



Compulsory Wills for Heirs of Different Religions Perspective of *Istihsan*

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Abstract: The issuance of mandatory wills to heirs of different religions is a form of legal innovation by the Supreme Court, yet the legal innovation by the Supreme Court constitutes a contradictory decision in Islamic law. Based on this issue, this article aims to explore the controversy of mandatory wills for heirs of different religions from the perspective of *istihsan*. This research is conducted as a library research, employing the perspective of *istihsan*. The data sources in this research are divided into primary and secondary data. Primary data are extracted from the Directory of Supreme Court Decisions regarding mandatory wills. Secondary data consist of books, journals, and studies related to the topic. Consequently, the results of this study indicate that the mandatory wills granted by the Supreme Court to heirs of different religions, from the perspective of *istihsan*, fall within *istihsan* with necessity, prioritizing justice to achieve benefits for all parties involved in litigation.

Keywords: *Istihsan*, Heirs of Different Religions, Compulsory Wills

1. Introduction

In Indonesia, inheritance law remains pluralistic, as three inheritance legal systems are currently in place: Adat Inheritance Law, Islamic Inheritance Law, and Civil Law Inheritance Law, recently there has been a dynamic and legal progress related to the issue of inheritance eligibility for individuals of different religion. (Amalia Yunia Rahmawati, 2020) Wills are one of the absolute authorities of the Religious Courts according to Law Number 7 of 1999 concerning Religious Courts, which has been amended by Law Number 3 of 2006 and Law Number 50 of 2009, in response to this issue the Supreme Court has made changes in inheritance law from various religions, giving hope to heirs of different religions to receive a share of the inheritance from the estate of Muslims, although not in the form of direct inheritance, this is achieved by using mandatory wills. (Zaman, 2018)

Research on mandatory wills for heirs of different religions has been extensively conducted by previous researchers, such as research on mandatory wills as a form of settlement for inheritance cases of individuals of different religions in the social development of society written by Zulfia Hanum and Alfi Syahr, (Hanum & Syahr, 2016) then research on the analysis of giving mandatory wills to heirs of different religions after the Supreme Court Decision Number 331 K/AG/201, written by Alip Pamungkas Raharjo and Elok Fauzia Dwi Putri, further in research on the distribution of inheritance rights to heirs of different religions through mandatory wills from the perspective of Islamic inheritance law, written by Maimun. (Maimun, 2017)

Based on several studies previously discussed, it can be seen that there has not yet been a specific discussion on the implementation of mandatory wills for heirs of different religions from the perspective of *istihsan*, so in this paper, the focus will be on how compulsory wills

for heirs of different religions are viewed from the perspective of *istihsan*? So, this paper aims to determine the compulsory wills given to heirs of different religions from the perspective of *istihsan* (Marni et al., 2023).

2. Method

This research is qualitative research, with the type of library research, library research is an activity of collecting information and research data with the help of various materials available in the library. (Siyoto, 2015) The data sources in this research are divided into primary and secondary data. Primary data in this research are taken from the Directory of Supreme Court Decisions regarding mandatory wills. Secondary data in this research consist of books, journals, and studies related to the topic. Therefore, data collection techniques are carried out by reading sources relevant to the title of discussion. The results of data collection will be analyzed by the author using the concept of *istihsan* in Islamic law, to determine whether this approach can be used as a solution to the controversy of mandatory wills for heirs of different religions (Liza et al., 2023).

3. Results and Discussion

a. Concept of Istihsan

Istihsan is one of several methods that can be used as a basis for establishing Islamic law. Istihsan linguistically comes from the word *hasana* with the *istif'ala* pattern which means *thalab*, so *istihsan* in this context is interpreted as considering something better, or there is something better or following something better. (Humaira, 2016) From this etymological understanding of *istihsan*, it can be concluded that when someone faces two things both good, but there is something that makes them leave one and choose the other because it is considered better to practice. As for the terminological definition of *istihsan*, there are several definitions put forward by *usul* scholars, including:

- a) Ibn Qudamah al-Maqdisi, *istihsan* is the transition of a *mujtahid* to another law in determining the law for a similar problem, because there is a specific evidence in the Qur'an and Sunnah.
- b) Imam Ishaq al-Shatibi, *istihsan* is the application of partial benefit when faced with general evidence.
- c) Imam al-Sarakhsi al-Hanafi, using *ijtihad* and all intellectual efforts in determining something whose affairs are left to our opinions, another definition is leaving analogy and using what is stronger than it, because there is evidence that requires and is more appropriate to realize human welfare. (Habibullah, 2016).
- d) Abu Hasan al-Karkhi al-Hanafi, the transition of a *mujtahid* from the determination of the law on a substantially similar issue to what has been determined because there is a stronger reason that requires the transition.
- e) Ibn Subki, explains two formulations of the definition of *istihsan*, first, shifting from the use of one analogy to a stronger analogy than it, second, shifting from the use of one evidence to customary habits because of a benefit.

Ibn Subki explains that the first definition does not have debate because the stronger of the two analogies must be prioritized. Whereas the second definition has those who reject it (Hizbullah et al., 2023). The reason is, if it can be ensured that custom is good because it is practiced as during the time of the Prophet or afterwards, and without rejection from the Prophet or others, certainly there is supporting evidence, both in the form of text and

consensus. In this form, customs must be practiced definitively. But if its truth cannot be proven, then that method is definitely rejected. (Basri, 2019)

Although the definition of istihsan is quite diverse, there are similarities that can be drawn, that istihsan is leaving a law that has been established by Sharia and establishing another law because there is a more suitable and stronger evidence according to the intellect of the person making ijihad. Whether by leaving explicit analogy and taking implicit analogy as a legal basis, or by establishing a law by taking a partial issue from an overall issue (Wahyudi et al., 2023). However, regarding the validity of istihsan, there are differences of opinion among fiqh scholars regarding the validity of istihsan as the main evidence in establishing law, the scholars who are most vocal in defending and acknowledging the validity of istihsan are Imam Hanafi, Imam Maliki, and Imam Hanbali, while Imam Shafi'i has a different opinion about the validity of istihsan as the main evidence in establishing law. (Effendi, 2019)

In this regard, Imam Shafi'i argued that istihsan cannot be used as an argument relied upon to establish the law on an event. Imam Shafi'i said, "whoever argues using istihsan, then he has established his own Sharia law, even Imam Shafi'i added the use of istihsan as an argument is a law that only follows his own desires, because only Allah SWT has the right to establish Sharia (Fitria, 2023). Responding to this, Imam as-Syatibi in his book *al-Muubiqaat* explains that the person who does istihsan does not rely on his feelings and desires, but must rely on what he knows about the shariah objectives globally in the wisdom of something that is apparent. (Somantri et al., 2018)

As for division of istihsan, Abdul Karim Zaidan in his book *Al-Wajiz fi Ushul Fiqh*, divides istihsan from the aspect of its evidence into several parts, including:

- a. Istihsan bil Nash, such as when someone eats lunch in the month of Ramadan, according to qiyas in the sense of a general rule, it invalidates fasting because it violates its pillar, which is the act of refraining. However, eating during the day in Ramadan due to forgetfulness is considered excusable. This excusability is a departure from the rule of invalidation of fasting intended by the general rule to the rule intended by the text, which does not invalidate fasting (Dafizki et al., 2023).
- b. Istihsan bil Ijma', such as the permissibility of receiving payment from someone who enters the restroom. According to the general rule, a person is not allowed to receive such payment because it cannot be known and ascertained how long the user stays in the restroom, nor can it be known how much water they use inside the restroom. However, based on istihsan, it is allowed for the attendant to receive payment from the restroom user, as it helps alleviate people's difficulties, and it has become a custom with no objections from anyone, thus forming a consensus. (Harisudin, 2021)
- c. Istihsan bil 'Urf, such as the opinion of some scholars allowing endowment with movable property, such as endowing books, cars, and other items. According to the general rule, endowment should be made with immovable property, such as land or buildings. Then scholars allow endowment with movable property because it has become a custom ('urf) in the community.
- d. Istihsan bil dharurat. Such as cleaning a well contaminated with impurities by just taking some of its water. According to analogy, the water in the well cannot be cleaned anymore because the cleaning tool is already impure and cannot be cleaned. But according to istihsan, the water becomes clean again just by removing some of it. Because removing

some of the water does not affect the purity of the rest. This is what is called urgency, which aims to facilitate human affairs(Wandri et al., 2023).

- e. Istihsan bil Qiyas Khafi. Such as someone who endows land that contains a road and a source of drinking water, if a mujtahid uses the usual analogy approach, then by only endowing the land, it does not automatically include the road and the water source, as in a sale and purchase transaction(Sundari et al., 2023). The similarity between endowment and sale and purchase in this case is both relinquishing ownership of land. In that case, the mujtahid switches from explicit analogy to another approach, namely equating it with a lease transaction, thus resulting in a different legal conclusion, namely the inclusion of the road and water source in the endowed land, even though it is not mentioned in the endowment contract. (Darmawati, 2019).

b. Concept of Compulsory Wills for Heirs of Different Religions

When viewed linguistically, the term "wasiat" originates from the Arabic word "washaitu-ushi asy-syai'a," which means "I extend something." In Islamic law, a will refers to the act of bequeathing property, debt, or benefits to another person, with the condition that the recipient will inherit what has been bequeathed to them after the testator's death. Terminologically, a will is defined as a gift given to another person, whether it be in the form of property, debt, or benefits, to be possessed by the recipient after the testator's death.(Arif, 2017)

Meanwhile, a compulsory will (wasiat wajibah) is a will whose implementation is not influenced or dependent on the wishes of the deceased person. Therefore, the execution of such a will does not require proof that the will was spoken, written, or intended. Instead, it is based on legal reasons that justify the execution of the will. A compulsory will can also be described as a mandatory gift to heirs or family members, especially grandchildren who are barred from receiving inheritance due to their parents' death before their grandparents' death or simultaneous death. The concept of compulsory wills was first introduced in Egyptian inheritance law in 1946 with the aim of upholding justice and supporting orphaned grandchildren, usually referred to as "replacement bequests."(Jalil, 2018)

On the other hand, contemporary scholars argue that compulsory wills are directed towards close relatives or those with kinship ties but do not have inheritance rights, excluding adopted children. According to the legal theory proposed by Wahbah al-Zuhaili, compulsory wills for relatives are considered recommended (sunnah) according to the majority of scholars.(Achmad Jarchosi, 2020)

As time progresses, cases related to inheritance issues become increasingly common, such as compulsory wills designated for heirs of different religions. In the Compilation of Islamic Law, the position of heirs is explained in Article 174 Paragraph (1), which states that the entitlement to be heirs is based on two criteria: blood relations and marital relations. Article 171 of the Compilation of Islamic Law defines heirs as individuals who, at the time of death, have blood or marital ties with the deceased, are Muslims, and are not barred by law from being heirs. Therefore, if the individual is not a Muslim at the time of death, they are not considered heirs and do not receive a share of the inheritance like other heirs. This provision is reinforced by a hadith of the Prophet Muhammad, narrated by Bukhari and Muslim, from Usamah bin Zaid, which states that "*a Muslim does not inherit from a non-Muslim, nor does a non-Muslim inherit from a Muslim.*"

Furthermore, the Compilation of Islamic Law (KHI) explains compulsory wills in Article 209, which states that the estate of adopted children is divided according to Articles 176 to 193 mentioned above, and if the adoptive parent does not receive a bequest, they are given a compulsory will. Additionally, if the adopted child does not receive a bequest, they are given a compulsory will amounting to 1/3 of the adoptive parent's estate. According to the provisions in the Compilation of Islamic Law, compulsory wills are only designated for adopted children and adoptive parents, with no specific provision granting the right to compulsory wills to heirs of different religions.

Therefore, the decision of the Supreme Court to grant compulsory wills to non-Muslim family members is an effort towards a positive step by not limiting the understanding of inheritance law. In inheritance law, it is stipulated that someone who renounces Islam is not entitled to inherit from their Muslim relatives. Similarly, a Muslim is not allowed to inherit from a non-Muslim. However, the Supreme Court has taken a step through compulsory wills for non-Muslim family members based on the principle that Islam is not a discriminatory religion, but rather a religion that embraces all people in the world. Regardless of an individual's choice to embrace their respective religion and beliefs, it is emphasized that Islamic law is not rigid but capable of providing protection and justice to non-Muslims as well (Jayusman et al., 2024).

This effort by the Supreme Court is reinforced by the fatwa of the Indonesian Ulema Council (MUI) Number 5/MUNASVII/MUI/9/2005, which states: "Islamic inheritance law does not grant the right to inherit between individuals of different religions (between Muslims and non-Muslims); Giving property to individuals of different religions can only be done in the form of gifts, wills, and donations."

c. Compulsory Wills for Heirs of Different Religions from the Perspective of Istihsan

The granting of compulsory wills to heirs of different religions is a legal innovation by the Supreme Court of the Republic of Indonesia, as seen in Supreme Court Decision Number 368 K/Ag/1995. This ruling established that heirs of different religions have the right to inherit through compulsory wills. This case involved Sri Widyastuti, the fourth child among six siblings, who converted to Christianity from Islam after the death of both parents. In this case, Sri Widyastuti's siblings filed a lawsuit regarding inheritance, involving her despite her changed religious status. According to Islamic law, a person who apostatizes cannot inherit from their deceased parents, as confirmed by the initial ruling of the lower court, which declared that Sri Widyastuti was not entitled to inherit from her deceased parents.

Subsequently, Sri Widyastuti appealed the lower court's decision to the High Court, which ruled in her favor, stating that she was entitled to inherit from her deceased parents through a compulsory will. Later, her siblings filed a cassation appeal, but the Supreme Court upheld the decision of the High Court. The Supreme Court ruled that Sri Widyastuti, who had converted to another religion, was entitled to 1/3 of the compulsory will portion. (Zainab & Sudirman, 2019)

The granting of compulsory wills to heirs of different religions by the judges of the Supreme Court was based on compassion and justice in resolving the lawsuit. Several factors underlie the granting of compulsory wills to heirs of different religions:

a. Historical Factors

The historical factor is one of the factors influencing the inheritance given to heirs of different religions, a problem that arose during the wars between Muslims and non-Muslims. This was aimed

at safeguarding the faith and assets of a Muslim from the control of non-Muslim heirs, which could potentially be used to combat Muslims themselves.

When considering the present time in relation to the above, it is possible to give inheritance to heirs of different religions because there are no longer wars between Muslims and people of other religions. Furthermore, during the time of the Companions, this was practiced by one of the companions, Muadh bin Jabal, who gave wealth to Muslim children even though their parents were Jewish. Thus, this became one of the factors used by judges in obligatory bequests to heirs. (Nugraheni et al., 2012)

b. Use of Sociological Interpretation Methods

The second reason relates to the duty of judges to find laws for every case they examine, as stated that a judge cannot reject a case on the grounds of absence of law (*ius curia novit*). Therefore, based on this, judges have the duty to find the law (*rechtsvinding*).

The use of sociological interpretation begins with the understanding that provisions regarding Islamic inheritance law are *lex specialis* and *lex generalis*. According to *lex specialis*, there is no provision for obligatory bequests in Islamic inheritance law, so judges find the law by referring to the *lex generalis*, which is the general provisions of Islamic law. In the application of obligatory bequests to heirs of different religions under the *lex generalis*, judges use principles of balanced justice, certainty, individuality, and bilaterality.

c. Use of Analogical Argumentation

The use of this method has the same rationale as explained above, which is the application of the principle of *ius curia novit*. In this method, judges find the law by searching for cases with similarities, as well as responding to society's demand for equal judgment, namely by using the provisions of obligatory bequests found in the Islamic Inheritance Law (KHI), specifically for adopted children or foster parents.

From these two events, there is a similarity: both formally, from a legal standpoint, do not receive a share of the inheritance despite having a family relationship with the deceased. Therefore, based on the provision of obligatory bequests to adopted children, it is also applied to children who are not of the Islamic faith. (Andayani & Hariyati, 2020)

d. Existence of Islamic Inheritance Law alongside Other Inheritance Laws

Islamic inheritance law has developed and coexisted with customary inheritance law and the Civil Code's inheritance law. In the issue of giving obligatory bequests to heirs of different religions, it is an effort to actualize Islamic law amidst Indonesia's pluralistic society in social, cultural, legal, and religious aspects.

Furthermore, by giving obligatory bequests to heirs of different religions, it has been demonstrated that Islamic law is not exclusive and discriminatory, which seemingly places individuals of different religions as second-class citizens before the law. It also clarifies that the purpose of Islamic law is to prevent harm.

e. Freedom of Religion as Part of Human Rights

Explicitly, the guarantee of religious differences is stated in Article 28 e, Paragraph 1 of the 1945 Constitution, which declares "that every person is free to embrace their religion and worship according to their religion, choose education and teaching, choose employment, choose citizenship, choose a place of residence within the territory of the State and leave it, and have the right to return." This article is strengthened by Article 28 J, Paragraph 1 of the 1945 Constitution, which governs religious differences within the constitutional scope, stating that "every person has the right to recognition, protection guarantees, fair legal certainty, and equal treatment before the law."

Based on these provisions, the judge believes that a person who has a different religion from the deceased still inherits, using the provision of obligatory bequests. However, the provision of

obligatory bequests will not apply if an heir is proven to have committed a crime against the deceased, such as murder, severe abuse, or defamation. (Gafur, 2022)

f. Legal Theory Recognizing Legal Principles and Deviations from Legal Principles

Granting compulsory wills to heirs of different religions deviates from the principle that heirs cannot inherit if they have a different religion from the deceased. This deviation allows judges to apply the principle of compulsory wills, an exception to Islamic inheritance laws, ensuring justice for all parties involved. The Supreme Court's decision to grant compulsory wills to heirs of different religions reflects *istihsan*, a principle in Islamic jurisprudence that allows for deviation from strict legal principles in favor of equity and justice. By departing from the original Islamic law principle, the Supreme Court adapts to the evolving societal context, ultimately benefiting all parties involved. Additionally, this decision indirectly expands the provisions of compulsory wills in the Compilation of Islamic Law, originally designated for adoptive parents or adopted children, to heirs of different religions.

To deviate from this principle, provisions regarding Compulsory Wills are introduced, allowing judges to grant inheritance rights to those who would otherwise not receive them based on legal principles. The granting of Compulsory Wills is an exception to the principles of Islamic inheritance law, thus the application of compulsory wills by the Supreme Court constitutes a form of legal innovation and is not contrary to Islamic law, neither in the Quran nor in the Hadith which states that there is no inheritance between Muslims and non-Muslims. This is because the designation of a child of a different religion as a recipient of compulsory wills has been established, rather than as an heir (Setiawan, 2017).

The factors underlying the granting of compulsory wills to heirs of different religions are reinforced by the opinion put forth by Ibn Hazm, stating that those entitled to receive compulsory wills are relatives who do not inherit, either because they are slaves or because they are of a different religion than the deceased, or because they are barred from inheriting due to the presence of other relatives or heirs who prevent them, or because they are not entitled to inherit (Andayani & Hariyati, 2020). In the case of such individuals, they should be willed to, and if the deceased did not make a will, then the heirs must give the deceased's property to those whom they deem worthy. Similarly, regarding non-Muslim relatives, the deceased must make a will for them, and if the deceased did not make a will or forgot, then part of their inheritance must be given to those relatives of different religions.

Based on several factors underlying the granting of compulsory wills to heirs of different religions, from the perspective of legal analogy (*istihsan*), the Supreme Court's decision regarding the granting of compulsory wills to heirs of different religions is included in the application of analogy with necessity, as seen in the Supreme Court's decision. The Supreme Court is more inclined to prioritize justice for both parties involved in the dispute and to depart from the original law regarding the granting of wills to heirs of different religions, as found in the hadith of the Prophet Muhammad from Usamah bin Zaid narrated by Bukhari and Muslim, which states that "a Muslim does not inherit from a non-Muslim, nor does a non-Muslim inherit from a Muslim." By departing from this original law, the Supreme Court judge can establish a law in accordance with the development of the times, and provide benefit for each party involved.

Furthermore, the granting of compulsory wills to heirs of different religions by the Supreme Court indirectly expands the provisions found in the Compilation of Islamic Law (KHI) regarding compulsory wills, which originally could only be given to parents or adopted children. However, after the Supreme Court's decision, heirs of different religions also have

the right to inherit from their deceased parents using the terminology of compulsory wills. (Mutmainnah, 2020).

4. Conclusion

The legal innovation made by the Supreme Court, by granting compulsory wills to heirs of different religions, is a positive step in the effort to reform Islamic law and to accommodate the rights of heirs who do not inherit due to their different religion. From the perspective of legal analogy (istihsan), this effort falls within one aspect of istihsan, namely istihsan with necessity, where in determining its decision, the Supreme Court judge is more inclined to prioritize justice to ensure the benefit for each party involved in the case and to avoid disputes among them.

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