

## THE POSITION OF MURTAD'S WIDOW IN THE DISTRIBUTION OF INHERITANCE FROM THE TESTATOR (HUSBAND)

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### Abstract

The research with the title of "The Position of Murtad's Widow in the Distribution of Inheritance from the Testator (Husband)", with the problem of an apostate wife, so that it is necessary to question the right of an apostate widow to the inheritance of the testator (husband), related to the obligatory will. Research based on legislation and case studies can obtain a conclusion that obligatory wills are known in Islamic law given to people who are not the heirs because there is no blood relationship with the testator or because he is an heir but for some reason, it is not recognized as an heir of the inheritance. People who have close relations with the testator but are not heirs because there is no blood relationship with the heir, including the adopted child. Widows according to Islamic Law Compilation Book are the heirs, although not because of blood relations, if the widow is an apostate, then she is not as an heir, therefore the widow gets a part of the heir's assets but in the form of a mandatory will.

### Keywords

Widow, apostate, required testaments

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## Introduction

In Indonesia, there are still legal systems that regulate citizenship for Indonesians. It is not exempt from the influence of the legal system in Indonesia by Dutch Government Law, which still recognizes by Article II of the Constitution of 1945 which "All bodies and laws still in force, are new under This Constitution.

The legal system is governed by 3 (three) norms enshrined in practice as outlined in Civil Law, Culture Law, and Islamic Law. Islamic law, in particular, Heritage Islamic law and social change, are two concepts that throughout the history of Islamic law have been discussed among scholars. Islamic law is considered a transcendent law and is therefore considered permanent. From the above statement, there is an opinion of Islamic Law that cannot adapt to the social change. This view is based on the concept, nature, and methodology of Islamic law which is considered as the eternal law. This view is expressed by most orientalists and the most traditional Muslims. The next point is that Islamic law can adapt to social change. The group is based on Islamic law that recognizes the principles of *maslahah* (human good), legal flexibility and *ijtihad*. This view is very common among Muslim reformers, from the time of prehistoric revival in the 18th and 19th centuries in Arabia to the movement of modernism and neomodernism, founded by Fazlur Rahman (Abdul Ghofur Anshori, 2005).

In Islamic law, there is a compulsory requirement, but there is no explanation regarding the compulsory requirement. Obligations are required on someone who is closely related to the heir but not to the heir. In Article 209 paragraph (2) Compilation of Islamic Law (hereinafter KHI), Compilation of Islamic Law (hereafter KHI), A compulsory will be given to the which means that the will has to do with the share of the heirs but to the non-heirs.

Article 171 letter a Compilation of Islamic Law (after referred to as KHI) defines the following: "The law of inheritance is the law governing the transfer of the right of inheritance of the heir (inheritance), determining who is entitled to be the heir and what portion thereof." The principles of Islamic inheritance law can be derived from the verses of the law of inheritance and the Sunnah of Prophet Muhammad. The following principles can be classified as follows:

- 1) The principle of *Ijbari*, the meaning of coercion is to do something outside someone's will. In the law of the heirs means "there is a transfer of the property of a deceased person to the living by himself, meaning that without legal action or statement of the will of the heir, even the heir (during his life) cannot deny or prevent the occurrence";
- 2) Bilateral basis, in Islamic law of inheritance, is the one who receives an inheritance from both sides of the lineage, which are from the female lineage and the male lineage;
- 3) The Individual Basis is that each heir (individually) is entitled to the portion he or she receives without being attached to the other heirs (as is the case with collective inheritance found in customary law provisions);

- 4) The Basis of Balanced Justice, which means the balance between rights and obligations and the balance between acquisitions and needs;
- 5) Inheritance is solely due to death, Islamic legal heirs see that the transfer of property is solely due to death. In other words, a person's property cannot be transferred (by inheritance) if he or she is alive. Although he has the right to administer his property, those rights solely to the extent of his needs while he is still alive, and not for the use of the property after his death.

The meaning of the heirs under Article 171 of the letter b of the KHI is "the person who dies or is declared to have died by the decision of the Islamic Court, leaving the heirs and inheritance". While the meaning of the heirs under Article 171 of the letter KHI is as follows: "a person who at the time of death had blood or marital relations with an heir is a Muslim and is not barred by law to be the heir". In Islamic law to be an heir is required to be Muslim by showing identity or acknowledgment or practice or testimony. For newborns or minors of religion to adopt the religion of their father under Article 172 KHI.

In Islamic law the reason a person receives an inheritance is twofold:

- 1) The blood lineage (*nasab*), which is the closest family and still holds the unity of blood throughout both generations;
- 2) A lawful marriage according to Islamic law, is a lawful marriage when it meets the requirements and rules of the marriage.

## Research Methods

The research used is normative juridical research. The normative juridical approach is based on the main law material by examining the theories, concepts, principles of law and legislation related to this research. This approach is also known as the library approach, which is by studying the books, legislation and other documents related to this research (Peter Mahmud Marzuki, 2011).

## Discussion

Heirs according to the Professor of the Faculty of Law, Airlangga University (Prof. Dr. H. Afdol, S.H., M.Sc) in KHI there are 3 (three) types of heirs, which include:

- 1) *Dzawil Furud*, as referred in Article 192 KHI. The heirs include: father, mother, widow, widower, and daughter. Each part of their inheritance has been determined according to Alqur'an and Sunnah of the Prophet Muhammad;
- 2) *Ashobah* is referred in Article 193 KHI, the heirs include: boys, both alone and with girls, and if there are no sons then father as *Ashobah*. The heirs of *Ashobah* got all the inheritance when he was the only heir, and received as much as the remaining after the shares of inheritance was given to *Dzawil Furud*;
- 3) *Mawali* or substitute heir is contained in Article 185 KHI. The substitute heir is the heir who replaces someone to get the part of the inheritance that will be

received by the person who was replaced if he is still alive. The person who was replaced was the liaison between the substitute heir and the heir (Afdol, 2005).

In addition to the above, KH. Ahmad Azhar Basyir, MA recognized the existence of 3 (three) kinds of heirs, which are:

- 1) Heirs who obtain certain parts according to the Qur'an or the Sunnah of the Prophet are called heirs of *Dzawil Furud*. The various heirs of *Dzawil Furud* are: Husbands, wives, fathers, mothers, daughters, grandchildren (from boys), biological sisters, older sisters, brothers and sisters, grandmothers and grandparents;
- 2) The heirs are assigned for their part but will receive all inheritance if there are no *Dzawil Furud* heirs at all. If there is an heir of *Dzawil Furud*, he is entitled to the remaining and if there is no remaining at all he does not get any part called the *ashobah* heir. There are 2 (two) types of *Ashobah* heirs:
  - a. the heirs of *Ashobah* are heirs of themselves, not because they are drawn by other *Ashobah* heirs or not because together with the other heirs, such as boys, grandchildren (of boys), siblings or someone, uncle and so on. *Ashobah* heir is called *ashobah bin nafsi*;
  - b. in the position as *ashobah* heirs by being drawn by other *ashobah* heirs, such as daughters being drawn to heirs by *ashobah* by sons, grandchildren are drawn into heirs by *ashobah*, grandchildren or siblings are drawn into heirs *ashobah* by biological or other brothers and so on. The heirs of this kind of *ashobah* are called *ashobah bilghairi*.
- 3) The heirs who have family relations with the heirs, but belong to the heir group *Dzawil Furud* and *ashobah* are called heirs of *Dzawil Arham*. Which includes the heirs *Dzawil Arham* is the grandson of a boy or girl, the daughter of a woman;
  - a. nephew male or female, children of a younger sister from the same father or mother;
  - b. sister cousin, daughter of a sibling from blood related brother or same father;
  - c. sister cousin, uncle's daughter (father's brother);
  - d. uncle from same mother (uncle's father from the same mother);
  - e. uncle, mother's brother;
  - f. aunt, father's sister;
  - g. aunt, mother's sister;
  - h. grandfather, mother's father;
  - i. great grandmother, grandfather's mother;
  - j. mother's nephew, sons of mother's siblings.

Although as an heir who can inherit it is possible to be prevented from receiving an inheritance, such as Article 173 KHI, which determines someone is prevented from being an heir if the judge's decision has the permanent legal force that is punished because:

- 1) To be blamed for killing or trying to kill or mistreat the heir;

- 2) Blamed in defamation has filed a complaint that the heir has committed a crime that is threatened with a sentence of 5 years in prison or a more severe sentence.

In addition to the above, heirs are prevented from receiving an inheritance in the following matters:

- a. Apostasy, which is out from the religion of Islam. People who leave Islam do not have inheritance rights from family members who are still Muslim. And apostasy himself is not the heir of his Muslim family;
- b. Not from a Muslim. For family members who do not embrace Islam, they will lose inheritance rights from Muslim families. And the Muslim family cannot inherit inheritance from non-Muslim family members;
- c. Murderer that is a family member who kills his family intending to be able to receive an inheritance or other purposes, then he, as a murderer, cannot receive part of the inheritance of the person he killed (Abdul Djamali, 1999).

Inheritance arises when there are three types of inheritance conditions, including the death of the person who inherits, both according to nature and according to law, the heirs are truly alive when the heir dies, it is known that his jihad in inheritance (for heirs) (Muhammad Ali Ash-Shabuniy, 1995).

Inheritance is related to the distribution of assets. In general, according to his level, according to Prof. Dr. Abdul Ghofur Anshori, S.H., M.H., "assets can be divided into three types, include assets, legacy, and inheritance".<sup>†</sup> Article 171 letter d KHI determines: "Legacy is the property left by the heirs both in the form of property that belongs to him and his rights". Article 171 letter e KHI stipulates that "inheritance is inherited property plus part of joint assets after being used for the needs of the heir during an illness until death, the cost of arranging the corpse (*Tajhiz*), payment of debts and gifts for relatives".

Regarding the types of assets mentioned above, it is further explained by Prof. Dr. Abdul Ghofur Anshori, S.H., M.H. as follows:

"Property is all property owned by a person personally and/or together when that person is still alive. The inheritance is the wealth left by the testator. This wealth belongs to the heir before purification is taken". The type of object is property (whether moving or not) and rights that have material values or rights that follow the object. As for inheritance, it is inheritance after purification is taken.

"Remains after purification, for example for maintenance, burial, and other purposes, are referred to as inheritance. This inheritance is the right of his heirs, including children, widowers and widows with the calculation as stipulated in Article 176 KHI, which determines: "A daughter if only one, she gets a half share, if

two or more people live together they are getting two of thirds, and if girls are together with boys, then the share of boys is two compared to one with girls ".

In Islamic law, if there is an heir receiver who dies earlier than the heir giver, Islamic law recognizes the replacement of the right to inherit. This is found in the Qur'an Al Surah An Nisa verse 33 translation as follows (Idris Ramulyo, 2004):

- a. And for each of Us (Allah) has made mawali (substitute heir) and (to inherit) the inheritance of his mother-father (who would have inherited his inheritance);
- b. And for everyone, We (Allah), have made mawali (substitute heirs) from (to inherit) the inheritance of the aqrabun who would have inherited the inheritance);
- c. And for everyone, We (Allah) have made mawali (successor to an heir) from (to inherit) the inheritance of the treaty as agreed (which would inherit the inheritance);
- d. Then give them their inheritance;
- e. The provisions as above are explained further in Article 185 KHI which determines;
- f. Heirs who die earlier than the testator, then their position can be replaced by their children, except those mentioned in Article 173;
- g. The part of substitute heirs may not exceed the proportion of heirs equal to the substitute.

Inheritance law is a law governing the transfer of ownership rights to inheritance (*tirkah*) of the testator, determining who is entitled to be the heirs and each part of (Article 171 number 1 KHI), in Islamic law is no different from inheritance in general, that is, the elements consist of the person who dies, leaves the person alive and leaves the inheritance. Although the elements of inheritance include heirs, however in Islamic law even though they are supposed to be heirs, for some reasons they cannot become the heirs, for example, due to apostasy.

In Islamic law, there is a mandatory will. Mandatory bequests are mandatory wills determined by the authorities (the Act) of the property of someone who has died based on justifiable legal reasons. The obligatory wills were born from *Ijtihad* and interpretations of scholars, including Ibn Hazm, *nash* of the Qur'an and the Hadith. This *ijtihad* product than with various similarities, specifications, and differences was adopted by the ulama and legal authority holders in various Islamic countries in the form of laws and regulations (Idris Ramulyo, 2004).

Mandatory bequests are testaments whose implementation is not affected or does not depend on the will or will of the deceased. A will must still be made either pronounced or not pronounced either as desired or unwanted by the deceased. This, the execution of the will does not require proof that the will was spoken or written or desired, but its implementation is based on legal reasons that justify the will must be implemented (Suparman Usman dan Yusuf Somawinata, 2002).



Mandatory wills can also be interpreted as a mandatory gift to the heirs or families, especially grandchildren who are prevented from receiving wealth because their mother or father died before their grandparents died or died together. This is because their inheritance law is prevented from receiving part of the inheritance of their grandparents because there is an heir uncle or aunt to the grandchild (Ahmad Zahari, 2006). So if it is based on the Qur'an and Hadith, apostate widows are not inheritors, so they are not entitled to be part of the inheritance, but if it has been adopted by the scholars and embodied in the legislation, apostate widows get part of inheritance based on mandatory wills.

In Indonesia, *ijtihad* of the ulama regarding mandatory wills is regulated in Article 209 KHI, which stipulates that the inheritance of adopted children is divided according to Article 176 through Article 193, whereas for adoptive parents who do not receive a will given a mandatory will of 1/3 (maximum mandate one of third) of the inheritance of his adopted child. For adopted children who do not receive a will, a maximum of 1/3 of the inheritance of their adopted parents will be given a will. In the provisions of Article 209 KHI the will is only intended for adoptive parents if their adopted child dies, or for an adopted child if his adopted parent dies. This means that wives of different religions don't have the right to inheritance of their husbands because the heirs must be of the same religion, that is, Islam with heirs, and wives who leave Islam or apostasy are not entitled to get part of the inheritance of their late husband. Likewise with the obligatory will, only intended for adoptive parents and adopted children by the provisions of Article 209 KHI.

Referring to the Decision of the Makassar High Court with its Decision Number: 59/Pdt.G/2009/PTA.Mks, dated July 15, 2009, 60 parts. Mandatory testament provisions stipulate the right to receive a share of no more than 1/3, so the share received by the recipient of the mandatory will is less than 1/3.

It is unfair if an apostate wife (widow) does not get a share of the inheritance of the deceased, considering the position of her husband and wife under Law No. 1 of 1974 concerning Marriage (hereinafter referred to as Marriage Law) as under Article 31 Paragraph (1) that the rights and positions of the wife are balanced with the rights and positions of the husband in domestic life and association together in the community. Also found in Article 36 of the Marriage Act concerning joint property, a husband or wife may request with the approval of a third party. Regarding their respective belongings, the husband and wife have the right to carry out the law regarding their property.

The same position cannot be ruled out by a rule in Islamic law, because Islam is a religion that highly values *Egalitarian* values and democracy. Nurcholish Madjid likens the word *Egalitarianism* (Nurcholish Madjid, 2008) which is supported by a substance with democracy.

This means that it is unfair if apostate widows remove their rights to get part of the joint property in marriage as part of the inheritance.

## Conclusion

The obligatory testament is known in Islamic law which is given to people who are not heirs because there is no blood relationship with the heir or because as an heir, but for some reason is not recognized as an heir. People who have a close relationship with the testator but are not heirs because there is no blood relationship with the testator, including adopted children. According to KHI, widows are heirs, although not because of blood relations, if the widows are apostates, then not as heirs, therefore widow apostasy get part of the inheritance's assets, but in the form of obligatory wills.

Obligatory wills are obtained through a request to the Religious Court. Some of the judges' considerations in issuing a Court Decree on mandatory wills include: as long as the testator is still alive, the apostate widow has been given or obtained sufficient marriage assets by the testator or not and also considers the information of the heirs in court. From some of the judges' considerations, the Religious Court judge can determine whether the apostate widow gets a mandatory will or not by prioritizing the heirs first.

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