



## Substantive Reasoning of Religious Court Judges in Granting Compulsory Will Rights to Non -Muslims

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### Abstract

The main problem of this study is related to the concept of Wasiat Wajibah which is not yet known in classical fiqh and the absence of provisions in Indonesian law that can be used by judges in granting the right of Wasiat Wajibah to non-Muslims. This study aims to analyze the substantive reasoning used by Indonesian religious court judges in resolving complications that occur through judicial decisions. This research uses a content analysis approach. The data source used is Decision Number 263/ Pdt.G /2007/ PTA.Sby . The decision was analyzed using the content analysis method. The data used is secondary data consisting of primary legal materials in the form of Wasiat Wajibah decisions of the Indonesian Religious Courts, as well as secondary and tertiary legal materials. The data was analyzed using a qualitative normative analysis method. The results of this study indicate that the substantive reasoning used by the judge in his decision is first, consideration of the maslahah perspective to maintain the five elements of Sharia: protection of religion ( hifzu'd -din), protection of the soul ( hifz 'un -). nafs ), maintenance of reason ( hifz al- akl ), protection of wealth ( hifz-i mal), protection of offspring ( hifz-i nasl ). In Islamic law, it cannot be ignored that there are five important things that consider the interests of non-Muslims that must be considered in making judicial decisions. Second, the principle of justice becomes the benchmark so that the distribution of inheritance is carried out proportionally, regardless of religious differences. Thirdly, judges use the method of reasoning by analogy and consider other legal provisions that have similarities and similarities. Fourth, the public good, which includes security and integrity, is an important aspect of Islamic teachings.

**Keywords:** Substantive Reasoning; Judge; Non-Muslims; Mandatory

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## Introduction

Substantive reasoning is the approach used by judges in making decisions, especially in cases of granting mandatory testamentary rights to non-Muslim heirs. Although the Compilation of Islamic Law does not explicitly regulate this, judges consider several important aspects to achieve justice. One of these aspects is benefit, namely consideration of wider benefits for the family. By paying attention to benefits, judges try to maintain harmony in family relationships and minimize potential conflicts that could arise due to religious differences in inheritance. Apart from that, qiyas or analogies are also an important basis. In this case, the judge used an analogy from the case of inheritance of an adopted child, where a mandatory will was given to ensure welfare and justice.

This substantive reasoning approach also includes the application of the principles of justice in every decision. The principle of justice is the benchmark so that inheritance distribution is carried out proportionally, regardless of religious differences. Judges strive to ensure that each party gets their rights fairly, so that decisions taken are not only based on written rules, but also on the social context and diverse realities of life in Indonesia. Thus, substantive reasoning not only creates decisions that are in accordance with the principles of Islamic law, but is also relevant to the conditions of a plural society, strengthening unity in diversity.

The term obligatory will<sup>1</sup> first introduced in Egypt through the Inheritance Law of 1946 with the aim of maintaining justice and providing assistance to orphaned grandchildren<sup>2</sup>. The main principle introduced in Egypt regarding inheritance law is the right of orphaned grandchildren to their grandfather's property<sup>3</sup>. This is controversial in Islamic law because it does not recognize representation. The proposed solution to support the position of orphaned grandchildren is through a mandatory will<sup>4</sup>. In Egypt, testamentary law limits the granting of wills to the heir's grandchildren whose parents die first, and they do not receive a share of the inheritance because of their position as *zawil arham* or being covered by other

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<sup>1</sup> Mohammad Yasir Fauzi, "Wasiat Wajibah Bagi Non Muslim Dalam Perspektif Hukum Islam Dan Hukum Positif Serta Kontribusinya Terhadap Hukum Keluarga Di Indonesia" (UIN Raden Intan Lampung, 2020), [http://repository.radenintan.ac.id/13497/1/WASIAT\\_WAJIBAH\\_BAGI\\_NON\\_MUSLIM.pdf](http://repository.radenintan.ac.id/13497/1/WASIAT_WAJIBAH_BAGI_NON_MUSLIM.pdf)

<sup>2</sup> Siti Nuraenun, "Problematika Kedudukan Anak Angkat Dalam Menerima Harta Warisan Dan Penyelesaiannya Menurut Kompilasi Hukum Islam (KHI)," *Inklusif (Jurnal Pengkajian Penelitian Ekonomi Dan Hukum Islam)* 2, no. 2 (December 1, 2017): 82, <https://doi.org/10.24235/inklusif.v2i2.1553..>

<sup>3</sup> A Biografi Singkat al-Asy'arī, "Abū Ḥasan Al-Asy 'arī (260 H-324 H)," *Literasi Pemikiran Muslim Dalam Lintas Sejarah: Reaktualisasi Ajaran Islam Di Tengah Perubahan Sosial*, 2022, 49.

<sup>4</sup> I FIHNA, "ANALISIS HUKUM ISLAM TENTANG AHLI WARIS PENGGANTI (Studi Komparasi Di Indonesia Dan Pakistan)" (UNIVERSITAS ISLAM NEGERI RADEN INTAN LAMPUNG, 2022), <http://repository.radenintan.ac.id/20555/%0Ahttp://repository.radenintan.ac.id/20555/2/bab1%2C5%20dapus.pdf>

heirs. Compulsory inheritance law in Egypt has existed since 1946 and was included in the 100th amendment in 1985. For example, Article 76 states that if the heir does not make a will for a descendant who has died previously, then his descendant will receive an inheritance equal to his father's share through a compulsory will, with a limit of no more than one third of the inheritance<sup>5</sup>.

Indonesia, different with Egypt, testament obligatory given special For child lift. If one child lift No accept will during his life from parents pick it up, then he own right For get will it's mandatory to get it submitted before law<sup>6</sup>. Amount will obligation given No can exceed one third of the total inheritance<sup>7</sup>.

In practice, determination magnitude will obligatory For child lift must Also take into account the size given part to child biological, so No happen injustice between both of them. This matter means that despite the maximum limit will obligatory is 1/3 part of the total inheritance, however No can exceed given part to child birth<sup>8</sup>. This matter important For ensure that No There is the gap that arises between child adopt and child biological, so ensure fair treatment inside distribution inheritance.

Existence child lift in public become A phenomenon social<sup>9</sup> practice with diverse motivation<sup>10</sup>. By general, motivation adoption child can shared into two categories big, that is motivation subjective and motivational objective. Motivation subjective For adopt child is the urge that arises from desire personal individual who adopts child the. Motivation subjective This can covers reason like absence descendants or expert heir, or as business For obtain child birth. On the other hand, motivation objective in adopt child means do adoption from corner look interest the child concerned. By general, motivation objective also involves factor social and spiritual. Good people who have child biological or not, you

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<sup>5</sup> MUHAMMAD MUHSIN AFWAN, "ANALISIS WASIAT WAJIBAH BAGI ANAK SAUDARA KANDUNG DALAM SURAT EDARAN MAHKAMAH AGUNG NOMOR 3 TAHUN 2015 PERSPEKTIF MAQASHID SYARI'AH," 2024.

<sup>6</sup> Khotifatul Defi Nofitasari, "Wasiat Wajibah Kepada Anak Angkat, Non Muslim Dan Anak Tiri (Formulasi Hukum Wasiat Wajibah Dalam Pasal 209 Kompilasi Hukum Islam Di Indonesia Dan Perkembangannya)," *Al-Syakhsyiyah: Journal of Law & Family Studies* 3, no. 2 (2021): 25–47, <https://doi.org/10.21154/syakhsyiyah.v3i2.3370>.

<sup>7</sup> Achmad Jarchosi, "Pelaksanaan Wasiat Wajibah," *ADHKI: Journal of Islamic Family Law* 2, no. 1 (2020): 77–90, <https://doi.org/10.37876/adhki.v2i1.34>; Raja Ritonga, "Wasiat Wajibah Pada Furu' Waris (Analisis Dan Aplikasi Kewarisan Bagi Cucu)," *Jurnal Abkam* 9, no. 2 (2021): 353–74.

<sup>8</sup> Wibowo Sugeng, "Analisis Maqashid Syari'ah Terhadap Pasal 53 KHI Tentang Perkawinan Wanita Hamil" (IAIN Ponorogo, 2018).

<sup>9</sup> Ahmad Hafid Safrudin, "Tinjauan Kompilasi Hukum Islam Terhadap Status Harta Warisan Anak Angkat," *Salimiya: Jurnal Studi Ilmu Keagamaan Islam* 3, no. 2 (2022): 103–17, <https://ejournal.iaifa.ac.id/index.php/salimiya/article/view/699>.

<sup>10</sup> Achmad Jarchosi, "Pelaksanaan Wasiat Wajibah.."

can motivated in a way social and spiritual for adopt child . Besides , reason economics can too become motivation objective in adopt children , especially if parents biological No capable fulfil need child the<sup>11</sup>.

Article 171 letter h in the Islamic Law Book (KHI) explains that child lift refer to child whose care For life everyday , incl cost education , and responsibility answer the redirected from parents original to parents he picked up based on decision court<sup>12</sup>. On the other hand , Article 209 regulates about inheritance child lift . Article 209 paragraph (1) stipulates obligation for child lift For give will to parents he picked up amounting to 1/3 of the total inheritance . Temporary That , Article 209 paragraph (2) confirms that child pick up the ones that don't accept will will given will obligatory as much as 1/3 of treasure inheritance from parents he picked up<sup>13</sup>. With Thus , testament must understood as obligations established by law ( KHI ) for parents lift For give part maximum 1/3 of his legacy to child he picked up after die .

In Indonesia, there are a number of case about will obligatory in the Religious Courts where the judge's decision was no always in line with draft will obligatory in Formulation of Islamic Law. One of example the case is at the South Jakarta Religious Court . The DKI South Jakarta Religious Court is institution the judiciary has authority For finish case level First between individuals who are Muslim , incl in matter marriage , inheritance , wills , and grants , which are based on Islamic law and regulated in Compilation Islamic Sharia . The contents of the KHI, especially Article 209 paragraph (1) and paragraph (2) concerning letter will obligatory , Article 210 paragraph (1) and paragraph (2), Articles 211 to 214 concerning grants , and Article 957 of the Civil Code about inheritance , become reference in solution cases the<sup>14</sup>.

In 2013 , the South Jakarta Religious Court level First handle involving cases giving will obligatory for a children born outside wedding legitimate from partner husband wife .

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<sup>11</sup> E Sompie, "Kajian Yuridis Pengangkatan Anak Dalam Upaya Perlindungan Anak," *Lex Et Societatis* V, no. 2 (2017): 164–71.

<sup>12</sup> Sompie; G P Fatia and I N P Budiarta, "Pengaturan Pengangkatan Anak (Adopsi) Dalam Hukum Islam," *Jurnal Analogi* ... 5, no. 1 (2023): 34–40, <https://www.ejournal.warmadewa.ac.id/index.php/analogihukum/article/view/6559%0Ahttps://www.ejournal.warmadewa.ac.id/index.php/analogihukum/article/download/6559/4344>.

<sup>13</sup> Nur Aisyah, "Anak Angkat Dalam Hukum Kewarisan Islam Dan Hukum Perdata," *El-Iqthisadi : Jurnal Hukum Ekonomi Syariah Fakultas Syariah Dan Hukum* 2, no. 1 (2020): 101, <https://doi.org/10.24252/el-iqthisadi.v2i1.14137>.

<sup>14</sup> Mustating Daeng Maroa and Arianti A Ogotan, "Batas Persinggungan Kewenangan Mengadili Sengketa Hak Milik Antara Pengadilan Agama Dengan Pengadilan Negeri," *Jurnal Yustisiabel* 4, no. 2 (2020): 155, <https://doi.org/10.32529/yustisiabel.v4i2.734>.

Applicants First is a wife 37 years old , Muslim , and working as employee private . Whereas her husband is applicant second , 41 years old , Muslim, and in office as Manager Business development . After through the trial process , Chairman The DKI South Jakarta Religious Court determined a number of things , namely : a) the child who was given Name child Petitioner I and Petitioner II, who were born on March 2 2013, are results from outside relationships wedding between Petitioner I and Petitioner II, b) children the own connection strong civil law with Petitioner II, c) child it also has connection civil with Petitioner I, which is limited to liability provide need child until reach age mature or stand yourself , as well get will obligatory maximum 1/3 part , d) court instruct applicant For deliver decision This to the Population and Registration Service Civil DKI Jakarta Province , please note in the available list For objective the .

The judge's basis for consideration in set decision the among others , Article 43 Paragraph (1) of the Law Number 1 of 1974 concerning Declaring marriage that " Children born outside wedding only own connection civil with his mother and family his mother ." However , there is Decision Court Constitution Republic of Indonesia No. 46 / PUU-VIII/2010 dated 13 February 2012 (" Decision Court Constitution no. 46") which amends Article 43 Paragraph (1) of the Law Marriage becomes : " A person children born outside wedding own connection civil with mother and family her mother as well as with man as his father , who can proven based on knowledge knowledge and technology as well as / or other evidence is appropriate with Constitution For prove connection blood , incl connection civil with his father ." <sup>15</sup>.

However, Constitutional Court Decision No. 46 has not yet been supported by implementing regulations, giving rise to a legal vacuum, especially in terms of procedures for making birth certificates or inheritance letters for children born out of wedlock. Therefore that's a confession children out of wedlock still must through the application process application confession children in the Religious Courts . This matter in accordance with authority Regulated Religious Courts in Article 49 Paragraphs (1) and (2) of the Law Number 7 of 1989 concerning Court Religion and its explanation . Religious Courts have duties and authority For review , decide , and resolve matters at level First between people Muslim , incl in matter determination confession illegitimate child <sup>16</sup>.

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<sup>15</sup> Luh Putu Putri Indah Pratiwi, Dewa Gede Sudika Mangku, and Ni Putu Rai Yulianti, "Pengaturan Terhadap Kedudukan Anak di Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010," *E-Journal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum* 3, no. 1 (2020): 67–69.

<sup>16</sup> M A Putra, G Dilova, and R A Wulandari, "Akibat Hukum Penetapan Dispensasi Perkawinan Terhadap Anak Di Pengadilan Agama Pulau Punjung," ... : *Journal Of Social Science* ... 3, no. 4 (2023): 3635–46,

From the description it is visible that there is gap necessary laws dug more in , esp in matter giving will must to children born outside of legal wedlock . Difference between decision Panel of Religious Court Judges with appropriate regulations show exists nonconformity in taking decisions at each institution Justice . However , it's good Religious Courts and institution Justice other should use sources and references the same law , like Preparation of Islamic Law, Civil Code , and regulations legislation related . Therefore that's the formula problem study This is How Base Juridical Religious Court Judges in Granting Wajibah Will Rights to Non-Muslims in Decision Number 263 / P. dt.G / 2007 / PT.Sby and Number 21 / P. dt.G / 2016 / PT.MK concerning will obligatory to non-Muslims.

Study This including in type study law , that is something activity science based on methods , systematics and thinking specific purpose For learn One or a number of symptom law certain with analyze it . Study This using a material research library study library , that is the judge's decision as material principal law . Approach used is approach case . The case in question is case lawsuit will that has been decided that is Decision Number 263 / P. dt.G / 2007 / PT.Sby . Approach understood case is the ratio decidendi, i.e reason the law that judges use to arrive at the verdict .

Data sources used in accordance with method get it is secondary data sources . Reference main used is court judge's decision high religion about will mandatory to have strength law remains in the religious courts in Indonesia until 2016. Apart from that , material law secondary like laws and regulations about marriage , books of fiqh and ushul fiqh is also used . Data collection done with browse related decisions with letter will mandatory on the Supreme Court website . Deep data analysis study This is analysis document or analysis content analysis. Analysis fill can done in a way objective and systematic For describe fill something material document information . Analysis fill descriptive in study This is describe in detail a particular message or text certain . In research here , order text in court judge's decision high religion about will obligatory the analyzed . Next , the data is described with use technique reduction , data presentation , and verification ( drawing conclusion ).

## **Results and Discussion**

### **Maqasid al-Shariah**

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<http://j-innovative.org/index.php/Innovative/article/view/3953%0Ahttps://j-innovative.org/index.php/Innovative/article/download/3953/2811>.

Maqasid Al-Syariah in detail literally means objective sharia <sup>17</sup>law Ideally, religious teachings are established by Allah SWT and Rasulullah SAW in the Al-Qur'an and Hadith own specific goals. Sometimes the goal Can is known with easy and sometimes objective Sharia law is necessary dug more in for found it. Expert in Islamic law matter This called mujtahid, who has authority wide based on provision sharia law for explore objective sharia law. Ash-Shatibi is one of the expert Islamic law introduced draft maqasid al-Shariah. According to him, this maqasid al-Syariah can summarized in five aspects ongoing maintenance in a way hierarchical. Fifth aspect maintenance the is maintenance of religion (hifz al-din), maintenance soul ( hifz al- nafs ), maintenance reason ( hifz al-' aql ), maintenance offspring ( hifz al- nasl ), and maintenance treasure objects ( hifz al-mal). Fifth form preservation This is objective general Sharia law advocated by Ash- Shatibi <sup>18</sup>.

This Islamic jurist elaborate the objectives of this Sharia with clear examples, That is: <sup>19</sup>.

1. Allah SWT has set Sharia about obligation prayer and wisdom as well mark Good in carrying it out, fasting and its benefits for health, and paying zakat to help each other and purify treasure with objective main guard religious existence. Conversely, when somebody insulting religion, making fun of people who pray or fast, then He worthy get penalty certain.
2. Allah SWT decrees that everyone eats, drinks, rests, and takes care himself with good for his body still Healthy For carry out worship to Allah and society. Conversely, when somebody meddle safety other people's souls inside various shape and then threaten safety his soul, even until killed him, then Allah SWT brought him down severe punishment to the culprit.
3. Allah SWT decrees that everyone takes care capacity intellectual with good food and drink for the brain still Healthy. Conversely, when somebody consume drink or substance certain ones can change function mind and brain, then Allah SWT punishes the culprit with clear punishment.

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<sup>17</sup> Muannif Ridwan, "Ijtihad Pada Era Kontemporer (Konteks Pemikiran Islam Dalam Fiqih Dan Maqashid Al-Syariah)," *Jurnal Masobi* (2020), <https://doi.org/10.36339/jmas.v1i2.356>.

<sup>18</sup> Prysilla Lutfiatus Sholikhah, "Tinjauan Masalah Ash-Shatibi Terhadap Pernikahan Mahasiswa Aktif (Studi Kasus Mahasiswa Fakultas Syari'ah IAIN Ponorogo)" (IAIN Ponorogo, 2023); Sugeng, "Analisis Maqashid Syari'ah Terhadap Pasal 53 KHI Tentang Perkawinan Wanita Hamil."

<sup>19</sup> H Alivermana Wiguna, *Memahami Maqashid Al-Syari'ah Perspektif Khaled M. Abou El Fadl Dan Jasser Auda* (Deepublish, 2021); Fuat Hasanudin, "Maqâshid Al-Syari'ah Ibn 'Asyur: Rekonstruksi Paradigma Ushul Fikih," *ABHATS: Jurnal Islam Ulil Albab* 1, no. 1 (2020): 172–87, <https://journal.uin.ac.id/Abhats/article/view/29282>.

4. Allah SWT has set Shari'a so that people who have fulfil condition the can married, so Sharia institutionalize wedding the with state aid. On the other hand, when people channel need sexual with deviant way, This condemned by religion and in circumstances certain the culprit even can punished.
5. Allah SWT has set that everyone is looking sustenance, collect wealth and do your best with good / right and Allah SWT guarantees it existence his property for him. Conversely, when there are people who take, rob and or darken treasure belongs to someone else, then Allah SWT punishes the perpetrators are serious.

In context moment this, document form Constitution letter power, regulations government, and regulations areas also have objective certain. The purpose of all regulations issued by any organization can assessed from perspective maqasid al- syari'ah with the same and substantive way. This matter based on a premise that Allah SWT has set that Muslims must obey Allah and the Prophet Muhammad and obey ulil amri. Ulil amri in Surah an-Nisa (4: 59) it has been interpreted by commentators with various meaning. The meaning of ulil amri including judges <sup>20</sup>. Judges are people who have right for take decision on the cases submitted to they <sup>21</sup>. Therefore that their decision for can studied and studied for the goal, because made by the people who were given it authority by the sharia law of the Qur'an and Sunnah.

### 1. Wajibah's Will

Will obligatory related with problem property <sup>22</sup> Redirection treasure from one person to another can happen through various method. For example, grants is diversion treasure from one person to another as long as the person who inherits it treasure the Still life. Inheritance is diversion treasure to others when owner treasure the die. Whereas will is property given from one person still life to others, but diversion treasure the happen after the death of the person who gave it <sup>23</sup>.

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<sup>20</sup> Wilta Mauliah, "Konsep Ulil Amri Dalam Surat Al-Nisā'[4] Ayat59 Dan 83 Perspektif Wahbah Al-Zuhaili Dalam Tafsir Al-Munir," 2023.

<sup>21</sup> Dwi Nissa Kamalia Putri and Ahmad Izzuddin, "Pertimbangan Hakim Pengadilan Agama Singaraja Dalam Penetapan Nafkah 'Iddah, Nafkah Mut'Ah Dan Eksekusinya Pada Putusan Verstek Cerai Gugat," *Sakina: Journal of Family Studies* 6, no. 4 (2022), <https://doi.org/10.18860/jfs.v7i1.2518>.

<sup>22</sup> Sri Windani and Indri Meiliawati, "Kedudukan Anak Angkat Terhadap Harta Warisan Orang Tua Angkat," *Lex Lectio Law Journal* 2, no. 1 (2023): 34–42, <https://doi.org/10.61715/jlexlectio.v2i1.20>.

<sup>23</sup> Yanuar Suryadini and Alifiana Tanasya Widiyanti, "Akibat Hukum Hibah Wasiat Yang Melebihi Legitime Portie," *Media Iuris* 3, no. 2 (2020): 241–56; Fauzi, "Wasiat Wajibah Bagi Non Muslim Dalam Perspektif Hukum Islam Dan Hukum Positif Serta Kontribusinya Terhadap Hukum Keluarga Di Indonesia."

Probate law mentioned in the Qur'an in Surah Al-Baqarah (2: 180) and Surah An-Nisa (4:11-12), which requires Muslims for make letter will before die. Apart from the verses above, the will is also based on many tradition Prophetic. Among them is hadith of Rasulullah SAW which tells about Sa'd bin Abi Waqqas ' wish inherit more from half his property Because only own One child women, but the Prophet forbade it and only allowed inherited 1/3 of his wealth. So, at the level doctrinal, a person only can inherit maximum one third (1/3) of his assets to other people <sup>24</sup>. Furthermore, recipient a will that is not expert inheritance No entitled on his legacy based on hadith of the Prophet that No allowed make letter will for expert heir.

Will obligatory is will for expert inheritance <sup>25</sup> or relatives brother who doesn't accept inheritance from late Because circumstances certain, like No can accept inheritance or Because his religion different with late <sup>26</sup>. Although there is a mandatory word in term will mandatory, in fact will This No required in a way law, but rather only recommended <sup>27</sup> Some Islamic countries have adopt provision must will This, <sup>28</sup> including Indonesia with include provisions of Article 209 of the Formulation of Islamic Law <sup>29</sup>. However, will the obligations mentioned in chapter This only concerning Mother lift to treasure child he picked up. Based on explanation on can understood that will obligatory maximum 1/3 of treasure deceased, in its implementation fully is at under decision the result of the ijihad of a religious court judge. The judge is right determine nominally in accordance with benefit according to view a judge.

## 2. Analysis of Court Decisions Decision Number 263 / P. dt.G / 2007 / PT.Sby

Will obligatory is one of things that don't always brought to Religious Courts though is at within the jurisdiction absolutely. Until mid- 2018, a number of case has finalized by religious

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<sup>24</sup> Eko Setiawan, "Penerapan Wasiat Wajibah Menurut Kompilasi Hukum Islam (KHI) Dalam Kajian Normatif Yuridis," *Muslim Heritage* 2, no. 1 (2017): 43, <https://doi.org/10.21154/muslimheritage.v2i1.1045>.

<sup>25</sup> Achmad Jarchosi, "Pelaksanaan Wasiat Wajibah."

<sup>26</sup> Muhammad Rinaldi et al., "Pemberian Wasiat Wajibah Terhadap Ahli Waris Beda Agama," *DE LEGA LATA: Jurnal Ilmu Hukum* 2, no. 2 (2017): 351–72, <https://jurnal.umsu.ac.id/index.php/delegalata/article/view/1161>.

<sup>27</sup> A Rifqi, "Konsep Keadilan Wasiat Wajibah Bagi Anak Angkat & Anak Beda Agama Perspektif Fiqh, Khi & Yurisprudensi Di Indonesia," *Repository.Uinjkt.Ac.Id* (Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, n.d.), <https://repository.uinjkt.ac.id/dspace/handle/123456789/59131>.

<sup>28</sup> Naily Fadhilah, "Pembaruan Hukum Waris Islam: Wasiat Wajibah Mesir Dan Relevansinya Dengan Konsep Waris Pengganti Indonesia," *Al-Mawarid Jurnal Syariah Dan Hukum (JSYH)* 3, no. 1 (2021): 36–47, <https://doi.org/10.20885/mawarid.vol3.iss1.art4>.

<sup>29</sup> Risma Nurul Fadila, "Ketentuan Wasiat Wajibah (Waris) Bagi Anak Angkat Menurut Kompilasi Hukum Islam Pasal 209 Dan Kitab Undang-Undang Hukum Perdata Pasal 954," *Skripsi*, 2019, [http://digilib.uinsgd.ac.id/id/eprint/24782%0Ahttp://digilib.uinsgd.ac.id/24782/4/4\\_BAB I.pdf](http://digilib.uinsgd.ac.id/id/eprint/24782%0Ahttp://digilib.uinsgd.ac.id/24782/4/4_BAB%20I.pdf).

judges and posted on the Supreme Court website. This matter different with other cases like divorce, inheritance and continued marriage increase every the year in all religious courts in Indonesia. In one side, rarity case will obligatory can understandable Because Muslims are rare inherit his property except to a handful of people. From cases According to this decision, two Supreme Court religious judges were selected. Second decision the own strength law remain and will explained in a way short in explanation following.

Existing cases in Decision No. 263 / P. dt.G / 2007/. PTA. Sby about giving letter will obligatory to Non-Muslims. In terms of this, one Mother want his property for five of seven his son. One of fill his will is set aside part his property For given to one child Christian, for given after his death . When the mother died, one of them child the Muslim challenge his will. He brought problem This to Religious Court in the month December. In the end, one from seventh brothers the object or not accept court judge's decision for give will the to you Non-Muslim that, even moment is in Jember. The Religious Court stated letter mother 's will No valid.

Case This decided by a religious court judge in the month December with Case No. 204 / Pdt.G / 2007 / PA.Jr . The judge decides that the PSP, which is Christian, is one from seven child birth S as expert heir, meanwhile six child other are Muslims. The judge ruled PSP no can accept inheritance Because condition objective as Non-Muslim make it No entitled accept inheritance from Mother the Muslim. Judge thoroughly special to quote one proposition hadith that states that a Muslim does not can inherit from a non-Muslim and vice versa. However, the judge moved his position as expert inheritance mandatory 1/7 top base its closeness with his mother and affirmation Article 209 of the Islamic Inheritance Law allows it. In accordance with provision Islamic law, the judge decided that problem inheritance must through grant to PSP must takes priority than distribution treasure inheritance to six brothers other.

That case Then reach appeal level. In terms of here, applicant is one of you birth from six applicants, including PSP who are non-Muslims. The decision of the judge at the Surabaya High Religious Court confirmed it decision Jember Religious Court. Decision the state that the respondent PSP forbidden accept inheritance from expert his heir Because the status as a non-Muslim. However , he entitled accept letter will must through grant from treasure heir as listed in dictum number five, which is 1/7 of treasure inheritance .

This case concerning religious judge's decision to give inheritance to one from seven non-Muslim brothers through will obligatory . Initially , 5 of 7 siblings the get will from her

mother moment Still life . However , will the annulled by a religious judge. However , the judge ruled For give inheritance to the Christian brother through will obligatory . Judge actually apply draft the delusion put forward sect Hanafiah . The judge cancels will must the Because deed law the violate provision Sharia law regarding grants and wills , where grant given during life and will given after death . However then the judge returned one 's right non-Muslim brothers through will mandatory , because non-Muslims are not entitled inherit treasure owned by their Muslim mother but can accept treasure through will must .

Basically , there is connection tightly between gifts and wills in Islamic law , where both can given Good to Muslims and non-Muslims alike. This matter in line with draft jurisprudence that allows it a Muslim gives will to kafir zimmi (non-Muslims who own agreement peace with Muslims) and vice versa , because will the considered valid . The judges inside the matter discussed apparently base decision they are in thought fiqh this , which states that allowed for a Muslim for inherit to unbelievers and vice versa . In context inheritance must form grant , the judge's decision considered Correct according to the view of qiyas, especially qiyas aulawi ( mafhum muwafaqah ), which states that grant can given and received from and to non-Muslim relatives .

Approach reason Substantiveness also plays a role important in taking decision This . The judge considers benefit , or more benefits broad , for guard harmony family and prevent conflict . The principle of justice is also applied For ensure distribution proportional inheritance , regardless from religious differences . In the case of this , action a Muslim mother gives grant to his non-Muslim children are considered more can accepted , relevant with reality pluralistic society . Therefore that is , the ijti had of religious judges in give grant to non-Muslim relatives do not only based on rules fiqh , but also on principles justice and benefit , which is the essence of reason substantive . With So , decision This reflect adaptation Islamic law in context diverse Indonesian society , all at once strengthen unity in diversity Judges use also put forward reasoning substantive form draft thank you in look for road for non-Muslim without violate provision Sharia law . First , take care soul ( hifz al- nafs ). This case involve seven children ( incl one non-Muslim) which is expert inheritance from heirs who have die . However before died , heir make letter the will states that the non-Muslim child will accept part his property in form grant . Circumstances This can give rise to conflict big If No resolved in the religious court after heir die . Many cases dispute inheritance has cause fights , abuse and even murder in between expert heir . With Thus , treasure the real thing must protected for continuity life become reason collapse humanity and kinship . The

judge's decision to give letter will must to non-Muslims in form grant can become solution effective For avoid conflict between relatives you .

Ensure safety soul in Islamic law is the second after obligation protect religion within Constitution This . Problem inheritance can cause member families who don't accept inheritance violate law , even each other kill on treasure object . Practices sort of That No in accordance with the aims of sharia ( maqasid al- syari'ah ), which is a religion of justice , peace and benefit natural universe (QS. al- Anbiya ` (21): 107). Therefore that , take care wholeness family is objective main principles of Islam (QS. at-Tahrim: 66): 6). Impact loss consequence killed expert heirs who are not given part his legacy can result rift House ladder . Apart from that , it's a problem This will become complicated and will continues until generations to come come Because reply feud . This matter No close possibility happen war you between member family . As effort preventive For overcome problem Accordingly , it is the judge's discretion grant letter will through grant is appropriate action in accordance with objective Islamic law , because one function judge's decision in Islamic law is as mediator and intermediary as the party who terminates and resolves dispute .

Second , protection treasure objects ( hifz al-mal). Treasure object is something to strive for For obtained human , so own mark in life man . Heir absolute need inheritance from his parents . For ensure security treasure objects so as not to destroyed and dominated only by a handful expert heirs , religious judges prevent damage the with decide will obligatory to child non-Muslim , because child the No can obtain treasure object through inheritance . The judge decides that distribution treasure inheritance must done moment heir Still life . With so , heir watched transfer treasure inheritance and responsibility answer For share it to their non- Muslim children . Indeed , according to Islamic law , will must made after heir die . How the judge decides that will the shaped will means will the can made at the time heir Still alive , because will the made during his lifetime . The judge relied on two grounds strong ( maslahah ), in one side implementation will and on the other hand provides leeway For straighten up rights child non-Muslim without ignore rights Muslim children as it should be . Third , protect religion ( hifz al-din). Other considerations of the judges in decision This is necessity guard religious values . Although obligation uphold tall religious interests take priority in sharia law, however No thereby case in case This. If the judge prioritizes internal religious interests decision this, then you non-Muslim birth does not will Can get part from inheritance from parents they. With Thus, value obligation preserving religion within decision This seen by the judge from corner different view. The destruction of one's religion

is impact worst from dispute heir, because if someone's religion tampered with, then He has lost meaning as man. Many cases show this that member family No get inheritance, usurp inheritance from relatives you other, or do action destruction form burning, etc. If p This happen, can impact negative for continuity life Muslims in the middle his non-Muslim brothers. Eventually all problem This can endanger security confidence somebody. Therefore That's very wise for follow steps of ijihad and development laws carried out by judges give letter will must form grant to expert inheritance non-Muslim for guard integrity of religion and belief.

Fourth, take care integrity of lineage family ( hifz al- nasl ). The judge's decision to give inheritance in will obligatory to non-Muslim children can give contribution positive for maintenance connection kinship between children expert heir . The judge opined that the consequences are very serious If a non-Muslim children do not get part from inheritance from his parents only Because religious differences . In terms of lineage , he born and have the same parents with you her other siblings . This fact separate it from his brothers Because his wealth . With the judge's decision , he will still bound with his brothers , so bond binding family they still intact . Therefore that is , wealth and obligations maintain those who occupy it order fifth in maqasid al-syariah no can and cannot should become reason For separate them , though There is a way that is justified by sharia for give it to non-Muslims, that is through grant .

Court judge pattern high religious judges in decide case will obligatory for non-Muslim No only based on qiyas but also in line with rule coaching stated by Tono that decide case filed which is not own base law or No clear must studied content existing meaning inside it <sup>30</sup>. Provision chapter This give understanding that as the main organ court and so on executor power judiciary , the judge is obliged find law in something case although provision the law No There is or No clear . Decisions of religious court judges and courts high level of religion regarding will obligatory for non-Muslim it's not decision made in a way No conscious and full hesitation as stated by Afrianto <sup>31</sup> but effort look for thank you from every considerations taken by the judge in notice benefit non-Muslim in the religious world ( Islamic judiciary ). Made it happen justice The judge's efforts to give will must through grant No limit understanding law heir , will obligation and grant only in the religious sphere . Inheritance

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<sup>30</sup> Sidik Tono, "Wasiat Wajibah Sebagai Alternatif Mengakomodasi Bagian Ahli Waris Non Muslim Di Indonesia" (Universitas Islam Indonesia, 2013), <https://dspace.uui.ac.id/handle/123456789/9416>.

<sup>31</sup> ( Aprianto , 2023)

law explain that someone who leaves Islam (apostate) does not entitled inherit from parents the Muslim . Likewise , a Muslim does not can inherit from a non-Muslim. However, in decision this, the judge took another step with request letter will and grant compensation to member family non-Muslims. Judge bases his view with state that Islam is not a discriminatory religion , but rather an embracing religion all over people man in a way equal and constitutive grace for natural universe (QS. al- Anbiya ` (21): 107).

The judge also gave understanding that Islamic law does not stiff . According to the judge, Islamic law can give protection and a sense of justice even to non-Muslims. This matter explained in a way long wide in the Koran, including in QS . an-Nisa ` (4): 92) and the Sunnah of the Prophet SAW. The judge didn't only guided by rules special purposeful inheritance For prevent mixed inheritance between Muslims and non-Muslims, but also guided by the rules justice generally contained in verses of the Koran and the legacy of the Prophet Muhammad. Therefore that's the decision taken based on principle mashalih al- murlah .

Another aspect that becomes which is form the judge's reasoning in give will obligatory to expert inheritance non-Muslim that is prohibitive provisions giving inheritance to expert non-Muslim heirs , firstly , sequentially historical set during the war past between Muslims and unbelievers. Prohibition This enforced For protect faith and wealth object Muslims from domination expert infidel heirs who can used as tool war oppose Muslims themselves . Remember situation moment This Where No There is Again war between Muslims and non-Muslims, then provision Article delimiter is seen No need Again . Second reason related with the judge's obligation to look for justice in every the matter being investigated . Obligation This arise from one from principle procedural law that prohibits judges from cancel something case Because No have Constitution because the judge has authority law For take valid decision .

Third reason is use reasoning analogical in determine binding will , which appears as application principle *ius curia novit* by religious court judges . In doing study law to publishing binding will for expert heirs of different religions, the judge uses method reasoning with analogy and consider provisions other laws that have equality and equality .

fourth reason used by the judge in decide is will grant will must to expert heirs of different religions are exists law Islamic inheritance in system law domestic. Even though in Indonesia, the law Islamic inheritance still still exists and lives side by side as well as develop with law inheritance other that is law inheritance custom and law Western heir. All three made choice law for Indonesian citizens . He found it the law arrange about binding will for expert heirs

of different religions constitute effort application Islamic law in the middle pluralistic Indonesian society in a way social, cultural, legal and religious. Approach like This will cause law Islam lost Power interesting, because is a society that is strongly influenced by living and developing spatial and legal norms in Indonesian society. Because it does not fulfil need public . The people around him treat him with fair .

More further , with give will to expert heirs of different religions as rewards on acquisition rights , actually Islamic law provides image positive which is not exclusive and discriminatory , so precisely placing non-Muslims in second class status . If you obey law the original, expert excluded heirs Because religious differences still considered as someone who doesn't can inherit Because something because, then Islamic law is viewed as threat for abolish law heir. More Far again , compared with system law inheritance other , circumstances this is so not profitable for Islamic law . Because , p This will lost with system law other heirs who do not put religion as barrier in accept inheritance . This reason is also emphasized by the objectives Islamic law for prevent loss to life man .

In other words, the judge can find priority thank you although No proven in a way clear with the arguments of the Qur'an and Sunnah. Although Thus , the judge remains emphasize that one non-Muslim brothers in case This it's not expert rightful heir accept legacy , but He can accept inheritance through will obligatory . This matter motivated by the judge's view that No allowed enter non-Muslim to in groups of infidels who are hostile and fighting Muslims. Responding matter that , you can understood that the decision of the religious judge is one of them form of internal ijihad a framework for Islamic law reform that puts forward values justice .

## **Conclusion**

Based on the explanation regarding the granting of mandatory wills to heirs of different religions in the Religious Court Decision Number 263/Pdt.G/2007/PTA.Sby , the conclusion drawn from the results of this research is reason substantive The underlying basis for judges in making their decisions is religious protection (hifzu'd-din), protection of life (hifz'un-). nafs), preservation of reason (hifz al-akl), protection of wealth (hifz-i mal), protection of offspring (hifz-i nasl). The principle of justice demands that all individuals, regardless of their religion, should be treated fairly in terms of inheritance rights. Public benefit, which includes security and integrity, is an important aspect of Islamic teachings. Apart from that, qiyas aulawi is also the basis for judges in their ijihad, namely an analogous method based on the principles of Islamic law, to interpret that in cases of gifts, non-Muslims

can receive property as a gift or donation. On the other hand, the concept of *maslahah murlahah*, which is a consideration of the general benefit without any specific texts (*shar'i propositions*), to interpret that in certain situations, giving a share of inheritance to non-Muslim heirs can be a general good or indisputable *maslahah*.

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