

# Maslahah Wasiat Wajibah for Adopted Children with Different Religions and Stepchildren

Wahyuni Retnowulandari<sup>1</sup>

<sup>1</sup>Faculty of Law, University Trisakti, 11440, Indonesia  
Corresponding author's email: [wahyuni.r@trisakti.ac.id](mailto:wahyuni.r@trisakti.ac.id)

## ABSTRACT

This research is aimed to devise a way that is more maslahah in this world and hereafter without using Wasiat Wajibah that deviates from sharia, especially regarding adopted children of different religions and stepchildren who are not actually heirs. This is important because in the implementation of Islamic inheritance such as Ijbari principle in the Qur'an Surah An-Nisaa': 13-14 that is currently being violated by many court rulings. For example, the Religious High Court Judge No. 136/Pdt.G/2013/PTA.S in Keman Rachman's inheritance case, gave Wasiat Wajibah to the stepchildren not included as following of kin and non-Muslim adopted children. Furthermore, the Prophet's Hadith forbade Muslims to inherit from non-Muslims and vice versa. Indonesia adopted the Compilation of Islamic Law Article 171 letter C requiring benefactors to be Muslim. This normative research applied descriptive and qualitative analysis to understand whether the Wasiat Wajibah inheritance follows Maslahah. The results showed that ash'aryah forbids non-Muslim adopted children and stepchildren to receive a mandatory will. It is also recommended to provide a grant equivalent to zakat maal as 2.5% to rightful heirs following Maslahah.

**Keywords:** *Islamic Inheritance Law; Wasiat Wajibah; Maslahah*

## 1. INTRODUCTION

Death is inevitable for all human beings. Hence, the inheritance law (*waris*) stipulates a person's rights in the management and continuation of their obligations. This law regulates the forwarding and transferring of assets (tangible or intangible) to heirs, causing family disputes and quarrels. Islam forbids these issues because each heir demands a larger share than others. Furthermore, the Islamic law on inheritance is complicated, leading to Rasulullah Sallallahu Alaihi Wassalam's (SAW) order to "learn and teach the Science of *Faraidh* because it includes half the knowledge that is forgotten by people, having been removed from Ummah" (Hadith Histor (HR). Ibn Majah, Ad-daruquthuny and Al-hakim) [1].

His concerns came true because most judges' rulings in the last decade contradict *Faraidh* Science. For example, is the judge's provision in the *Wasiat Wajibah* (mandatory will) on non-Muslim heirs. The Hadith of the Messenger of Allah regulated inheritance, as stated by Osama Bin Zaid Radhiyallahu anhu that "a Muslim does not inherit from a non-Muslim and vice versa." (HR. Bukhari) [2]. The Indonesian Compilation of Islamic Law (KHI) Article 171 letter C requires Muslim heirs. However, some judge's rulings allow non-Muslim

inheritance, such as the Supreme Court (MA) No. 368 K/AG/1995 that provided *Wasiat Wajibah* equal to a daughter's share. Additionally, No. 51.K/AG/1999 provided non-Muslims heirs with equal inheritance through *Wasiat Wajibah*. Other judges applied this ruling as jurisprudence in similar cases such as the Supreme Court Decision Case No. 16K/AG/2010, giving a 1/3 *Wasiat Wajibah* for non-Muslim wives; the Kabanjahe Religious Court Case No. 2/Pdt .G/2011/PA-Kbj, gave *Wasiat Wajibah* to non-Muslim children; and No. 331/k /ag/2018/MA allowed *Wasiat Wajibah* for husbands.

*Wasiat Wajibah* allows judges to determine inheritance ruling for non-Muslim heirs, husband, wife, and children, providing justice, benefit, and a legal vacuum. This *Wasiat Wajibah*'s ruling helps beneficiaries but violates the Qur'an 4:59 letter on Muslim's obedience to the *Syara'*. Furthermore, this study showed that *wasiat wajibah* application is not limited to its designation. This is similar to the Keman Rachman's inheritance case by the Religious High Court Judge No. 136/Pdt.G/2013/PTA.Sby on *Wasiat Wajibah* non-Muslim provision which filled the legal vacuum and provided justice, despite contradicting the *Syara'*. The Hadith, narrated by Bukhari and Muslim, from Usamah bin Zaid stated that "Not inheriting a Muslim against a

non-Muslim, nor inheriting a non-Muslim against a Muslim." [3] Various studies on Islamic inheritance has been repaired based on *Maslahah*. Therefore, this study provided more *Maslahah* in this world and hereafter without *Wasiat Wajibah* provision, which disregards Sharia, specifically on adopted non-Muslim children and stepchildren who not considered heirs.

## 2. METHOD

This study applied a normative method [4] to explore Islamic inheritance law, specifically on *Wasiat Wajibah*. It used qualitative analysis to explain judges' *Wasiat Wajibah* provision to heirs, non-heirs of different religions, and stepchildren. It applied descriptive methods for quality data to describe *Wasiat Wajibah* in *Maslahah* for non-Muslim adopted children and stepchildren who follow the *Syara'*.

This also applied two shari'a-compliant theories to explain challenges in this world and hereafter, namely the *ijtihad* theory as the legal basis for the law enforcement theory called QS An-Nisaa'/4:59. It states that [6] "O you who have believed, obey Allah and the Messenger and those in authority among you and if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day, that is the best [way] and best in result." Al-Hasyir verse 2: the last part states that "... So take a lesson 'from this', O people of insight!." Both verses show that mujtahids can perform *ijtihad* with *beri'tibar* but must follow the Qur'an and Hadith in a disagreement. This follows the *Maslahah/justice* theory on Islamic divine law, specifically on *Asy'aryah* as theistic subjectivism, that all ethical values follow the decrees of Allah Subhana Wa Taallah (SWT) through eternal revelation and unchanged.

## 3. RESULT AND DISCUSSION

### 3.1. The Phenomenon of Giving *Wasiat Wajibah*

#### 3.1.1. *Wasiat wajibah*

*Wasiat wajibah* is not in the Qur'an, Hadith, or classical *fiqh* books, but in contemporary *fiqh* books, specifically after its promulgation in Egypt (Law no.71, 1356 H/ 1946 AD) on grandchildren, great-grandchildren, or heir's children who died before the subsequent heirs. This was adopted by African Islamic countries such as Tunisia, Morocco, and Syria as well as extended to Indonesia. *Wasiat Wajibah* involves a ruler or judge's action to force or give inheritance to certain people in various circumstances. It includes heirs with blood ties, but the text forbids a share. M. Yahya Hararap's book M. Fahmi Al Amruzi states that a person's *Wasiat Wajibah* is based on the law to receive a will even without a concrete will.

A legal assumption occurs when the law enforces *Wasiat Wajibah*, considering its existence [7]. *Wasiat Wajibah* is applied as scholars' *ijtihad* for grandchildren whose parents died before the heirs. The QS. al-Baqarah (2): 180 states that "It is prescribed that when death approaches any of you—if they leave something of value—a will should be made in favour of parents and immediate family with fairness. "This is' an obligation on those who are mindful 'of Allah'". This provision gives the grandchildren *Wasiat Wajibah*. Indonesia followed the Compilation of Islamic Law in 1991 legislated by the president in Article 201 and 209 paragraphs (1) and (2), regulating *Wasiat Wajibah* for adoptive parents and children without a will or a 1/3 of the inheritance assets in the will. This was motivated by the Indonesian adoption culture. Therefore, *Wasiat Wajibah* does not require addressing blood ties heirs (*nasab*), but by texts, allowing shares division with those without kinship relationships such as adopted children and stepchildren.

*Wasiat Wajibah* is not inheritance, but *ijtihad*, as the last message stipulates the recipient's inheritance obligations or other unrelated messages. It was derived from *washshaitu asy-syaia, uushiihi*, meaning *aushaltuhu* "I convey something," and in *Syara'*, *wasiat* (will) means gifting to others through goods, receivables, or benefits based on a will. Some jurists define a will as voluntary giving property rights after the giver's death [8].

Scholars support that a person who leaves heirs cannot testify on the inheritance, hence, the law provides limitations based on the will allowing a maximum of 1/3 (one third) of their property. This follows The Hadith from Sa'ad bin Abi Waqosh based on the history of Al-Bukhari [10]. "From Sa'ad bin Waqosh which stated: "I was sick in Mecca, a disease that brought death, the Prophet SAW visited me, I said to the Prophet: "O Messenger of Allah, I have much wealth no one will inherit property except a daughter, may I give two-thirds of it?" The Prophet replied, "No" I said: "Half?" The Prophet said: "A third is a lot, verily if you leave your family in abundance is better than leaving them in a state of deprivation to beg from others." Therefore, the Islamic law compilation Article 209 allows *Wasiat Wajibah* similar as a will limit in the Apostle Hadith from Sa'ad bin Waqosh.

#### 3.1.2. *Wasiat wajibah* for heirs and non-heirs of different religions

Surah Al-Baqarah verse 141 [9], and Usamah Bin Zaid Radhiyallahu anhu Hadith on the Messenger of Allah and four priests' opinion of the *madhhab* (Maliki, Hambali, Hanafi, and Shafi'i), states that heirs and testator with different religions create challenges, making heirs lose their inheritance rights. Furthermore, apostates cannot inherit property. The Qur'an Hadith, four *madhhab* priests' *fiqh*, and *ijbari* principle in the Qur'an Surah An-Nisaa': 14 states that "He will put him into the

Fire to abide eternally therein, and he will have a humiliating punishment," on the other hand verse 13 states, those who carry it out will go to heaven. Therefore, non-Muslim heirs are veiled forever (*Mawani*). The Indonesian regulation in Article 171, letter C of the KHI also forbids non-Muslims' inheritance.

### **3.2. Reconstruction of Wasiat Wajibah for Heirs and Non-Heirs of Different Religions for the Sake of Justice/Benefit of the World and the Hereafter**

The reconstruction/*ijtihad* of *Wasiat Wajibah* for non-Muslims based on the *Mu'tazilah* theory of justice provides rationalist objectivism. It allows inheritance shares to biological children, wives/husbands, fathers/mothers, and apostatized brothers through equal *Wasiat Wajibah*. This is considered rational because all are biological children, wives/husbands, fathers/mothers, and brothers. Therefore, the judge's justice ruling can give *Wasiat Wajibah* freely and responsibly before God. For example, in case No. 136/Pdt.G/2013/PTA.S, the judge freely gave *Wasiat Wajibah* for non-Muslim adopted children. This case was not regulated in the KHI (Book of Islamic Law), but most judges' rulings give *Wasiat Wajibah* to non-Muslim heirs. Furthermore, history records showed that a will was given to non-Muslims after Prophet Muhammad SAW death. There were pros and cons to granting a will in the Shafiyah bint Huyai (widow of the Prophet) case, as the eighth wife of Prophet Muhammad died in 52/672H and left an inheritance worth 100.00 dirhams. Shafiyah was Jewish and embraced Islam after marriage, making it impossible for her Jewish relatives to inherit her. A 1/3 of the inheritance was bequeathed to his Jewish nephew. Various figures refused to respect the will, making Aisyah, another Prophet's wife, warn them that, "Fear Allah and give him his will (Shafiyah's nephew). The figures accepted and gave the rights of Shafiyah bint Huyai's nephew [10].

Judges follow this history to reconstruct *Wasiat Wajibah* in the Indonesian Article 209 KHI for adopted children (who, according to Sharia, are not heirs) and non-Muslim heirs (classified as *Mawani* in the Hadith). Article 5 paragraph (1) of Law no. 48 of 2009 on Judicial Power states that "Judges and constitutional judges are obliged to explore, follow, and understand legal values and justice in the society" and should provide justice in the community to make legal findings/*ijtihad*. Most judges conduct *ijtihad* to establish Islamic law and benefit human life.

The *kuliyah* principles should be followed to receive the *Syara'* benefit, including:

- a. Avoid or eliminate those with harm.
- b. Avoid the damaged and prioritize those that bring benefits based on Islamic law principle and reject

harm.

- c. Achieving benefit removes everything that brings difficulties in life "all difficulties can bring ease"[11].

Judges apply the *Mu'tazilah* [12] benefit theory, which is convenient. The Religious Courts jurisprudence contains disparities in *Wasiat Wajibah* for adopted children and non-Muslim heirs. Some judges in Religious Courts give 1/3 of the inheritance to adopted children based on *Wasiat Wajibah*, disregarding the maximum gift effects of the rightful heirs. In contrast, other judges give *Wasiat Wajibah* not exceeding the smallest part of the heirs. However, some adopted children are treated as biological, and apostates get an equal share as non-apostates.

*Maslahah* theory/*Asy'ariah* justice is essential in Islamic law philosophy. *Maqasid attasyri'* or *maqasid al-syariah* emphasizes that Islamic law realizes and maintains humankind's benefits. This is supported by scholars who formulated a popular rule, "Where there is a benefit, there is Allah's law.", by Imam al-Haramain al-Juwaini, Al-Gazali, Izzuddin ibn Abd al-Salam from the Shafi'iyah circles, and al-Syatibi from the Malikiyah circles. This rule is based on Islamic law that must lead to benefit because God's purpose in *Sharia* is to benefit this world and hereafter. There are three sequences of goals, namely *daruriya* (primary), *hajiyyat* (secondary), and *tahsiniyat* (tertiary). According to al-Gazali's concept, *Maslahah* maintains five aspects: religion, soul, mind, lineage, and property [13].

*Wasiat Wajibah* for non-Muslim is related to religion, lineage, and wealth, hence, the decision to benefit them must be carefully considered. This is because legal provisions strengthen the non-Muslim heirs' obstacles, namely the Qur'an Surah At-Tahrim verse 6:

"O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones, over which are [appointed] angels, harsh and severe; they do not disobey Allah in what He commands them but do what they are commanded."

This verse instructs Muslims to protect, maintain, and prevent faith deviations (apostasy) for themselves or family members. Therefore, judges giving *Wasiat Wajibah* to apostate heirs should consider faith and not property/inheritance. An apostate cannot obtain equal rights, as maintaining religion is more important than property. Judges should not give *Wasiat Wajibah* to non-Muslims and must implement the Islamic law objectives in the Qur'an, Hadith, and *ijtihad*. The justice principle of giving assets despite someone's rights contradicts Islamic law and the Qur'an and Hadith provisions.

Judges can perform *ijtihad* due to a legal vacuum but must follow *Sharia* provisions. Apostates who deny the Qur'an, Hadith, and Compilation of Islamic Law have no benefits because they violate Allah's law. However,

*ijtihad* is legal based on the KHI Article 209 allowing *Wasiat Wajibah* for non-Muslim adopted/foster children.

The Religious High Court No. 136/Pdt.G/2013/PTA.S judge ruling, applied *ijtihad* to share Keman Rachman's inheritance stipulating Muji Rahayu and Tri Septo as *Wasiat Wajibah* recipients. Muji Rahayu was determined the stepdaughter of the late Suyatimah and Keman Rahman, whereas Tri Septo was considered a non-Muslim adopted son of Suyatimah. They received *Wasiat Wajibah* of 7 shares from Suyatimah inheritance, larger than other heirs. This study did not support giving *Wasiat Wajibah* to a non-Muslim adopted child not because it is unresponsive and against *Maslahah/justice*, but based on the *syara'*. Furthermore, it viewed *maqasid al-syariah* as a way to benefit this world and hereafter, specifically maintaining religion, hence, non-Muslims/apostates should not receive *Wasiat Wajibah*. The Keman Rachman case would have given all heirs as 2.5% of the inheritance as *zakat mal*.

Keman Rachman's stepdaughter with Suyatimah Muji Rahayu Ningati bint Gadri had no kinship relationship and could not inherit or *Wasiat Wajibah*, hence, the study viewed that giving *Wasiat Wajibah* should follow religious law. Therefore, the amount should be wisely considered because it allows giving a maximum of 1/3 of inheritance. This also viewed that based on *Maslahah* reconstructing/*ijtihad* on *Wasiat Wajibah* of KHI 209 should be given to those with similar lineage. Those without kinship relationships and apostates should be given a 2.5% grant as *zakat mal* to ensure their share is smaller than their heirs.

#### 4. CONCLUSION

More judges are ruling on *Wasiat Wajibah* for non-Muslim heir's children, husbands, or wives. Stepchildren also receive an inheritance and cannot testify but are obliged by law to accept a will for justice and fill a legal vacuum. *Wasiat Wajibah* Reconstruction in KHI 209 given to adopted children and parents, as well as heirs and non-heirs of different religions should be careful to fulfill justice/benefit because Islamic *Maslahah* follows *Mu'tazilah* and *Asy'ariah* theories. Judges applying *Mu'tazilah* theory enforcing rationalist objectivism should be free based on justice/rationality as the apostate child considered biological/adopted can get *Wasiat Wajibah*, even when the amount is equal to heirs. However, applying the *Maslahah/Asy'ariah* justice theory, the determination of Islamic law must follow *Maslahah* of this world and hereafter, as God's purpose in *Sharia*. Therefore, judges must implement Islamic law objectives and follow it, as well as the Qur'an, and Hadith (*Sharia*). *Wasiat Wajibah* for non-Muslims must follow Islamic law provisions. Furthermore, Article 209 KHI *Wasiat Wajibah* fulfills justice for entitled heirs but should not equate another heir's share or a 1/3 maximum limit. According to *Asy'ariah* justice, non-Muslims

should not receive *Wasiat Wajibah*, instead they should receive a grant. Furthermore, adopted and stepchildren should receive 2.5% *zakat mal* of all heirs to avoid interfering with their share.

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