one which states that those who submit and can be subject to the environment of the Peradilan Agama are those who Muslims or non-Muslims cannot be forced to submit to the Peradilan Agama".

Other things that become universal considerations. First, justice in other words, law is applied to uphold the values of justice. Second, human values, meaning that law does not have human values, it is not considered law in a substantial way. The three laws were created by social engineering that would be aimed at social welfare. The application of wills to the development of contemporary Islamic law is a necessity that deserves to be implemented, because the law evolves, develops and runs according to the guidance of the era, it is valid for a while, when the time comes for the law to bring benefits, then it applies again.

When looking at the inheritance case in the decision of the Pengadilan Tinggi Agama Palembang Number 05 / Pdt.G / 2015 / PTA.Plg, the first thing to pay attention to is what law or whose law is used in this case, considering that the Plaintiff and Defendant have different beliefs. Seeing in one of the main exceptions put forward by the Defendant which stated that "the identities of the Defendant Antonius Papilaya and Fransisca Papilaya are Catholic Christians, the absolute competence to judge cases is subject to the authority of the District Court".

According to the researcher, these questions can be answered using Yurisprudensi MARI No. 172 / K / Sip / 1974 which reads "*that in inheritance disputes, the inheritance law used is the law of the inheritor*". So it is appropriate for the Pengadilan Agama to resolve this case using faraid law and within the scope of the Peradilan agama.

Problems provision was *wajibah* still undergo much debate due to the discussion about this is not so complete discussed in the Kompilasi Hukum Islam, which is only addressed in Article 209 which states that:

- (1) A treasure relics adopted children are divided based on Article 176 to Article 193 mentioned above, while against the adoptive parents who do not accept the will was given was *borrowed* as much as 1/3 of the estate probate adopted son.
- (2) Adopted children who do not receive a will shall be given a legacy *wajibah* maximum of 1/3 of the inheritance of their adoptive parents.

The article does not explain in detail who is entitled to a will *wajibah*, whether or not it is allowed to be given to non-Muslims. Meanwhile, Article 171 letter c of the Kompilasi Hukum Islam 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 hindered by law from becoming an heir*

According to researchers, in case was *wajibah*, it a judge needs to conduct legal interpretation because the clause concerning was *wajibah* not described in detail anyone entitled to receive was *wajibah*. In Article 209 Kompilasi Hukum Islam said that the adopted child or adoptive parents who do not accept the will, can receive was *wajibah* the maximum 1/3 of the inheritance a parent or adopted child. When viewed from the aspect of

Islamic Law, the granting of awill is *wajibah* not correct if it is intended for heirs who are impeded due to different religions, in this case the Defendant. In the fiqh books it is stated that

barriers that abort a person's right to inherit one of them are different religions. This is based on the hadith of the Prophet *sallallaahu 'alaihiwasallam* which states that:

حَدَّثَنَا أَبُو عَاصِمٍ عَنْ ابْنِ جُرَيْجٍ عَنْ ابْنِ شِهَابٍ عَنْ عَلِيِّ بْنِ حُسَيْنٍ عَنْ عَمْرِو بْنِ  
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The hadits above suggests that there is no inheritance between Muslims and infidels, between infidels and Muslims. Likewise in the hadith narrated by Tirmidhi as follows:

وعن عبد الله بن عمر رض الله عنهما قال: قال رسول الله صلى الله عليه وسلم لا يتوارث أهل ملتين رواه احمد والاربعة والترمذى وأخرجه الحاكم بلفظ أسامة وروى النسائى حديث أسامة بهذا اللفظ

*And from Abdullah bin Umar *radliallahu 'anhuma*., Said: *Rasulullahsallallahu 'alaihiwasallam* said: no heir inherits from people of different religions (HR.Ahmad, Abu Dawud, Tirmidzi, Nasa'i, and Ibn Majah. Nasa'i also narrated from Usamah bin Zaid) (Al-Imam Abu Isa Muhammad ibn Isa ibn Saurah ibn Musa ibn ad-Dahak as-Salmi at-Turmuzi, 1931: 137 and Al-Hafidz ibn Hajar al-Asqalani, tth: 196).*

This hadits suggests that there is no inheritance between Muslims and infidels, and vice versa. The Prophet Muhammad *sallallaahu 'alaihiwasallam* himself practiced inheritance sharing, where religious differences were used as a barrier to inheritance. he, Abu Talib, a person who was quite instrumental in the struggle of Prophet Muhammad *sallallaahu 'alaihiwasallam*. died before converting to Islam, by the Prophet Muhammad *sallallahu 'alaihiwasallam* his inheritance was only distributed to his children who were still kafir, namely 'Uqail and Talib. Meanwhile, his children who had converted to Islam, namely 'Ali and Ja'far, were not given any part (Fatchur Rahman, 1981: 12).

"Muslims do not take heirlooms from infidels, and vice versa" (TM. Hasbi Ash Shiddieqy, 2000: 293). This law was agreed upon by four priests. "Said ibn Musaiyab and an-Nakha'i believe that Muslims take heirlooms from infidels, not the other way around, as Muslims can marry infidel women, Muslim women cannot be married to infidel men" (TM. Hasbi Ash Shiddieqy, 2001: 310) .

Mutjahid scholars agreed that on the basis of these texts, a close family (biological child) who is not Muslim is not the heir. This religious difference becomes a barrier for someone to inherit rights. Islamic law has arranged everything, and it is explained that the sunnah of the Prophet Muhammad sallallaahu 'alaihiwasallam, there is no inheriting a believer from an unbeliever, and vice versa.

Due to the inheritance rights of the heirs of different religions already closed, so in practice most of the judges have given way to use judgment was *wajibah* to give to the heirs inherit the right to religious differences. Although the jurisprudence books state that different religions are one of the obstacles to inheritance, Article 173 of the Kompilasi Hukum Islam states that: A person is prevented from becoming an heir if a judge who has permanent legal force is convicted of: blamed for murdering or attempting to kill or severely maltreat the heirs; slanderous has filed a complaint that the heir has committed a crime punishable by up to 5 years in prison or a harsher sentence.

The exclusion of non-Muslims as an inheritance barrier in the Kompilasi Hukum Islam is clearly a deliberatenota *act, mistake*, because if it is impossible for 24 (twenty-four) years it will not be corrected. The desire of the parties to systematically want such a formula has turned out to be a juridical argument which is very influential in the decision-making process in the Pengadilan agama.

According to the researcher, inheritance law concerns rights, both the rights of Allah and human rights, because it reflects an attitude to create justice among mankind, especially those who are Muslim. Judges as law enforcers and justice are obliged to explore, follow and understand the legal values that live in society, when viewed from the Court's decision, the laws that are explored, followed and understood are not in accordance with the values that live in society.

Furthermore, judges at the Pengadilan Agama and the Pengadilan Tinggi Agama analogized adopted children with heirs of different religions and heirs. This is very different and far from analogy, as can be seen in the general provisions of Article 171 letter h, that an adopted child is a child who is cared for for daily life. Based on these provisions, it is clear that heirs of different religions are not the same as adopted children, so that heirs of different religions and heirs do not receive a share of the inheritance of the heirs. Heirs of different religions still have an heir relationship with heirs, both by blood and marriage, while adopted children do not have an heir relationship due to blood or marriage.

Different religions are a barrier for someone to get a share of the inheritance of an heir who is Muslim. This was stated by Abdul Ghafur Anshari "there are several inheritance barriers according to Islamic law, namely murder, different religions, slavery, apostates, different

countries, dying together between a child and a father" (Abdul GhafurAnshari, 1998: 35).

A Muslim is bound by the laws of Allah Ta'ala as in his confession through the two sentences of the Shahada, as in the following Word of Allah Ta'ala:

Q.S Al Maidah : 44

إِنَّا أَنْزَلْنَا التَّوْرَةَ فِيهَا هُدًى وَنُورٌ يَحْكُمُ بِهَا النَّبِيُّونَ الَّذِينَ أَسْلَمُوا  
لِلَّذِينَ هَادُوا وَالرَّبَّانِيُّونَ وَالْأَحْبَارُ بِمَا اسْتُحْفِظُوا مِنْ كِتَابِ اللَّهِ  
وَكَانُوا عَلَيْهِ شُهَدَاءً فَلَا تَخْشَوُا النَّاسَ وَآخَشَوْا وَلَا تَشْتَرُوا بِعَاقِبَتِي  
ثَمَنًا قَلِيلًا وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ



*“Whoever does not decide the law according to what Allah has revealed, then they are people who disbelieve”.*

Q.S. Al Maidah : 45

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنْ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ  
بِالْأَنْفِ وَالْأُذُنَ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصٌ فَمَنْ تَصَدَّقَ  
بِهِ فَهُوَ كَفَّارَةٌ لَهُ وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ

الظَّالِمُونَ

*“Whoever does not decide the law according to what Allah revealed, then they are people who zholim”.*

Q.S. Al Maidah : 47

وَلِيَحْكُمَ أَهْلَ الْإِنجِيلِ بِمَا أَنْزَلَ اللَّهُ فِيهِ وَمَنْ لَمْ يَحْكَمْ بِمَا  
أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْفَاسِقُونَ

*“Those who do not judge by what Allah revealed, then it is people who fasiq”.*



## Conclusion

Islamic inheritance law does not mention the existence of inheritance rights between Muslim heirs and heirs of different religions. Strictly speaking, Islamic inheritance law does not regulate the granting of inheritance rights to heirs who are hindered due to different religions, but the hadith of the Prophet sallallahu'alaihiwasallam is believed by some scholars and legal experts as the strongest basis for not giving inheritance rights to different heirs. religion. The giving of inheritance to heirs of different religions is considered a violation of Islamic law on the grounds that because they do not maintain the Islamic religion, property owned by Muslims should be used as a way of worshiping Allah Ta'ala, not given to people who are not Muslim. If the heirs of Islam are given to heirs who are not Muslim, it is feared that there will be harm / loss by Islam because they are not used to maintain Islam.

The basis for the judge's consideration in determining the distribution of Muslim heirs to non-Muslim heirs through a *wajibah* will in the Pengadilan Tinggi Agama Palembang Decision Number 05 / Pdt.G / 2015 / PTA.Plg the use of the *Yurisprudensi Mahkamah Agung RI* Number: 51K / AG / 1999 which basically states that heirs who are not Muslim can still receive assets from an heir who is Muslim based on "*Wasiat Wajibah*" which shares the same as the share of the daughters of some heirs, so that non-Muslim children are entitled to a share of the inheritance of a Muslim heir as recipients of the will. *wajibah*. What has been decided by the judge to decide the case has deviated from the rules of Islamic law because of the issue of inheritance disputes with Muslim heirs who must comply with the rules of Islamic Inheritance Law.

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