

## OBLIGATORY WILLS FOR ADOPTED CHILDREN, CHILDREN OF UNMARRIED COUPLES, AND CHILDREN OF DIFFERENT RELIGIONS

### WASIAT WAJIBAH UNTUK ANAK ANGKAT, ANAK YANG LAHIR DI LUAR PERKAWINAN, DAN ANAK YANG BERBEDA AGAMA

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**Abstract:** In the perspective of Islamic law, the realization of obligatory wills is along with Islamic insight as a religion which focuses on realizing such realization from the principal of justice and a form of love among human being. This passion which has been created in one family can be realized by the giving of some part of the inheritance through obligatory wills to obstructed people being (heirs), both obstructed as adopted, born outside of legal marriage or children of different religions. All of those are meant for kindness, harmony and to avoid conflicts in the world which give big impact for creating harmony and peaceful family. This research was analysis the application of obligatory testaments to adopted children, legitimate children that born outside of marriage and children of different religions. Analysis has been reviewed according to fiqh's view, Compilation of Islamic Law (KHI) and practice in the Religious Courts.

**Keywords:** Obligatory Wills, Islamic Law, Harmony and Peaceful Family.

**Abstrak:** Dalam perspektif Hukum Islam terwujudnya obligatory wills adalah sejalan dengan pandangan Islam sebagai Agama yang bertujuan untuk merealisasikan suatu perwujudan dari prinsip keadilan dan bentuk kasih sayang antar umat manusia kepada manusia lainnya. Perasaan kasih sayang yang terjalin dalam satu keluarga dapat diwujudkan dengan pemberian bagian waris melalui obligatory wills kepada orang-orang yang terhalang menjadi ahli waris, baik terhalang karena sebagai anak angkat, anak yang lahir di luar perkawinan yang sah atau berbeda agama. Semuanya dimaksudkan untuk kebaikan, kemaslahatan dan menghindari konflik di dunia yang berdampak besar bagi terciptanya kerukunan dan ketentraman keluarga. Penelitian ini menganalisis penerapan obligatory wills terhadap anak angkat, anak yang lahir diluar perkawinan yang sah dan anak yang berbeda agama. Analisis ini telah ditinjau sesuai pandangan Fiqh, Kompilasi Hukum Islam (KHI) dan praktik di Pengadilan Agama.

**Kata kunci:** Wasiat Wajibah, Hukum Islam, Kemaslahatan dan Ketentraman Keluarga.

## Introduction

God has set the rules for mankind living on earth. The rules are manifested in the form of a command or will regarding things that men are and are not allowed to do. God's rules of human behavior are sharia that is now called Islamic law.

The Islamic law covers all aspects of human life in the world. Among these laws there are those that do not contain sanctions, namely demands for compliance, and there are also those that contain sanctions that can be received in the world, just like legal sanctions in general. There are also sanctions that are not felt in the world, but are inflicted in the hereafter in the form of sins and retribution for the sins.

Aspects of human life cannot be separated from the nature of his creation as a human being. There are two instincts that both humans and other living things have in common, namely survival instinct and instinct to continue life. To fulfill the two instincts, Allah creates two passions in every human being: appetite and lust.

Appetite has the potential to fulfill survival instinct, so a human needs something he can eat. From here comes the tendency of humans to get and own property. Lust also has the potential to fulfill the instinct to continue life that humans need the opposite sex in channeling their lust. As an intelligent creature, humans need something to keep and increase their intelligence. As a religious creature, humans need something to preserve and perfect their religion.<sup>1</sup>

Therefore, there are five things that have to exist in human life, namely: preserving

religions, minds, souls, properties and children. These five things are called *darûriyyât al-khamsah* (the five basic needs) in human beings.<sup>2</sup>

Among the rules governing the relationship between human beings that have been determined by Allah are the rules about Islamic wills, which the application is used to refer to a right whose provisions are in effect when someone has died. Islamic wills are a way to transfer property from one person to another. The wills system has been adopted since ancient times and it is not only limited to Islamic tradition, but has also been implemented by every ancient community despite with a different understanding of wills.

The wills system has differences in its implementation. All have its respective provisions on the legitimacy of the implementation of wills. In Indonesia, it has its own rules about wills. Among them are arranged in *Burgerlijk Wetboek (BW)* for non-Muslims or indigenous peoples while for Muslims wills are regulated in the Compilation of Islamic Law (KHI).

The dynamics of legal development in Indonesia has accelerated dramatically along with the dynamics of the development of the community related to the acquisition of inheritance rights through different inheritance religions. The development of the law can be seen in the ruling of the Supreme Court of Indonesia which made a breakthrough in the new law by giving inheritance rights to other parties of different religions (non-Muslims) through obligatory wills.

In theory obligatory wills are interpreted as rights granted by a ruler or the judge dedicated to relatives or heirs who do not get a share

1 Amir Syarifuddin, *Hukum Kewarisan Islam* (Jakarta: Kencana, 2004), p. 2.

2 Wahbah Al-Zuhaili, *al-Wajîz fî Uşûl al-Fiqh* (Damaskus: Dâr al-Fikr, 2002), p. 92.

of inheritance from an testator (a dead person) due to an obstacle.<sup>3</sup> The legal breakthrough can clearly be seen in a Supreme Court of the Republic of Indonesia verdict Number 51 K / AG / 1999, allowing non-Muslims to receive a share of inheritance inherited by Muslims. The verdict is actually not based on the system of pure inheritance practice as stipulated in the Compilation of Islamic Law (KHI), but is made using the concept of or extending obligatory wills contained in the KHI. Provisions of obligatory wills are legal provisions outlined in the Compilation of Islamic Law (KHI) to give inheritance rights to parties (communities) who have adopted children, but the Supreme Court of Indonesia also provides a legal breakthrough as part of its effort (*ijtihād*) by upholding the value of justice through a sociological juridical method that relies on Ibn Hazm's opinion giving inheritance rights to non-Muslims (different religions) through obligatory wills.

This paper aims to understand obligatory wills for Muslims in Indonesia and practices in the Religious Court and society which its implementation is not only intended for adopted children, foster parents and parties of different religions, but also children who were born into unmarried couples. They all are also possible to receive a share of inheritance through mandatory wills.

Nonetheless, the Compilation of Islamic Law (KHI) is an Islamic law that is applied in Indonesia. The KHI is actually the result of *ijtihād* from classical *fiqh* books which is contextualized in accordance with Indonesia. The contextualization is carried out because the legal framework compiled by past Islamic scholars (*ulama*) exists within their space,

time, and place which until now have been used as a reference by judges in the religious court.

### The Definition of Wills

Etymologically, the word wills (*waṣiyyah*) is from Arabic (*waṣiyyah*), which has several meanings namely "creating, affection, ordering, and connecting something with something else". Terminologically, wills are a gift given by someone to other people in the form of goods, lenders or benefits to a person who is given wills after a will giver dies. In general, wills are a handover of property from a person to someone, or to some people after the death of the person.<sup>4</sup>

Experts in Islamic law explain that wills are ownership based on a person who declares a will before he or she dies with good intention without demanding compensation or *tabarru'*. Sayyid Sabiq argues that this understanding is in line with the definition put forward by experts in Islamic law of the Hanafi school which states that wills are an action of someone who voluntarily gives his rights to others to possess something in the form of goods or benefits without asking for compensation whose implementation is suspended until the person declaring the will dies.<sup>5</sup>

According to Hasbi Ash-Shiddiqy, wills are interpreted as a *taṣarruf* (a release) of inheritance that occurs after a person who gives a will passes away. According to its legal origin, wills are an act carried out with willingness under any circumstances. Therefore, there is nothing in the Islamic Sharia a wills must be fulfilled through a verdict.<sup>6</sup>

3 Amir Syarifuddin, *Hukum Kewarisan Islam* (Jakarta: Kencana, 2004), p. 2.

4 Sayyid Sabiq, *Fiqh al-Sunnah* (Beirut: Dâr al-Fikr, 1983), p. 583.

5 Sayyid Sabiq, *Fiqh al-Sunnah*..., p. 583.

6 Hasbi Ash-Shiddiqy, *Fiqh Mawaris* (Jakarta:

Another definition of wills is that it is a final message of someone who is approaching his death. It can be in the form of a message about what the recipients of a will have to do with inherited properties or other messages outside the inheritance.<sup>7</sup> In the Compilation of Islamic Law, the definition of wills is explained in Chapter II concerning Inheritance Law, which states that wills are a transfer of an object from a testator to a person or an institution that wills take effect after the testator dies.<sup>8</sup>

Obligatory wills term was not discussed in the classical books that when this term appears, it is interpreted as a will that is obliged to undertake. Obligatory wills are a special term whose definition is mandatory wills. Therefore, it is necessary to explain the definition of obligatory wills, which is as follows:

1. Obligatory wills are a policy carried out by an authority a panel of judges as law enforcement officers to force or oblige people who have passed away to do a mandatory will to certain people in certain circumstances.<sup>9</sup> Therefore, a will is considered obligatory wills due to two things:
  - a. The absence of effort element in a will giver and the emergence of obligation element through a law or a decree without dependence on the willingness of the will giver and the consent of the recipients of the wills.
  - b. There is a similarity to the provisions

Pustaka Rizki Putra, 2001), p. 273.

7 Anwar Sitompul, *Fara'id: Hukum Waris Dalam Islam dan Masalah Masalahnya* (Surabaya: Al-Ihlas, 1984), p. 60.

8 Kompilasi Hukum Islam, Article 171 (f)

9 Fatchur Rahman, *Ilmu Waris* (Jakarta: Bulan Bintang, 1979), p. 63.

for the distribution of inheritance in the case of male income (two) times the share of women.

2. The meaning of obligatory wills, a person is considered, according to the law, have received a will even though there is no real will. The assumed law is born from *a principle that if in a case the law has decided an obligation to make wills then whether or not there is a will is made, the will is considered to exist by itself*.<sup>10</sup>
3. Obligatory wills are a will intended to heirs or relatives who do not get a share of inherited properties from a person who has died due to a sharia barrier.<sup>11</sup>
4. Suparman in his book *Fiqh Mawaris* (Islamic Inheritance Law) defines obligatory wills as wills whose implementation is not influenced or does not depend on the willingness of a deceased.<sup>12</sup>

Wasit Aulawi explains that the implementation of obligatory wills is grandchildren whose parents have died. In this case wills are a transfer of property as much as received by their fathers or mothers if they are still alive with a maximum amount is 1/3 inheritance. The implementation has to fulfill some requirements: the grandchildren have never received a will, and obligatory wills will be carried out before the implementation of *ikhtiyâriyyah* wills to precede the distribution of

10 Cik Hasan Bisri, *Kompilasi Hukum Islam Dan Peradilan Agama Dalam Sistem Hukum Nasional* (Jakarta: Logos Wacana Ilmu, 1999), p. 71.

11 Abdul Aziz Dahlan, *Ensiklopedi Hukum Islam*, Vol. 6 (Jakarta: PT Ikhtiar Baru Van Hoeve, 2000), p. 1930

12 Suparman, et.all., *Fiqh Mawaris (Hukum Kewarisan Islam)*, (Jakarta: Gaya Media Pratama, 1997), p. 163.

inheritance to other heirs.<sup>13</sup>

### The Legal Basis of Wills

The legal basis of wills in Islamic inheritance law is the surah al-Baqarah verse 180 and surah al-Ma'idah verse 106. In al-Baqarah verse 180, Allah says:

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِن تَرَكَ خَيْرًا  
الْوَصِيَّةَ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى  
الْمُتَّقِينَ (١٨٠)

Meaning:

Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous.<sup>14</sup>

The word wills in the above verse is the most complete verse relating to wills. This verse does not explain about testimony at the time a wills are made whereas if a will is not done in front of a witness, it will cause problems in the future. Therefore, in Al-Ma'idah verse 106 testimony is regulated both for Muslim or non-muslim witnesses.

In al-Ma'idah verse 106, Allah says:

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ  
الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِنْكُمْ أَوْ آخَرَانِ  
مِنْ غَيْرِكُمْ إِنْ أَنْتُمْ صَرَبْتُمْ فِي الْأَرْضِ فَأَصَابَتْكُمْ  
مُصِيبَةُ الْمَوْتِ تَحْبِسُونَهُمَا مِنْ بَعْدِ الصَّلَاةِ فَيُقْسِمَانِ  
بِاللَّهِ إِنْ ارْتَبْتُمْ لَا نَشْتَرِي بِهِ ثَمَنًا وَلَوْ كَانَ ذَا قُرْبَى وَلَا  
نَكْتُمُ شَهَادَةَ اللَّهِ إِنَّا إِذَا لَمِنَ الْأَثِمِينَ (١٠٦)

Meaning:

O you who have believed, testimony [should be taken] among you when death approaches one of

you at the time of bequest - [that of] two just men from among you or two others from outside if you are traveling through the land and the disaster of death should strike you. Detain them after the prayer and let them both swear by Allah if you doubt [their testimony, saying], "We will not exchange our oath for a price, even if he should be a near relative, and we will not withhold the testimony of Allah. Indeed, we would then be of the sinful."<sup>15</sup>

The transfer of property through wills is the will of Allah to realize a good life for humans both for individuals and communities. It is for this reason wills are regulated which provides ownership legalization or benefits of property associated with the time after someone's death, and is voluntarily undertaken to others so that they can take advantage of that wealth.

Scholars differ in their views on the meaning of the al-Baqarah verse 180 above. This difference lies in assessing whether the verse contains undisputed law (*muhkamat*) or it still needs further explanation (*mutasyabihat*). The difference will have an impact on the content of the verse.

The opinions of Ibnu Abbas, Hasan Basri, Taus, Masruq and Dahhaq are that wills to both parents and relatives who receive inheritance has been removed while those who do not get any share of inheritance will remain to receive obligatory wills. This is because the verse includes both, then those who get inheritance are erased whereas those who do not get inheritance will still be qualified. Therefore, Ibnu Jarir At Thabari in his tafseer chose this opinion, but the ulamas after him called it as specification (*takhshîs*), that is parents or relatives who do not get wills, even if their inheritance rights are hindered, they still get a share through obligatory wills, and the verse is not

13 A. Wasit Aulawi, *Sejarah Perkembangan Hukum Islam Dalam Amrullah Ahmad, Dimensi Hukum Islam Dalam Sistem Hukum Nasional* (Jakarta: Gema Insani Press, 1996), p. 65.

14 Al-Baqarah (2): 180.

15 Al-Ma'idah (5): 106.

classified as a abrogation verse (*mansûkh*).<sup>16</sup>

Al-Qurtubi explained the opinions of scholars about the meaning of al- Baqarah: 180. In this case there are some scholars who explain it as a verse which is decisive (*muhkamah*). Interpretively the verse is general, however, its meaning is specific, which is parents who do not get inheritance and relatives who belong in heirs. Other scholars argue that the verse is abrogated (*mansûkh*) by the verse of inheritance (*farâ'id*) and is strengthened by hadith which means: *Allah has given the rights to the people who have them, thus it is not allowed to give wills to heirs*. Meanwhile, other scholars argue that wills to parents are removed by certain parts which in the wills are still valid to relatives who do not get inheritance.<sup>17</sup>

Actually, if the verse is analyzed (al-Baqarah verse 180), there is nothing that makes absent between verses about wills and those about inheritance, that is, the verse of inheritance is for relatives who have received inheritance, while the verse for relatives who do not get inheritance owing to the fact that there are barriers such as being infidels and slaves, they are veiled or closed by heirs who are closer and belong to the *dzawî al-arhâm* beneficiaries.<sup>18</sup>

## The Amount of Wills

Scholars agree that people who leave heirs are not allowed to give wills exceeding 1/3 (one

third) of their wealth.<sup>19</sup> This is in accordance with a Prophet's Hadith peace be upon him, which reads:

عَنْ عَامِرِ بْنِ سَعْدٍ عَنْ أَبِيهِ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي حَجَّةِ الْوَدَاعِ مِنْ وَجَعٍ أَشْفَيْتُ مِنْهُ عَلَى الْمَوْتِ فَقُلْتُ يَا رَسُولَ اللَّهِ بَلِّغْنِي مَا تَرَى مِنَ الْوَجَعِ وَأَنَا ذُو مَالٍ وَلَا يَرِثُنِي إِلَّا ابْنَةٌ لِي وَاحِدَةٌ أَفَأَتَصَدَّقُ بِثُلُثِي مَالِي قَالَ لَا قَالَ قُلْتُ أَفَأَتَصَدَّقُ بِشَطْرِهِ قَالَ لَا التَّلْثُ وَالتَّلْثُ كَثِيرٌ إِنَّكَ أَنْ تَذَرَ وَرَثَتَكَ أَغْنِيَاءَ خَيْرٌ مِنْ أَنْ تَذَرَهُمْ عَالَةً يَتَكَفَّفُونَ النَّاسَ وَلَسْتَ تُبْفِقُ نَفَقَةً تَبْتَغِي بِهَا وَجْهَ اللَّهِ إِلَّا أَجْرْتَ بِهَا حَتَّى اللَّفْمَةِ تَجْعَلَهَا فِي فِي امْرَأَتِكَ (رواه مسلم)

Meaning:

Amir b. Sa'd reported on the authority of his father (Sa'd b. Abi Waqqas): Allah's Messenger (may peace be upon him) visited me in my illness which brought me near death in the year of Hajjat-ul-Wada' (Farewell Pilgrimage). I said: Allah's Messenger, you can well see the pain with which I am afflicted and I am a man possessing wealth, and there is none to inherit me except only one daughter. Should I give two-thirds of my property as Sadaqa? He said: No. I said: Should I give half (of my property) as Sadaqa? He said: No. He (further) said: Give one-third (in charity) and that is quite enough. To leave your heirs rich is better than to leave them poor, begging from people; that you would never incur an expense seeking therewith the pleasure of Allah, but you would be rewarded therefor, even for a morsel of food that you put in the mouth of your wife.<sup>20</sup>

Abu Daud, Ibn Hazm and Salaf clerics argued that wills are compulsory for every one (*farḍ 'ain*). Their reason is that al-Baqarah verse 180 and An-Nisa' verses 11-12 contain a notion that "Allah obliges His servants to inherit some of their wealth to heirs and re-

16 Sayyid Sabiq, *Fiqh al-Sunnah*..., p. 588.

17 Syamsuddin al-Qurtubi, *Tafsir al-Qurtubi* (M - sir: Dâr al-Kutub, 671 H), p. 258.

18 *Dzawî al-arhâm* is beneficiary who has family kinship or blood relationship with the deceased other than the *aşhâb al-furûd* beneficiaries and '*aşabah*, whether male or female, such as a son and a daughter to a daughter, a son and a daughter to a female sibling, an uncle from mother's side, and so on.

19 Ibnu Rusyd, *Bidayatul Mujtahid* (Jakarta: Pu - taka Imami, 1990), p. 452.

20 Abu Hasan Al-Qusyairi An-Naisyaburi, *Shahîh Muslim*, Vol. III (Beirut: Dâr al-Ihya, 261 H), p. 1250.

quires the implementation of wills ahead of repayment of debt. The meaning of to the parents and relatives is understood because they do not receive inheritance".<sup>21</sup>

Based on the hadith, it can be understood that to protect heirs, so that they are not in poor condition after being left behind by the testator, the permissible property (maximum amount) may not exceed one third of the whole assets. In Islamic inheritance law it aims to protect heirs.<sup>22</sup>

### Obligatory Wills in a Multidimensional Study

Basically, giving wills is an act of *ikhtiyâriyyah* (an effort), that is an action carried out on the basis of self-willingness under any circumstances. Thus, basically a person is free whether or not to make a will. It is based on the shared opinion of ulamas from the four mazhabs who argue that making wills for relatives is preferable (*sunnah*). However, some scholars argue that the freedom to make or not make a will only applies to people who are not close relatives. They argue that for close relatives who do not receive inheritance, someone is obliged to make a will. It is based on al-Baqarah verse 180, while other opinion shared by Ibnu Hazm adh-Dhahiri, Ath-Thabari, and Abu Bakar bin Abdil Aziz from the Hambali Mazhab state that wills are a religious obligation and the obligation payment for parents and relatives who do not get the rights of inheritance because being blocked by a testator.<sup>23</sup>

Based on the above text, Ibn Hazm views the wills law as mandatory for everyone who has properties after his death. His argument is referred to textual passage of the Quran (*zhâhir*), which states the obligation of giving a will. Because the obligation of giving wills applies to everyone who has properties after his death, then if someone dies, and he does not make a will, his properties have to be donated partially to the obligation of the will. Due to the fact that authorities have the rights to determine the affairs of Muslims, and matters of wills belong in one of the affairs of every Muslim, so in this case the authorities must act to give a portion of the inheritance as mentioned above in order to fulfill the obligation of giving a will. Based on the Ibn Hazm's thought, the term obligatory wills emerged.<sup>24</sup>

Obligatory wills are wills that are considered to exist although in reality they do not exist for the purpose of benefits. Obligatory wills are *ijtihâdiyyah* (based on ulamas' interpretation of the Quran) because there are no clear texts that explain them, thus the conditions, the legitimate and cancelling requisite of the wills are a legal study field that is *ijtihâdiyyah*.

The obligation of obligatory wills does not require the provisions contained in ordinary wills because obligatory wills do not need *ijab* and *qabul* (selling and buying agreement). Obligatory wills are like inheritance and are carried out as a distribution of inheritance. For this reason, their implementation is not the same as that of ordinary wills, which does not require an *ijab* (a permit) from the person who gives wills and there is no *qabul* (stated reception) from the person who receives the wills. Thus, obligatory wills resemble the dis-

21 Sayyid Sabiq, *Fiqh al-Sunnah*..., p. 583.

22 Rahmad Budiono, *Pembaruan Hukum Kewarisan Islam di Indonesia* (Jakarta: PT. Citra Aditya Bakti, 1999), p. 24.

23 Wahbah Al-Zuhaili, *al-Fiqh al-Islâmî wa Adilatuhi*, Vol. VIII, (Beirut: Dâr al-Fikr, 1989), p. 122.

24 Wahbah Al-Zuhaili, *al-Fiqh al-Islâmî wa Adilatuhi*, Vol. VIII, p. 122.

tribution of inheritance, so they are treated as an inheritance treatment, that is, men get a portion twice the share of women, the original heirs cover the branches, and each branch only takes a portion from its origin.<sup>25</sup>

Scholars differed in determining whether the obligation of making a will is still valid or not. Such a difference is due to an opinion about the Qur'anic verses whether they are erased by the verses of the Qur'an on inheritance or not. Ulama opined (*jumhur* ulama) that the obligation to give wills for mothers, fathers, and close relatives have already been erased, whether they receive inheritance or not. They also argue that the Prophet's Hadith which means "There are no wills for heirs" is an affirmation of their stance.<sup>26</sup>

Owing to the fact that there is no contradiction between verses that oblige wills with those relating to inheritance, so the verses that oblige wills are not erased by the verses of inheritance. This is the opinion of the ulama who remain to oblige giving wills for close relatives who do not get inheritance. In this regard, Ibn Hazm argues that "if wills are abolished for close relatives who do not receive inheritance, then the judge must act as a testator, who is to give a portion of inheritance to relatives who do not get any of it as obligatory wills for them".

Based on the above conditions, for grandchildren who do not get inheritance, both children from daughters or children from sons, because there are sons who are still alive, then a will is required to be made. For example, a person dies leaving a son and a grandson of

his son, the grandson's father has passed away earlier than his grandfather. In this situation, the grandson does not receive inheritance because he is blocked by the son. To solve such a circumstance, the grandson is given a portion based on obligatory wills. The maximum portion of grandchildren is only one third of inheritance, because the amount of obligatory wills must not exceed one third of inheritance. So, the grandchild's portion is not as big as the portion received by his parents should they were still alive.<sup>27</sup>

The above opinions of Ibn Hazm and other scholars regarding obligatory wills as mentioned above is adopted by the Egyptian Inheritance Law, Number 71 year 1946. In the law it is stated that the amount obligatory wills is as large as the portion received by parents, if they are still alive, with a provision that it must not exceed one third of inheritance. Besides, two conditions must also be fulfilled, namely:

1. The grandchildren do not belong to the people who have the rights to get inheritance.
2. The dead do not give them in any way the amount which has been predetermined such as grants for example.<sup>28</sup>

The law in Egypt above does not mention anything about nephews or nieces. It is a clear clue that the law tries to overcome very urgent problems. The illustration of the truth of this statement can be illustrated through an example that a person has two grandsons. One is from a son, and the other is from a daughter. The parents of both grandsons have

25 Wahbah Al-Zuhaili, *al-Fiqh al-Islami wa Adilatu*, Vol. VIII, p. 123.

26 Imam Taqiyuddin Abi Bakar Bin Muhammad Al Husaini, *Kifayat al-Ahyar* (Bandung: Syirkatul Ma'arif, 1993), p. 35.

27 Rahmad Budiono, *Pembaruan Hukum Kewarisan Islam Di Indonesia* (Jakarta: PT. Citra Aditya Bakti, 1999), p. 26.

28 Hasbi Ash-Shiddiqy, *Fiqh Mawaris* (Jakarta: Pustaka Rizki Putra, 2001), p. 277.

passed away, and the only heir is the grandson from the son. The grandson of the daughter is blocked. To overcome this kind of problem Islamic law experts think hard because both the Qur'an and the Sunnah do not regulate in detail the portion of a grandchild.

The center of attention of obligatory wills is focused on the problem of grandchildren, and efforts (*ijtihad*) that appear are like obligatory wills. In the development of Islamic inheritance law discussion, Islamic law experts not only analyzed grandchildren whose inheritance rights are blocked, but also broadened their analytical horizons by arguing that Islamic inheritance law acknowledge replacement (substitute heirs). The expert in the Islamic law is for example Professor Hazairin. Nevertheless, even though in a very limited scope, obligatory wills bear a resemblance to the replacement of place. The similarity lies in the fact that there is a person who dies earlier than a person who leaves properties.

Although at some points there is a similarity between the replacement of place and obligatory wills, however, there are many differences between the two. The difference arises because the basic ideas between the two are not the same. Obligatory wills are a method for solving one type of problem, while the replacement of place is a way to overcome a comprehensive problem. What is meant by being comprehensive here is comprehensiveness in the problem of death first than individuals who leave wealth, both in a straight line down, a straight line up or a side line.<sup>29</sup>

The regulation of obligatory wills in Indonesia is regulated in the Compilation of Islamic

Law (KHI) as stated in an article in Chapter II which regulates inheritance. It is mentioned in article 209 of the Compilation of Islamic Law (KHI). The compilation of Islamic Law (KHI) is a substantive law of the religious court in Indonesia which becomes a reference for the judges of the religious court throughout Indonesia despite its enactment is only through the Indonesian Presidential instruction No.1 of 1991 dated June 10, 1991. One of the KHI materials is the transfer of obligatory wills to adopted children and foster parents mentioned in article 209 KHI. This is a new breakthrough in Islamic law which is not found in the classical books and even in the Egyptian, Syrian, Moroccan and Tunisi Acts, all of which do not state obligatory wills for adopted children and foster parents. Article 209 of the KHI states:

Verse 1:

The wealth left by adopted children is divided based on the articles 176 to 193 above, while for adoptive parents who do not receive a will is given obligatory wills maximum 1/3 of the assets of the adopted children.

Verse 2:

For adopted children who do not receive a will is given obligatory wills maximum 1/3 of the assets of the foster parents.<sup>30</sup>

Based on the word of Allah in al-Baqarah verse 180, this is what caused differences of opinion among scholars regarding the law of wills. Some scholars (Hanabilah) argue that basically the law of wills is obligatory, which is to give a portion to parents or relatives who do not receive inheritance because they are blocked (*mahjûb*), or cannot become heirs because they are blocked (*mamnû'*). Based on this opinion, several Islamic countries have imposed obligatory wills to give a portion to grandchildren whose parents die before or together with their grandparents. Meanwhile, in

29 Rahmad Budiono, *Pembaruan Hukum Kewarisan Islam di Indonesia* (Jakarta: PT. Citra Aditya Bakti, 1999), p. 24.

30 Kompilasi Hukum Islam, Pasal 209.

the Compilation of Islamic Law, obligatory wills are used to give part to adopted children or foster parents, other than that, taking into account the diverse conditions of Indonesian society both in terms of religion, race, ethnicity and language, therefore obligatory wills are also intended for non-Muslim heirs with consideration of a sense of justice and humanity.

The giving of obligatory wills to heirs who lose their rights because of religious differences is regulated in the Supreme Court Decision No. 368K / AG / 1995 and Decision No. 16 KAG 2010 Regarding the Inheritance of Different Religion.<sup>31</sup> In that case the Supreme Court of Indonesia has made a decision regarding obligatory wills for relatives who do not get inheritance because they are blocked (having different religions). The matter that is considered by the judge is the use of *qiyās* (analogy) with its legal idea or the underlying cause is the expansion of the interpretation of obligatory wills for relatives who do not get inheritance, namely adopted children or foster parents and is extended to non-Muslim relatives. Obligatory wills are considered the most realistic form of compromise for heirs who have different religions from testators', even though in Islamic law differences in religion are a barrier to receiving inheritance. Some of the judge's reasons to give obligatory wills to the heirs of different religions include: the judge uses the analogy argument method by finding other legal provisions that have similarities or resemblances in law as the provisions of obligatory wills in the KHI specifically for adopted children and foster parents besides for overcoming a legal vacuum and

the demand in the community to get the same assessment. The similarities in the law cause the rules that apply to one event to also apply to other events, so the provisions of obligatory wills for adopted children also apply to children or heirs of different religions.<sup>32</sup>

In the perspective of Islamic Law, the realization of obligatory wills, is in line with the Islamic view as a religion that aims to realize an embodiment of the principles of justice and compassion contained in the teachings of Islam as mentioned in the Quran and some hadiths. Affection intertwined in a family can be realized by giving a part through a will as a form of affection between mankind. Everything is intended for goodness, avoiding conflicts in the world that have a major impact on the creation of harmony and peace of the family.

It has been agreed by some ulamas that differences in religion (Muslims and non-Muslims) are one of the obstacles to being qualified to get inheritance. Likewise, *nasab* (family root) is one of the causes to be qualified to get inheritance. Differences in religion are religious differences which become beliefs between people who inherit and testators. This can be seen in a *fiqh* book which means: "It has been agreed by scholars that there are three things that can become barriers to inherit, namely: slavery, murder, and religious differences." And in the hadith of the Prophet SAW that is narrated by Bukhori and Muslim from Usamah Ibn Zaid which means as follows: "Muslims cannot inherit the wealth

31 Putusan Mahkamah Agung RI Nomor 368.K/AG/1995 dan Putusan Mahkamah Agung N0. Register 51 K/AG/1999 tanggal 29 September 1999 dan Putusan N0. 16 KAG 2010 Tentang Kewarisan Beda Agama

32 Muhammad Rinaldi Arif, "Pemberian Wasiat Wajibah terhadap Ahli Waris Beda Agama (Kajian Perbandingan Hukum Antara Hukum Islam dan Putusan Mahkamah Agung Nomor 368.K/AG/1995)", *Journal De Laga Lata*, Vol. 2, No. 2, 2017, p. 357.

of infidels and unbelievers cannot inherit the property of Muslims". Thus, majority of muslim jurists scholars (*jumhûr*) agree that non-Muslims (infidels) cannot inherit Muslims' wealth because their status is lower.<sup>33</sup>

Likewise, apostates (people who left the religion of Islam), have the same position, namely they do not inherit their families' inheritance. They are considered to have committed the biggest crime and have broken the provisions of the God's law. Therefore jurists agreed that apostates are not entitled to receive inheritance from their relatives.<sup>34</sup>

In addition, there are some other scholars who also agree like Ibn Hazm, Ath-Thabari and Muhammad Rasyid Ridha that non-Muslim heirs will get inheritance from Muslim heirs through obligatory wills. Among the three scholars whose description is more complete and clear is Ibn Hazm.

According to him, "It is mandatory for every Muslim to give wills for relatives who do not inherit due to slavery, the existence of *kufir* (non-Muslims), being blocked or because simply do not get inheritance (they are not heirs), then a person should give a will for them (in this case there are no certain limitations). If he does not give a will, then heirs or the guardians who administer wills should give a will for them (relatives) in accordance with a decent size"<sup>35</sup>.

From Ibn Hazm's description above, it is clear that parents who do not inherit caused by not being Muslim (non-Muslim) are required to be given obligatory wills. If a Muslim does not make a will in his life, then heirs or the

guardian who takes care of wills must carry out the will. Thus, the obligation to give wills is not only someone's responsibility in executing religious orders (to make a will), but it can also be imposed if he neglects to implement it because it relates to the interests of society.

The obligation to make a will for every Muslim, as explained by Ibn Hazm, is based to the argument of the Qur'an in al-Baqarah verse 180. The understanding of Ibn Hazm about the verse mentioned above is certainly a little bit different from what the *jumhur* scholars understand that the obligation verse above has been entered into by the inheritance verse, which has determined the inheritance portion for both parents and other relatives. The understanding of the *jumhur* scholars is strengthened by an authentic hadith that forbids making a will to heirs. The hadith is as follows: "Allah has given to every person who has the right his rights (inheritance), thus it is forbidden to make wills to heirs" (Narrated by Abu Daud, Tirmidhi and Ibn Majah).<sup>36</sup> Whereas according to Ibn Hazm the obligation verse to make wills is still perfectly valid (*muhkam*) which is specifically for parents and relatives who do not inherit because of various things including the existence of religious differences (non-Muslims). Even though there is a difference between the *jumhûr* scholars and Ibn Hazm in determining the law of wills, the Syafi'iyah, Hanafiyah and Hanabilah ulamas have allowed to make wills for those who are not Muslims (non-Muslims) on a condition that the wills are not fighting Muslims. In such a circumstance the wills are null or invalid.<sup>37</sup>

The difference in religion being a barrier to inheritance as stated by the scholars above

33 Muhammad 'Alî al-Shâbûnî, *al-Mawârîts* (Makah: 'Alamul Kutub, 1985), p. 36.

34 Ibnu Rusyd, *Bidayatul Mujtahid...*, p. 497.

35 Wahbah Al-Zuhailî, *Fiqh al-Islâmî wa Adillatuhu*, Vol. VIII, p. 122.

36 Sayyid Sabiq, *Fiqh al-Sunnah...*, p. 153.

37 Wahbah Al-Zuhailî, *al-Fiqh al-Islâmî wa Adillatuhu*, Vol. VIII, p. 123.

remains to color the Islamic law today. Egyptian, Syrian, Moroccan and Tunis inheritance laws explicitly state that Muslims and non-Muslims cannot inherit from each other.

The rights to receive obligatory wills for non-Muslim heirs as stated in the decision of the Supreme Court of the Republic of Indonesia can be regarded as an attempt to the discovery of law (*rechtvinding*) for the inheritance of Islam in Indonesia and also in the whole Islamic world because in other Islamic states such as Egypt, Syria, Tunisia and Morocco obligatory wills are only given to grandchildren whose parents have died not to non-Muslim heirs. The judge who decides this case may be considered to make a legal discovery (*rechtvinding*) using the Sociological Juridical method by adopting the opinion of Hazairin, while Hazairin himself adopted the Ibn Hazm's opinion who based his idea on the fact that Islam is a *rahmat li 'l-'âlamîn* (goodness for the entire world) religion which upholds the principle of balanced justice, the principle of certainty (absoluteness), and individual and bilateral principles. Even though the decision of the Supreme Court of the Republic of Indonesia grants obligatory wills to non-Muslim heirs only represents a minority in the tradition of Islamic legal thoughts, it should be valued as a result of the discovery of law in an attempt to actualize the Islamic law in the pluralistic Indonesian people whether in social, cultural, legal, and religious fields so that Islamic law does not lose its identity as a *rahmat li 'l-'âlamîn*.

The renewal of the law carried out by the Supreme Court of Indonesia in relation to providing obligatory wills to non-Muslim heirs is a renewal of a limited nature which still positions non-Muslim heirs as people who are blocked from inheriting Muslims' properties

as agreed by the ulamas (*ijmâ'*). But on the other hand, it seems that if the Supreme Court allowed non-Muslim heirs not to get anything from the inheritance left by Muslims is less relevant to the legal values and norms in Indonesian society, so the solution is by providing obligatory wills which basically has quite significant differences from those whose status is heirs in particular in receiving inheritance portion.

In the context of Indonesia, obligatory wills for Non-Muslim heirs relate to the value and the people of Indonesia who have a social contract to live in harmony, peace, mutual respect, and do not undermine human dignity on any basis such as ethnicity, culture and religion. The social contract has been outlined in the state constitution, namely Pancasila and the 1945 Constitution. The 1945 Constitution as an elaboration of Pancasila which has recently undergone amendments in many parts of its articles outlines the protection of human rights, which not only as a reflection of the wishes of the people of Indonesia, but also has become the desire of the global community.

## Conclusion

The legal provisions obligatory wills for adopted children and foster parents whose inheritance rights are blocked when they have not received wills from testators as stipulated in the Islamic Law Compilation (KHI) as a product of Presidential Instruction is not based on the order of laws and regulations in Indonesia. Nonetheless, the majority of judges in the Indonesian Religious Court made KHI as a binding basis in inspecting cases and giving legal verdicts. The issue of verdict by the judge on the transfer of obligatory wills to foster parents and the extension of the verdict to non-Muslim heirs (different religions) as well as

to children from unmarried couples are an act of a legal breakthrough to establish a new law for those who are hindered to receive inheritance. The amount of obligatory wills with a maximum of 1/3 of the testators' properties is not found in a trusted reference (*shârih*) both in the Quran and Hadith, but it falls within the efforts (*ijtihad*) of scholars.

The basic consideration for obligatory wills by the judges of the Indonesian Religious Court as a legal breakthrough to find a law (*rechtvindig*) in the Islamic inheritance law on the basis of the freedom principle it has to give a legal verdict which is not regulated in the material law of the Indonesian law. Through the extension of obligatory wills application which not only applies to adopted children and foster parents, but also to non-Muslim heirs (different religions) and children from unmarried couples through a sociological juridical method, *fiqh*, and the implementation of the principle of balanced justice and the principles of certainty and benefits which are aimed for goodness as well as a form of embodiment of affection contained in the teachings of Islam.

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