DISPARITIES OF THE SUPREME COURT JUDGE'S DECISIONS ON THE NON-MUSLIM INHERITANCE: INDONESIAN CASE

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ABSTRACT

This article aims to analyse the disparities in the judges' decision of the Supreme Court (MA) of the Republic of Indonesia (RI) regarding the completion of non-Muslim inheritance in Indonesia and its relevance to the values of justice and humanity. This study uses a normative-juridical approach and a statutory approach by with a legal, conceptual, and case approach. It analyses five Supreme Court decisions from 1995 to 2018 that consist of: a) 368 / K / AG / 1995; b) 6 / K / AG / 2010; c) 331 / K / AG / 2018 and religious court decision. For the sense of justice in the community, Supreme Court judges decided that non-Muslim heirs are still entitled to the inheritance of Islamic heirs through wasiat wajibah scheme. This study shows that the judiciary progressively uses a contextual-humanistic approach to divide the inheritance of different religions. Following the maqashid sharia, by entrusting the legacy of Muslim to non-Muslim heirs, it will safeguard these assets by carrying out righteous deeds following the teachings of Islam. These findings can be applied to strengthen the arguments of judges and for formulating marriage and family law in Indonesia, especially in determining the material rights of non-Muslims in family institutions. The rejection of inheritance for non-Muslims has been more dominant because of religious politics which undermine the human value. Therefore, this study offers the contextual-humanistic legal approach by prioritizing legal certainty, justice, humanity and equality, which become the foundation of Non-Muslim possibility to inherit the asset.

Keywords: Decision Disparity, Interfaith Inheritance, Wasiat Wajibah, Judges of the Supreme Court.

INTRODUCTION

The increasingly dynamic relationship between religions carries out synergy and co-existence in the various dimensions of life both in society and in the family institution. Inheritance for non-Muslims is a very controversial issue because of differences in views and treatment of the law, including in Indonesia. It is because, sometimes, the Muslim heir has non-Muslims direct descendants (Hendarsanto, 2006). Some scholars fatwa sourced from the Qur'an, and Hadith stated that non-Muslim heirs could inherit (Tangkau et al., 2019; Sujana, 2020). Nevertheless, Marriage Law No. 1 Year 1974 and Presidential Instruction Number 1 of 1991 about the Compilation of Islamic Law (Kompilasi Hukum Islam) also do not regulate inheritance for non-Muslims. Meanwhile, the verdict of the Supreme Court judge as the judex jurist in deciding inheritance for non-Muslims is not only based on Marriage Law No.1 Year 1974 and Presidential Instruction Number 1 of 1991 but also considers other factors such as justice, benefit and legal uncertainty to society in inheritance regulations (Hendarsanto, 2006).

This study aims to analyse the disparities in the judgments of religious courts and the Supreme Court in resolving inheritance for Non-Muslims or different religions in Indonesia. This study seeks to evaluate and disseminate decisions by taking into account the formulation method, political and religious socio-cultural conditions surrounding them and people's reactions to decisions. The disparities in religious decisions regarding different-religion inheritance are interesting for argumentation analysis and cut off the inheritance of different religions and their relevance to issues of justice, human rights and equality before the law. Several previous legal studies examined the permissibility of non-Muslim inheritance in Muslim families such as those conducted by Omar & Muda (2017), Tangkau et al. (2019), Herenawati et al. (2020), Sujana (2020), Waluyadi & Budiyanti (2020) and Saepullah (2020). Furthermore, Ariphia et al. (2020) compared the distribution of heirs in Indonesia and Malaysia which concluded that in Malaysia, inheritance to non-Muslim in Indonesia is not regulated in writing except with guidelines for Supreme Court decisions. Based on previous research, this study uses Maqashid Sharia and contextual-humanistic approach to analyse the decision of the Supreme Court judges in determining the non-Muslim inheritance. Several decisions of the Supreme Court that analysed are the position of an apostate child (1995), an apostate brother (1999), a non-Muslim wife (2010), a non-Muslim wife and child (2016), and an apostate husband (2018). This study focused on identifying how Supreme Court judges have moved from classic fiqh books and made breakthroughs for justice, and social benefit through the discovery of law (rechtsvinding) and legal creation (rechtsschepping) which consider the humanity and justice dimension.

METHOD

This study uses a normative-juridical approach and a statutory approach. The normative approach is intended to analyse normative legal provisions (laws) in any particular legal event that occurs in society. Meanwhile, the case approach aims to examine cases related to the Supreme Court's decision regarding the inheritance of different religions. The main object of study in the case approach is the ratio decided or reasoning, namely the judge's consideration to arrive at a decision. The data of this research uses primary and secondary, sources of law in the form of data that is directly collected by researchers whose source is the object of research, namely Supreme Court decisions from 1995 to 2018 with case numbers as follows; a) 368 / K / AG / 1995; b) 51 / K / AG / 1999; c) 6 / K / AG / 2010; d) 218 / K / AG / 2016; e) 331 / K / AG / 2018. Meanwhile, secondary data in this study are statutory regulations, Islamic Law Compilation (KHI), landmark decisions of the Supreme Court's annual report, and data obtained from literature such as books, journals, articles, research results (thesis, dissertation) or newspapers relating to the provisions of the law on the inheritance of different religions.

The data collection technique was carried out through document research from the delegation's data related to the problem of granting interfaith inheritance in the Supreme Court Decisions, Number 368 / K / AG / 1995, 16 / K / AG / 2010, 162 / K / AG / 2018, 331 / K / AG / 2018 and library research, such as laws, books, journals, literature and other reading sources that contain research reports. Meanwhile, the data analysis method uses qualitative analysis which is *logically normative*, to analyse the problem issues based on logic and laws and regulations and then draw a conclusion that has been obtained. Therefore, the logic of thinking used in this research is deductive, that is, an analysis that departs from general provisions of laws and towards a specific conclusion. This means that the provisions contained in statutory regulations

are used as a reference in analysing legal considerations of Supreme Court judges in cases of inheritance between religions.

RESULT AND DISCUSSION

This study analyses five Supreme Court decisions regarding inheritance cases which consist of Muslim heirs and non-Muslim heirs (Riadi, 2011; Yudistiawan, 2018). These decisions include: Supreme Court Decision Number 368 K / AG / 1995, 16 K / AG / 2010 and 331 K / AG / 2018.

Inheritance of Different Religions for Apostate Children

In the case of interfaith inheritance Number 368 K / AG / 1995, in his consideration, the Supreme Court Judge stated that the heirs of the late HSI and heirs of the deceased HSM are: the deceased DS, UL, BS and SA and PP. In his decision, the Supreme Court judge rejected the appeal and made corrections to the decision of the Jakarta High Religious Court. At the Central Jakarta Religious Court, non-Muslim heirs do not get inheritance rights from Muslim heirs. Meanwhile, in the Jakarta High Religious Court, non-Muslim heirs (children of apostates) receive a share of the inheritance of a Muslim heir in the amount of 3/4 of a female share of the deceased (father) and the deceased (mother) through the mandatory institutions. Meanwhile, the Supreme Court thinks that the portion size for the non-Muslim heirs should be as much as the share for other female heirs.QS. An-Nisa [4]: 11: "*…for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt".*

Because this is a matter involving differences in beliefs in a family, the Supreme Court Justice referred to Jurisprudence MA 172K / Sip / 1974 which essentially states that in inheritance disputes, the law of inheritance used is the law of the inheritor. Because t the biological child is an apostate, according to Islamic law, he cannot get a share of the property through the inheritance route, but through the mandatory route given by the judge based on the judge's consideration.

In his legal considerations, the Supreme Court Justice stated that the Jakarta High Religious Court had to fix the duties assigned to the Defendants. With the rule of law "*the right of an apostate biological child is the same as the right of a biological child who is Muslim.*" Based on that, the judge gave a share of 3/4 of the female heir's share of the father's heir line and the female heir share of the female heir line through the mandatory line. In this consideration, even though through the mandate, the judge has equalized the position of an apostate child with that of a Muslim girl. It is as if the non-Muslim female heirs are still brothers to their Muslim sisters.

Whereas the jumhur fuqaha have determined that the difference between the religion of the heir and the heir is a barrier to inheritance. This is not found in the Qur'an but is regulated in the hadith narrated by Usama bin Zayd: Has told us Hisham bin 'Amar and Muhammad bin Ash Shabah, both said; has told us Sufyan bin Uyainah from Az Zuhri from Ali bin Al Husain from

Amru bin Uthman from Usamah bin Zaid, he said; Rasulullahsallallaahu 'alaihiwasallamsaid: "*A Muslim has no right to give his inheritance to an infidel, likewise an infidel is not allowed to give his inheritance to a Muslim*" (Fahimah, 2018).

In KHI article 171 letters b and c, it has also stipulated the requirements for heirs and heirs who must be Muslim. This is not following the content of the Supreme Court's decision which states that non-Muslim heirs are not considered legitimate heirs because these heirs are not Muslim. Therefore, the judge should not equate the position of an apostate girl with that of a Muslim girl. Rather, the judge should provide the mandatory parts of the minority in the Islamic heritage.

Besides, the judge has carried out a legal interpretation of the KHI article 209 which reads the application of the legality of 1/3 (one third) only applies to adoptive parents and adopted children, not to the legal heirs. The words only apply to parents and deeds, not to legitimate heirs. "*Using the extensive and restrictive interpretation of the judge has broadened the meaning of adoptive parents and adopted children as everyone who has been connected and contributed to the heir, with the restrictive limitation of "not a legal heir"*. SW, who should have been the legal heirs, but because of her apostasy has been prevented from becoming the legal heirs. So that the judge can consider giving the condition of the apostate child through the mandatory legacy of the Inheritor because in the case of the mandatory legacy, the heirs is not required to be Muslim.

The considerations of Supreme Court Justices Panel provide opportunities for an apostate inheritance to receive a share of the inheritance through the above obligations seem sufficient to reflect the benefit. Non-Muslims in this regard, seem to be in a weak position because it deserves to be given the same opportunity so that the inequality can be tolerated as far as it does not harm the other inheritance. However, Supreme Court judges did not use any standard law such as KHI or other regulations. Thus, the statement of the verdict as above is not in line with the principle of legal certainty concerning legal sources in a judge's decision.

Supreme Court Judges only considered the benefits in the decision without digging deeper into the legal certainty that should exist in every case resolution, especially for cases that already have basic laws such as inheritance of different religions. If he examines it further, actually one of the maslahat is maqashid al-sharia. Whereas, the purpose of the Shari'a is to maintain religion, soul, mind, descent and wealth. The concept of maslahat applied by the judge contradicts the objectives of the sharia (maqashid al-sharia) itself because the judge gives a share of the inheritance's wealth which should only be for a legitimate inheritor and according to the law, but the judge gives it also on a mandatory basis so that it is achieved (Yanti & Mulyadi, 2016).

Heirs of Different Religions for Non-Muslim Wives

In addition to non-Muslim heritage scholars and non-Muslim siblings, there are also non-Muslim heiresses. As in case Number 16 K / AG / 2010 ELM (non-Muslim wife) gets a part of the mandatory legacy of 15/60 or ¼ of the inheritance of the heir. Slightly different from the previous decision, in this decision, there is a new rule of law that is formed to achieve justice and benefit.

In this decision, the Supreme Court judge granted the request for safekeeping and annulled the decision of the Makassar Religious High Court and strengthened the decision of the

Makassar Religious Court. With the rule of law "*To give a wife who is not a Muslim the same as a wife who is Muslim.*" Therefore, the Supreme Court judge gave a share of 1/4 through the mandate and shared assets to the Non-Muslim wife. In this decision, the Supreme Court Judge also referred to decisions related to the inheritance of different religions that had previously existed namely Jurisprudence Supreme Court Decision Number 368 / K / AG / 1995 which stated that "*the law of concurrence / Islamic law an heir who is not a Muslim can still inherit from the legacy of an heir who is Muslim*". Thus, the part of the inheritance for a Non-Muslim wife is the same as a wife who is Muslim, namely ¼ in line with QS. An-Nisa, verse 12: "*Wives get one-fourth of the assets that you leave if you do not have a child*." (Omar & Muda, 2017). However, because the ruling in this decision is non-Muslim, the judge does not give the legacy through inheritance, but through other considerations, namely the mandate.

This can be seen in the legal considerations, that the marriage of the Defendant / Petitioner Case with Ir. MA has been going on for quite a long time, namely 18 years, which means that the Defendant / Petitioner will have the right to be independent of the devisor because even though the applicant for the case is non-Muslim, it is appropriate and fair to obtain her rights as a wife to share with him as a part of the title 16 K / AG / 2010. *"In these considerations, the Judge said that 18 years of marriage between the two of them was the cause of the worthiness of this apostate wife, but still (his wife) getting her share of it through legal channels".*

Even though in the existing statutory regulations, it should never be seen that it deserves to be due to legitimacy. Therefore, the judge looks at the existing regulations but is not clear enough to be interpreted in a triological-sociological way, where the judge in the decision does not find the appropriate rules again (Omar & Muda, 2017). Therefore, the judge adjusts to the circumstances that occur in the context of resolving disputes in society. Therefore, the judge considers the justice and benefit to the Non-Muslim wife by giving the same share and the share of the inheritance of the native by using the wasiatwajibah.

Although in Article 209 KHI the will is only intended for adoptive children and adoptive parents, not for legal heirs. Judges have made legal discoveries by carrying out extensive and restrictive interpretations simultaneously, namely the word *"only applies to parents and sons and daughters, not to legitimate inheritance."* Using the judge's extensive and restrictive interpretation has broadened the meaning of adoptive parents and adopted children as anyone who has been related and contributed to the heir, with the restrictive limitation of *"not a legal heir."* The marriage bond in Islamic inheritance law is one of the ways to obtain the inheritance, but because the Non-Muslim wife has been prevented from giving the gift of inheritance. So that the judge can consider giving the Non-Muslim wife through the mandatory legacy of the Inheritance because in terms of the mandatory requirement it is not required to be Muslim

The judges' considerations also seemed to have taken into account the ulama's doctrine. In the opinion of IbnuHazm, Al-Tabari and Muhammad RasyidRidh, who argue that non-Muslim inheritors will still get the wealth of Muslim heirs through mandatory oblig.tions (Fahimah, 2018). In other considerations, Supreme Court judge also considered the opinion of the cleric Yusuf Al-Qardhawi interpreted those non-Muslims who living side by side in peace could not be categorized as the infidel. Cassation Petition receives a share of the inheritance as a legal duty. Judge M has made legal findings in order to achieve this, a benefit for the litigants. However, this effort would be far from the shari'a objective itself. Especially the objective of the Shari'a to

safeguard religion, property, and inheritance in the inheritance of different religions cannot be properly addressed.

Different Religions Heirs of Apostate Husbands

In Decision Number 331 K / AG / 2018, there are differences in the belief between husbands and wives who do not have children. Based on MA jurisprudence number 172 / K / Sip / 1974 that in a dispute, the law used is the law of inheritance from the heir. In this case, it is appropriate if the settlement of inheritance disputes is decided based on Islamic law by the Supreme Court and the Religious Courts. Because considering the heir is Muslim while one of his heirs (husband) is a non-Muslim, therefore to resolve this inheritance dispute using Islamic law. In this decision, the Supreme Court Judge rejected the request for safekeeping and made amends for the decision of the Banten Religious High Court. With the rule of law "*a good and harmonious relationship in the household can be used as consideration for judges in giving the inheritance to non-Muslims*." Accordingly, the judge to apostate husbands shall give a share of two or 50 per share of the share and a share of the death toll of 1/4 of the share of the inheritor through the mandatory route.

In this decision, the Supreme Court Judge also referred to the decision regarding the inheritance of different religions that had previously existed, namely Jurisprudence Decision MAN number 368 / K / AG / 1995 which stated that *"the right of an apostate biological child has the same status as having an Islamic religion,"* Jurisprudence conclude Supreme Court Decision number 368 / K / AG / 1995 which states that "*the right of an apostate biological child has the same status as an Islamic religion.*" Jurisprudence MAN number 16 / K / AG / 2010 which states that "*gives the position of a wife who is not Muslim the same as the position of a wife who is Muslim*."

Based on the first two jurisprudences, namely the Jurisprudence of the Decision Number 368 / K / AG / 1995 and the Jurisprudence of the Decision Number 51 / K / AG / 1999, the judge made it the basis for divisions of the non-Muslims who have the same position (rights) as the legitimate Muslim left to inherit status. Meanwhile, in Jurisprudence Supreme Court Decision number 16 / K / AG / 2010, which states *"to give a wife who is not Muslim the same as a wife who is Muslim with the basis of having lived together and harmoniously for 18 years,"* the judge carried out a legal construction using the analogy method (Argumentum Analogiun), where there is almost the same status as the same as the similarity of law. Then on the jurisprudence, the Supreme Court judge carried out a legal construction using the Argumentum A Contrario method based on consideration if a non-Muslim wife can get the remain as her loyalty, then it is a part of a Muslim who has a large share of rights.

However, because the husband has apostatized from Islam, the judge was unable to grant Islamic inheritance rights properly, so the judge gave it through a compulsory will based on humanistic considerations, namely because he had taken care of the wife during joy or sorrow, even when he was sick, the petitioner remained caring for the heir faithfully and always accompanying him to seek treatment in China so that non-Muslim heirs should have a share from the inheritance in the form of the wasiatwajibahabout 1/4 as a result of the Supreme Court Decision 331 K / AG / 2018 decision (Raharjo & Putri, 2018). However, the Supreme Court judge may not provide the non-Muslim husbands as Muslim husbands should. Because the husband's share does not have children, then according to Articles 209 paragraphs (1) and (2) of

the Compilation of Islamic Law the portion is 1/2 of the inheritance and the limit of inheritance through mandatory obligations is as much as 1/3 part. In the case of non-Muslim inheritance, the judge also uses the legal basis, which is the principle that allows non-Muslim inheritors to obtain the mandatory requirements while recording no more than an equal share of the inheritor (Yanti & Mulyadi, 2016).

In this case, the smallest part of the share of inheritance to the share of inheritance is not 1/4 (25 percent) of the share, but only 18.75 percent and 9.375 percent. Thus, judges have been liberated from legal literacy who should be judges of attention in granting mandatory mandates to non-Muslim inheritance. The amount of 1/4 of inheritance was not mentioned in the consideration of the law. Moreover, the judge only considers the reason for the reconciliation of a household as the reason for giving the proportion of the legacy of an apostate to her husband (husband). This does not reflect the attitude of safeguarding the sharia (maqashid al-sharia) which is guarding religion. The judge only considers social factors such as heirs' loyalty to his devisor and does not consider his apostasy. In a case like this, it seems that the judge prioritizes the principle of justice rather than keeping the goal line itself. As stated by John Rawl, the main goal of justice is not to eradicate inequality, but to ensure that there is an equal opportunity, so that inequality can be tolerated as long as it benefits all, especially the weakest group (Wahyudi, 2015). The judge's attitude which makes the above considerations reflects the judge has carried out a reflex with the method of exegetical legal interpretation of Article 171 letter C, which requires that the inheritor must be of the same religion as the heir. In this case, the judge has broadened the legal meaning that heirs who are not equal with Muslim heirs are not classified as inheritors, but receive a share of the inheritance rights.

CONCLUSION

In deciding the inheritance of different religions, the Supreme Court considers the aspects of justice and benefit to the non-Muslim inheritors by providing them with the necessary obligations based on sociological considerations and benefit to the parties in litigation. Judges use humanistic considerations which not to make apostasy and religious differences an absolute barrier to obtaining a share of Muslim heritage. Nevertheless, the judges resolve this issue through providing such bargains through overseeing the mandatory requirements for apostate and non-Muslim scholars. Besides, there is no definite legislation on the imposition of mandatory inheritance as a way of dividing apostate or Non-Muslim ancestors to acquire inheritance rights. This makes judges far from legal certainty and must always carry out legal discovery and legal formation using interpretations and legal constructs related to the inheritance of different religions against the KHI Article 171 letter C. Judges carry out restrictive interpretations, against article 180 KHI Supreme Court, perform the Argumentum A Contrario and Agumentum Analogium. In this consideration, the Supreme Court judges tend to use considerations based on aspects of justice and benefit. The benefits aspects considered by the Supreme Court judges have deviated from the objectives of sharia (maqashid sharia), especially regarding hifdz al-nafs (maintaining the soul as an obligation to protect and maintain the human soul in a broad sense), and hifdz al-mal (maintaining property as an obligation to protect and maintain the property in the framework of serving him as a means of worship).

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