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**Reconstruction of Different Religion Inheritance
through *Wajibah* Testament**

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RECONSTRUCTION OF DIFFERENT RELIGION INHERITANCE THROUGH WAJIBAH TESTAMENT

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Abstract

The basic principle of the judge in the decision of the Supreme Court No.16K / AG / 2010 was borrowed which according to some heirs of non-Muslim thinkers of Islam inherited inheritance through borrowed roads. Their opinion as stated by Classical Islamic Scholars. The authorities must exclude part of the legacy of the person who died as proof of him even though he did not inherit it beforehand, based on the premise that the authorities must ensure the rights of people who have not been fulfilled. According to the legal system in Indonesia, the body will include being borrowed into the absolute competence of religious courts based on Law No. 7 of 1989 concerning the Religious Courts related to Law No. 3 of 2006 concerning amendments to Law No. 7 1989 concerning the Religious Courts. Judges who refer to the inheritance of Islam in Indonesia are conducted by judges in the religious court environment with the first absolute level of competence as mandated by law.

Keywords: *Construction, Reconstruction, Different Religion Inheritance, Wājibah Testament*



A. Introduction

There is no statutory provision that explicitly grants the *al-waṣīyyat al-wājibah* right [compulsory will (Ahmad, 2017: 22) or mandatory will (Nasir, 1990: 272)] to the non-Muslim heir to get a share from the Muslims heir. However, there are implicit gaps that allow the text of Law to be interpreted that non-Muslim heiress gets a share from Muslim heir from through the *al-waṣīyyat al-wājibah* or the other provision, in the field of Islamic heir law (Andi Syamsu Alam, interview at November 10, 2015).

Islamic scholars (*'ulamā'*) based the *al-waṣīyyatal-wājibah* on Q.S. al-Baqarah (2): 180. However, they have a different opinion about the law and the status of the testament in that verse, whether it is *muḥkamah* (perfected) or *mansūkhah* (abrogated). Some classical Islamic scholars, like al-Ṭabarī (d. 310/923) (al-Ṭabarī, 1954: 390–396), al-Qurṭubī (d. 671/1273) (al-Qurṭubī, 2006: 91–114), and contemporary Islamic scholar, like Muḥammad 'Alī al-Sāyis (d. 1396/1976) reported (al-Sāyis, 2010: 100–103) that Ibn 'Abbās (d. 68/687-8), Masrūq (d. 62/682), al-'Alā' ibn Ziyād (d. 94/712-3), Ṭāwūs (d. 106/723), al-Ḥasan al-Baṣrī (d. 110/728), al-Ḍahhāk b. Muzāḥim (d. 114/732), and Muslim ibn Yasār (d. 100/718) argued that the verse is a *muḥkamah* (perfected) which means that the law of testament is compulsory (*wājib*) to both parents and relatives who get an heir and who do not.

In a further explanation, al-Ṭabarī sees that the verse is included in the *muḥkamah* verse. However, he opinionated that the verse deceived by the verse of heir (al-Ṭabarī, 1954: 394–396); and Abū Muslim al-Aṣfahānī (d. 322/934) compromises the different opinion with *al jam'u* (combined) method. The meaning of the verse is combined to the verse of 1 and 11 of Q.S. al-Nisā' and the verse of 90 of Q.S. al-Naḥl (al-Anṣārī, 1921: 16–17; al-Asfahānī, 2007: 54). Their opinion is very likely related to the hadith narration of of Usāmah ibn Zayd (d. 54/681), "A Muslim may not inherit from an infidel nor an infidel from a Muslim." (al-Bukhārī, 2015: 1076; al-Naysābūrī, 2015: 517).

Several other classical scholars of Qur'anic commentators, like al-Baghawī (d. 516/1122) (al-Baghawī, 1989: 192) and Ibn Kathīr (d. 774/1373) (Ibn Kathīr, 2000: 166–172) and the contemporary one, like al-Ṣābūnī (1980: 100–104) reported that among *ṣaḥābah* (companions) like Ibn 'Umar (d. 73/692), Abū Mūsāal-Ash'ārī (d. 48/668), and *andṭābi'īn* (followers) like Sa'īd ibn al-Musayyab (d. 94/712) argue that verse of 180 of Q.S. al-Baqarah has been abrogated by the verse of 11 of Q.S. al-Nisā'. So that, the heir is given to those who receive heir or those who do not gain it. This opinion is based on the hadith as follows:

Narrated by Ibn 'Abbas: The custom (in old days) was that the property of the deceased would be inherited by his offspring; as for the parents (of the deceased), they would inherit by the will of the deceased. Then Allah canceled from that custom whatever He wished and fixed for the male double the amount inherited by the female, and for each parent a sixth (of the whole legacy) and the wife an eighth or a fourth and for the husband a half or a fourth (al-Bukhārī, 2015: 1073).

Al-Shāfi'ī (d. 204/820) is one of '*ulamā'*' who argues that the verse of 180 of Q.S. Al-Baqarah is abrogated by the verse of heir law. He sees that as Allah has ordered testament and set the portion of the heir, the testament is regarded to be voluntary (*sunnah* or *tatawwu'*) (al-Bayhaqī, 1990: 163–166; al-Shāfi'ī, 2009: 22).

Regarding legal formal status in determining the *wājibah* testament (compulsory or mandatory will), the religious court judges refer to the provisions of the Islamic Law Compilation (*Kompilasi Hukum Islam* [KHI]) as stated in Presidential Instruction No. 1 the Year 1991, especially article 209 stating that the compulsory or mandatory will applies only to the adopted child and adopted parent. The religious court judge in Indonesia as one of the law enforcement apparatus has implemented the verdict function on matters submitted to him by initial judicial consideration to the verdict. It is no room for doubt, through the verdict judge has taken part in Islamic legal thinking especially when his verdict covers the renewal of Islamic law (Manan, 2006: 311–327).



B. Literature Review

Al-waṣīyyat al-wājibah is a branch of science that is closely related to inheritance, but rarely covered in society. It was originally introduced in Egypt in 1946 as a provision in the law known as the code of will. An introduction was then made in several other Arab countries, such as Syria, Lebanon, and Morocco (Jusoh et al., 2019). Conditions are provided based on cases when a person needs and has the legal right to inherit from his ancestors, but this is hindered by certain reasons. Their rights are usually blocked because their father or mother overtook their grandparents. Because of this, they were excluded from the heirs of their grandparents, although they needed to be able to inherit mainly because they were orphans (Jusoh et al., 2019).

In Indonesia, *al-waṣīyyat al-wājibah* is recognized as an "Indonesian fiqh" forruling adopted children in the case of inheritance. According to the general role of Islamic law, adopted children cannot receive any inheritance from the property of their adoptive parents. However, a collection of Islamic law states that the adopted child must accept *al-waṣīyyat al-wājibah* from their parents. So, the adopted children have the right to receive a certain portion of the property of their adoptive parents (Minhaji, 2008: 296). The provision of the compulsory or mandatory will to the interfaith family members does not merely happen without judicial consideration that the person who gives heir and gets heir to have a harmonious relationship, mutual respect, and mutual assistance (Hamdanah, 2018; Jusoh et al., 2019; Ropiah, 2018; Sewenet et al., 2017).

For Indonesia context, the basis of the Supreme Court verdict in article 368 K/AG/1995 (Arif, 2017; Maulana, 2013; Novandy, 2018), the Panel of Judges to the Court of Cassation argues that the interfaith family members may obtain heir through the compulsory or mandatory will that the authority has to issue part of the dead's heir as a testament even though he previously did not make will, based on thinking that authority has to guarantee the rights of people. The reason of the Supreme Court in case number 51K/AG/1999 (Mukhlis, 2017; Nugraheni et al., 2010; Syafi'i, 2017) is only referred to the compulsory testament. As for the case number 16 K/AG/2010, the Supreme

Court based verdict on the marriage of the heir with his wife that has lasted for 18 years. Supreme court judge sees the fact that the wife has devoted herself to her husband and family for a long time (Abubakar, 2017; Ahmatnihar, 2019; Ropiah, 2018; Sufiati & Anggraeni, 2017).

In addition, there is a legal reason that their marriage is legitimate and recorded in civil records so as to refer to civil law and the judge considers that the wife is not included in the *ḥarbī* disbeliever or the warring enemy (Averroës, 1994: 440) but *dhimmi* disbeliever or non-Muslim who enjoys the *dhimma*, or “protection” of the Muslim state (Lumbard, 2009: 147), that the non-Muslim wife is entitled to inherit the heir based on the the *wājibah* testament .

Thus, the reasons underlying the judge’s decision in the Supreme Court verdict number 16K/AG/2010 on giving heir to non-Muslims:

1. Supreme Court considers it as a *wājibah* testament.
2. Wife has been serving her husband for about 18 years.
3. Wife is not supposed as heir.
4. Law argues that the relationship between heir and the heiress (husband and wife) is recorded in the civil record.

Based on the above argument, judge has the authority to deviate from the provisions of written law, but the deviation intended to make justice among community. The judge has to satisfy clear and sharp legal considerations by considering various aspects of law. The judicial verdict from judge which then serves as the basis for a verdict which has a similar case is referred to as jurisprudential law intended to avoid any disparity of the judge’s verdict in the same case. For this context, this study is focused on the inheritance construction through the *wājibah* testament and the inheritance reconstruction of interfaith marriage through the *wājibah* testament.

C. Method

This research was conducted using qualitative methods (Burton, 2013: 55; Hess, 2014). While the data submission technique is done through three types of methods, namely: interview (Vincent-Jones &



Blandy, 2017: 37–53), book review (Curtis, 2005: 33–75), and documentation (Dobinson & Johns, 2017: 18–47).

Interviews are conducted directly through informants (Madinger, 2000: 149). In this case the authors conducted interviews directly (Frances et al., 2009) to the Supreme Court judge about the inheritance of different religions. The technique is carried out to explore important information from informants related to the problem (Anastas, 2012: 312) of inheritance of different religions.

Book Review is a data collection technique by taking the main ideas (Snyder, 2019) about the inheritance of different religions. This article examines written data such as books (Ramdhani et al., 2014), like fiqh books (Hadi, 2017), Qur'anic commentaries (Hussin et al., 2012), hadith (Idri & Baru, 2018), papers, articles, and other written sources (Palmatier et al., 2018) relating to inheritance of different religions, such as Islamic Law Compilation and the Supreme Court Decree on the inheritance of different religions.

Documentation is carried out by means of a review of written data (Bowen, 2009) in the form of official state documents issued by the Supreme Court ruling on the inheritance of different religions.

D. Discussion

Provisions regarding the number of wills that are allowed to other than the heirs who get the inheritance, in addition to the words of the Prophet to Sa'adibn AbīWaqā when the farewell pilgrimage (*hajjwadā'*), according to al-Qurṭubī (d. 671/1273), adopted children in Islamic law, not including heirs but are entitled to get a share of the inheritance of their foster father based on the verse of 180 of Q.S. al-Baqarah. Some scholars of Qur'anic commentators argue that the understanding of relatives in the verse is not limited to people who are related by blood or marriage so that the circumcision can be performed for the benefit of others who have a special relationship with the testator or those who need help can receive testament or will (al-Qurṭubī, 2006: 91–114).



Ibn Kathir (d. 774/1373) explained that the verse of 180 of Q.S. al-Baqarah contains mandatory wills before the arrival of verses on inheritance. After the recitation of the verses on inheritance, the inheritance obligation is eliminated specifically for parents and close relatives who inherit. He further asserted that the verses of inheritance did not invoke overall inheritance law, but only raised a part of the material of the common testamentary obligations. Therefore, the inheritance verses only raise the wills law for people who get the inheritance only (Ibn Kathir, 2000: 166-172). In a general explanation of the fundamentals of Islamic law, according to al-Ghazali (d. 505/1111), any problems that contradict the Koran, *sunnah* (Prophetic traditions) and *ijmā'* (Islamic scholars' consensus) must be discarded. There is not a single Islamic law that is contradictory to benefit or in other terms, there is not a single Islamic law that makes mankind harmless (al-Ghazali, 1993: 172, 174-175).

Ibn Qayyim al-Jawziyyah (d. 751/1350) reaffirmed theoretically by equating sharia with justice. The decision of political authority he sees as legitimate as sharia if it contains the values of justice because sharia is a representation of justice. On the other hand, justice initiated by Ibn Qayyim refers to the judge's efforts to find the truth and provide the law if there are violators who have no formal strict rules. He stressed that judges were able to capture the truth, even in conditions of minimal evidence and minimal formal rules. Judges' efforts to find the truth on a practical level are a form of procedural justice (al-Jawziyyah, 1994: 21).

Wahbah al-Zuhayli argued that the transfer of assets through a will is a necessity that must be done by someone who has property, while he/she feels his/her end is near. On the other hand, Allah has not revealed verses of the Koran that contain provisions regarding inheritance. This will serve as a guide for the relatives he left behind in distributing the assets he left behind. However, when the verse about inheritance has come down, then the area of validity of the will is only two things. First, a will can no longer be given to heirs, as the Apostle Saw said when giving a sermon on the farewell pilgrimage. Second, the provisions regarding the number of wills that are allowed to other than



the heirs who get the inheritance, as the Prophet said to Sa'adibn AbīWaqāṣ when the farewell pilgrimage (al-Zu aylī, 2014: 7-8).

Yūsuf al-Qara āwī is one of the scholars who stated that there was an inheritance between Muslims and non-Muslims. According to him, Islam does not obstruct and does not reject the path of goodness that is beneficial to the interests of its people. Moreover, inheritances that can help to monotheism (*tawhīdullāh*), obey God, and help uphold His religion. In fact, wealth is intended as a means to be obedient to Him, not to immoral to Him. In addition, scholars who allow the inheritance of different religions are based on good fortune in the context of preserving religion, descent, and wealth. Therefore, they only allow Muslims to inherit from non-Muslims, not vice versa (al-Qardāwī, 2001: 128).

Yūsuf al-Qar āwī states on opinions that allow Muslims to accept from infidels with the following reasons: First, Islam must not prevent the property from being used to defend monotheism, obedience, and help the religion of Allah. Second, in the use of property, it is intended for obedience to God, not disobedience. Third, the first person to use property is a person of faith. If the laws and regulations in force in a country determine the ownership of inheritance, it is not appropriate to refuse and let the infidels enjoy using it while doing so, it will endanger the Muslims (al-Qardāwī, 2001: 128).

Based on the principle of legal flexibility, according to Satria Efendi, judges need to focus more on upholding justice than just focusing and 'rigid' on the legal text. Therefore, the legal text is the media to achieve the goal, namely to uphold justice (Zein, 2004: 78). For Indonesian context, Hazairin stressed the need for a formulation of the Islamic law that is unique to Indonesian people (Hazairin, 1963: 15).

Relating to the *wājibah* testament, Abdul Manan said that legally and formally in determining it, the judges of the Religious Courts use Islamic Law Compilation's provisions in accordance with Presidential Instruction No.1 Year 1991. Like one of the Islamic law enforcers in Indonesia, the Religious Court Judges have been able to settle and decide cases submitted through the court. Through these decisions, it can be

concluded that the judges have played an active role in developing ideas and reforms in Islamic law. The judge's decision to give compulsory testament to non-Muslims was made in consideration of the benefit. This consideration is related to the condition of non-Muslim heirs who are in dire need. In addition, when he was still alive, the heir was never harmed by the heir of the non-Muslim (Manan, 2006: 311–327).

According to Andi SyamsuAlam, the most important aspect of the decision was the aspect of justice and community conditions that differed from then to now. In ancient times, the Religious Court firmly did not give inheritance to non-Muslims because it relied on the hadith. However, further developments show that the relationship between the people in Indonesia has been such a situation, it is necessary to think justice among the judges. Therefore, the Supreme Court judge has the thought that non-Muslim wives are not heirs, but because he has a marital relationship, it is considered that it is very fair for wives of different religions to get a share. Justice for non-Muslim wives is analogous to justice for adopted children who get part of the obligatory will. It would be unfair if an adopted child gets an obligatory will, especially since he is a wife just because of differences in faith. Based on this, the provision of compulsory testaments to non-Muslims is appropriate, because non-Muslims are not heirs'law (Andi SyamsuAlam, interview, November 10, 2015).

According to Mukhtar Zamzami, Decision No. 16K / AG / 2010 actually relies on the thought of Yūsuf al-Qara āwī. He strengthened the judge's ruling about the mandatory will. This proves that judges pay attention to the diverse conditions of Indonesian society, according to the rule: "that the law changes with the change in place and time". That is, the judge did not give a decision based on the opinion of Yūsuf al-Qara āwī which allowed the inheritance between Muslims and non-Muslims. This is due to the condition of Indonesian people who have different understandings of inheritance of different religions. Some allow and some don't. On the other hand, the right to use the rule: Does not make self-harm and does not make other people (Mukhtar Zamzami, interview, November 25, 2015).



As the Hadith of the Prophet SAW said: From ibn Abbas, the Prophet SAW said: "It is not permissible to make any harm to oneself and it cannot make another person ill (HR Ahmad and Ibn Majah). So, in this case, the judge does not use the path of inheritance, but through a will that is permitted both by Islamic law and the laws and regulations in Indonesia. Thus, there is no harm in the decision. In addition, there are also other reasons that were raised, among others, that interfaith wives had lived in harmony for 18 years. Related to this, time or period does not become the main benchmark in the determination of compulsory testaments to religious wives. But caused by the devotion and loyalty of the wife to a husband who lives in harmony and peace (Mukhtar Zamzami, interview, November 25, 2015).

The Supreme Court ruling of the Republic of Indonesia on the *wājibah* testament refers to the Presidential Instruction of the Republic of Indonesia Number 1 Year 1991 on Islamic Law Compilation and some other legal considerations that follow, including legal consideration that refers to customary law and Law Number 4 Year 1979. In addition, regarding the *wājibah* testament, the Supreme Court specifically issued the Supreme Court's circular letter dated April 7, 1979 Number 2 Year 1979 on Children Adoption that has legal consequence of the *wājibah* testament in sharing inheritance.

In Islam the tradition of child adoption is acceptable with the following amendments:

1. The genealogy of the adopted child is not connected to his adopted parents, but attributed to his biological parents.
2. The status of child adoption does not cause a legal relationship of inheritance between adopted child and adopted parents as well as their families (Pagar, 2001: 11-14).

The position of adopted child and adopted parents in the inheritance law of Islamic Law Compilation has been explicitly set forth in article of 209. In general, the status of adopted child and adopted parents in Islamic Law Compilation remains as their original status, that the

adopted child has a biological relationship with his biological parents based on the opinions of the jurists. Therefore, it is clearly noted that child adoption does not change his genealogy and biology status in terms of family relations. The above concept of child adoption differs from the adoption concept regulated in today's growing positive law saying that adopted child is connected to his adopted parents, which leads to sharing inheritance.

Although child adoption does not change the descent status, the adoption, however, does not decrease the value and meaning of child adoption, especially when seen from the following points: *first*, child adoption makes the law of nurturing child daily life change which is initially under the control of his biological parents to his adopted parents; *second*, the responsibility of tuition fees that is initially handled by his biological parent is moved to his adopted parents; *third*, child adoption is seen to be inadequate if it happens only under agreement of two families as formalized through traditional and religious ceremonies, but the adoption must be legalized through a court verdict, so that the adopted child will have clear and legal status before the law; and *fourth*, the status of legitimate adopted child as mentioned above will lead to the legal consequence of inheritance, in which the child will receive a *wājibah* testament of maximally one-third of his adopted parent's property. Conversely, if the adopted child dies the adopted father will receive the *wājibah* testament of one third of his adopted child's property (Pagar, 2001: 9-14).

According to Compilation of Islamic Law, adopted parents are required to testify the *wājibah* testament for the benefit of their adopted child as they have received the responsibility to take care of all the needs of their adopted child. Therefore, the Qur'anic verse states that even though the adopted child does not get the inheritance from his adopted parents, when considering the benefits for the child that is emotionally and socially closed to his adopted parents, the adopted parent still has responsibility as Allah says in Q.S. al-Zariyat, verse 19 "And do not make [as equal] with Allah another deity. Indeed, I am to you from Him a clear warner".



Based on the verse above, regarding the obligation of adopted parents to fulfill their responsibility to their adopted child, the adopted child is similar to a poor person, in which he needs help from his adopted parents to get a good future, especially in terms of his economy. The Compilation of Islamic Law consistently remains in accordance with the *farā'id* which places the position of adopted child outside his heir, the same as the law in fiqh; however it adopts limited customary law into the value of Islamic law due to transferring responsibility of biological parents to adopted parents in nurturing his everyday life.

A principle applied to make rules on the *wājibah* testament of adopted child as provided in the Compilation of Islamic Law as part of fiqh law is merely the consideration of *al-maṣlahat al-mursalah*. This means that with benefit consideration and the custom of our community (for instance, the refusal to polygamy though a couple have no child for many years) the *wājibah* testament for the adopted child may be granted. The adopted child can be formulated as a person worthy of being a child of the couple's family, who is raised, educated and nurtured and by turns he will nurture his adopted parents in the future time. This *wājibah* testament is applied as a way to equate inheritance for that who cannot inherit, but the person has very close inner relationship with adopted child even though they do not have biological relations. Thus, the *wājibah* testament is essentially set to create benefits for a person who deserves it. As a testament has the potential to realize a specific justice related to personal interests and has the effectiveness in spending property, the development of social and family relations is reflecting the concern of the heir towards the heiress.

The article of 209 of Compilation of Islamic Law that regulates the *wājibah* testament differs from the *wājibah* testament in Muslim countries that generally identifies an orphan as the recipient of the *wājibah* testament. Indonesian Islamic jurists through Compilation of Islamic Law, have used the *wājibah* testament to grant the right to adopted child and parents with a maximum amount of one third of the inheritance.

The idea behind the spirit of the *wājibah* testament construction is that Indonesian Muslim jurists have obligation to bridge the gap between Islamic

law and customary law. As a matter of fact, that Islamic law strongly rejects the adoption institution, while Muslim families in Indonesia practice adoption. Thus, the Islamic jurists in Indonesia try to accommodate the existing value system in both laws by adopting the *wājibah* testament derived from the Islamic law as a means to receive the moral value behind the practice of adoption in customary law. According to RatnoLukito this effort should be taken because social reality shows that people who practice adoption, adoptive parents always think about the welfare of their adopted child when they pass away (Lukito, 2008: 111).

The presence of Compilation of Islamic Law that establishes the *wājibah* testament of adopted child and adopted father which is different from the *wājibah* testament in Islamic countries can stimulate the growth of anticipative understanding of the development of legal necessity. That article 209 which regulates the *wājibah* testament through Islamic Law Compilation is the success of the Indonesian people who have a connection with the progressive legal spirit. Islamic Law Compilation, especially chapter 209, has shifted the provisions of inheritance law in the Jurisprudence classical books. After the Islamic Law Compilation's presence, some articles governing the inheritance law in Indonesia can be seen to be "native Indonesian law", as this law applies to all native Indonesian citizens, this inheritance law is seen to be the fulfillment of the Indonesia's Islamic jurists that has emerged since the 1950s, which was introduced among others by Hasbi Ash-Shiddieqy who advocated for the jurisprudence (Islamic law) applied in Indonesia is a purely Indonesian Jurisprudence, which is in accordance with the culture of Indonesian society (Ash-Shiddieqy, 1966: 42; Najib, 2011: 57). In addition to Hasbi, Hazairin emphasized the need for Islamic unique law formulation for Indonesian people. This idea is presented at the opening of Islamic Higher Education in Jakarta (Hazairin, 1963: 15).

According to Muhammad Daud Ali, (Baharuddin, 2008: 105) the compilation of Islamic Law Compilation, in particular the article related to the *wājibah* testament, always concern the benefits in matters categorized as *ijtihādī*. Therefore, it is hoped that in addition to maintaining and



accommodating the law aspiration and the justice of society, Islamic Law Compilation will be able to act as a social engineering for the Indonesian Muslim community (Ali, 1993: 268).

Abdul Manan stated the similar opinion to Daud Ali's, that the rule renewal, (Manan, 2008: 298) when viewed from its substance has a purpose to realize *maslahah* for the benefit of man, in terms of preserving religion, soul, intellect, wealth and descendants which is called in the *fiqh* term, *al-kulliyatal -khamsah*. The practice of *maṣlaḥah* theory in solving various legal issues has inspired Islamic law experts in Indonesia to use this theory in the framework of Islamic law reform, either by establishing laws and incorporating Islamic legal values into national legalization; while Umar Syihab's comment that the Indonesian regulation that tightens polygamy except in the most urgent circumstances is a law which is in line with Islamic law. And the fulfillment of the conditions within the rule, a polygamous man will not get any difficulty in his household due to his wives insistence (Syihab, 1996: 120-121). This is in line with Satria Effendi's statement that judges need to focus more on enforcing justice rather than focusing on rigid legal texts because legal texts constitute means to achieve the goal of justice enforcement (Zein, 2004: 78).

The reconstruction of interfaith inheritance through the *wājibah* testament of Islamic Law Compilation is not only applied to adopted and adopted parents but also to non-Muslim wife from Muslim husband, where religious difference remains one of the barriers in inheritance. Regarding religious difference as the barrier of inheritance, this rule makes many difficulties in areas where the members of family embrace different religions, (Anderson, 1994: 85) including Indonesia.

As for the reconstruction, due to the absence of positive law that underlies the provision of *wājibah* testament for a non-Muslim encourages the Supreme Court to make legal discovery in deciding these cases based on the provisions of Article 10 of the Judicial Power Law stating that "Court is prohibited to refuse examining, judging and deciding a case that was proposed under the pretext that the law is absent or unclear, but the court is obliged to examine and judge the case it" (Law Number 48 Year

2009 on the Judicial Power, contained in the State Gazette of the Republic of Indonesia Year 2009 Number 157). In other words, the court must find its own law independently. In this regard, in Article 5 paragraph (1) of the Law, there is stated that “Judge and judge of Constitution must explore, follow and understand the legal values and sense of justice that lives in society. This provision is the legal basis for Islamic Law Compilation to be applied as an indirect reference or a guide. The provision of above article is in line with article 229 of Islamic Law Compilation that says “Judge in resolving cases filed to him must pay attention to the legal values that live in society, so that his decision is in accordance with a sense of justice”.

The Supreme Court’s verdict expresses that the *wājibah* testament has justice value (philosophical aspect) and benefit value (sociological aspect) required by the surah al-Baqarah verse 180. The legal reasoning developed by the Supreme Court is in line with the way of thinking in *maqāṣid al-sharī’ah*.

In addition, it is based on a consideration to provide substantive justice to litigants. This means that the Supreme Court attempts to fulfill the sense of justice of all parties by developing and discovering law (*ijtihad*) which does not violate the Islamic law of heir. Andi Syamsu Alam states that the justice is based on surah al-Nisa verse 58 as follows:

Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.

The main characteristic of progressive law is that the law serves human interests and refuses the status quo in law. This is in line with the principle of *maslahah* determination in Islamic law, as follows: *al-dararuyuzālu* (all harmful things should be avoided), *dar’u al-mafāsīd muqaddamun ‘alā jalb al-maṣāliḥ* (avoiding the harmful things is more preferred than taking meaningful things) and *al-mashaqqah tajlib al-taysir* (difficulties can bring easiness), (A. Rahman, 1986: 3–4; Mubarak, n.d.: 151) the three principles of *maslahah* determination in Islamic law are in line with the characteristics of the progressive law, that the law is for man. Based on these rules, it is concluded that sharia has great attention to the



easiness and lightness of law for human. This means that Islamic law positions the law for human benefit, in accordance with the spirit of progressive law stating that law is for humans.

The presence of testament system in Islamic law is very important as problem solver in a family as there are some family members who are not entitled to receive property by inheritance, whereas they have contribution in keeping the property or hindered poor grandchildren, or have different religions and so forth. Thus, the testament system regulated in Islamic law can overcome disappointment (Rofiq, 2002: 448).

The *'illat* [or, in another term, ratio legis (Athoillah& Al-Hakim, 2013)] in the article 209 paragraph (2) of Islamic Law Compilation, not the presence of genealogy relationship, as adopted child does not have genealogy relationship with his adopted father, but the adopted child's emotional closeness with his adopted father and being a part of the family members become *illat* (ratio legis). The breakthrough of inheritance law in the *wājibah* testament institution is a compromising approach to realize substantive justice without breaking the legal provisions of inheritance as law is a means not a goal.

Based on the explanation above, inheritance construction and reconstruction of people from different religions are described as follows:

Reviewed	Construction	Reconstruction
Philosophical principle	Having special human relations in terms of closeness and mutual assistance.	Because of closeness, Devotion, Service, and harmonious life.
Legal sources	Article 209 of Islamic Law Compilation; SEMA No 2 Year 1979	Article 10 and article 5 (1) of Law No. 48 Year 2009
Legal Material	Adopted child, adopted parent	Different religion (non Muslim wife)



The results of the analysis of the reasons underlying the Judge's Ruling on MA Decision No. 16K / AG / 2010 include:

First, the Supreme Court Judge assumed that the heirs of non-Muslims were given a part of the mandatory wills. This is in accordance with the verse of 180 of Q.S. al-Baqarah, which means: It is obliged upon you if someone among you arrives (signs) of death, if he leaves a lot of wealth, wills to his parents and close relatives in a complete way, (this is) the obligation of the righteous. Because the will of the will applies to anyone who leaves the property, so if someone dies and the person does not have a will, his property must be dedicated in part to fulfill the will. Those who are entitled to determine the affairs of the Muslims are the rulers, including probate matters, the steward must act to provide a portion of the inheritance as mentioned above in order to fulfill the testamentary obligations.

Second, wives of different religions are not declared as heirs. This is in accordance with Islamic law which states that religious diversity is a barrier to inheritance. So, wives of different religions are not heirs. This is in accordance with Islamic Law Compilation, article 171, part c, which states that the heirs of Muslim heirs must be Islam. Therefore, the Supreme Court stated that non-Muslims are not heirs.

Third, the reason for the Law that the relationship between heirs and heirs (husband and wife) is recorded in the civil registry. Based on article 2 paragraph 2 of Law No. 1 of 1974 stated that related to the registration of marriages it is known that the institution of marriage registration in Indonesia consists of the Civil Registration Office intended for non-Muslims and the Office of Religious Affairs intended for Muslims. Based on the above, it is clear that the authority of each institution is authorized to record marriages.

Fourth, the Supreme Court Judge based his consideration on Yūsuf al-Qara āwī's opinion that inheritance in Islam was based on the principle of help. This is in accordance with the word of Allah in Q.S. al-Māidah, which means: Please help you on the basis of kindness, and do not please help on the basis of sin and enmity". The verse is in accordance with the



principles in Islamic law that help each other are directed at the principle of monotheism, especially in increasing the goodness and piety of Allah.

Fifth, wives of different religions have lived in harmony for 18 years. Related to this, time or period does not become the main benchmark in the determination of compulsory testaments to wives of different religions. But caused by the devotion and loyalty of the wife to a husband who lives in harmony and peace.

D. Conclusion

The construction of inheritance through the *wājibah* testament in article 209 of Islamic Law Compilation is given to adopted child and adopted parent considering the special relationship between adopted child and the parents in terms of emotional closeness and gaining benefit and justice. Moreover, the reconstruction of the *wājibah* testament is given to non-Muslim considering that the non-Muslim wife has lived in harmony and devoted herself to her husband, and the judge decides the testament to realize the substantive benefit and justice to maintain the family unity without opposing the provisions of Islamic law.

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