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Contemporary Ijtihad Deconstruction in The Supreme Court: *Wasiat Wajibah* as An Alternative for Non-Muslim Heirs in Indonesia

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ABSTRACT

This research critically analyzes the rules and theoretical foundations of ijtihad and its application in resolving contemporary Islamic inheritance law issues, particularly as addressed by the Supreme Court. The focus is on wasiat wajibah (compulsory testament) as an alternative for non-Muslim heirs. Using a descriptive-analytical method, the study explores ijtihad comprehensively through primary data from interviews with Religious Court Judges and Religious High Court Judges, and observations in various religious courts. Secondary data includes Supreme Court decisions on compulsory testaments for non-Muslim heirs, classical texts, scientific articles, and related internet sources. The study finds that the Supreme Court has implemented modern ijtihad in Islamic inheritance law by offering compulsory testaments as an alternative for non-Muslim heirs. This approach is a product of judicial ijtihad, aimed at achieving legal discovery (rechtvinding) and promoting justice for those excluded from inheritance. Significant Supreme Court decisions, such as 16 K/AG/2010, 218 K/AG/2016, and 331 K/AG/2018, exemplify this legal innovation. These decisions represent a historical necessity that should be positively acknowledged for future legal developments.

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1. INTRODUCTION

In the treasures of Islamic legal thought, the sources of Islamic law can be categorized into two parts. The first category is the source of the Islamic law that comes from the revelation of Allah swt., either in the form of the Qur'an or Hadith (Ridwan et al., 2021). The second category is the sources of Islamic law derived from *ijtihad* (*ra'y*) such as *qiyas* and *ijma'* (Khallaf, 1978). If the provisions of law are taken clearly and in detail in the Qur'an, then the provisions and requirements of the law are taken into account. However, if the provisions of the law are not in the Qur'an clearly and in detail, then the requirements of the legal provisions must be sought in the Hadith (Rasidin et al., 2021; Witro, 2021b). Then, if there is a legal provision that is not found in the Qur'an or Hadith clearly and in detail or only found in vague or general legal provisions requirements, then to see the legal provisions must be sought through *ijtihad* or *ra'y* (Fawaid, 2013).

The activity of *ijtihad* as a method of finding Islamic law was carried out at the time of the Prophet Muhammad, whether the *ijtihad* was carried out by the Prophet or carried out by the companions (Suma, 1991). In this period, the Prophet Muhammad Saw. and the Companions, when doing *ijtihad,* still used a fundamental and straightforward method without any theoretical rules that bound it. Only after the death of the Prophet Muhammad Saw. the *ijtihad* model began to be developed and modified by the Companions to the generation of the *tabi'in* and the generation after that (Rohman & Witro, 2022; Rusyana & Witro, 2021; Supena & Fauzi, 2002). This was done as a demand for the realities of an increasingly developing era after the teachings of Islam encountered foreign civilizations and cultures (Hafidh, 2011).

The term actualization in Islamic law is a discourse that is always discussed everywhere (Rasidin et al., 2020), Muslim jurists eventually established theoretical rules and regulations that must be followed and are binding on every *mujtahid* when performing *ijtihad* so that the process of *ijtihad* seems to be difficult and can only be done by someone who is considered to have specific skills and qualifications in performing *ijtihad* (An-Namr, 1978). These theoretical rules and regulations include the limitation of the scope of the *ijtihad* area. Muslim jurists map it into two parts. First, legal issues that have not been explained in the Qur'anic or Hadith texts and legal issues that have been described in the texts that are *zhanny*. Second, legal issues that have been presented in clear and detailed legal provisions in the *qath'i* texts (Zuhaily, 1998).

As a product of human thought, the theoretical rules regarding the limitation of the scope of *ijtihad* areas that bind the *mujtahid*s need to be deconstructed innovatively and reactively so that the advantages and disadvantages and the impacts they cause will be known. Then, the theoretical rules and regulations are reformulated with the principle of "holding on to good old patterns and taking new, better patterns." So the reformulation of the rules and theoretical rules is carried out by not denying and completely removing the existing rules, but by reformulating them as an *ijtihad* reasoning that is active with the needs of the people so that it will be in line with the social dynamics that always develop in society.

The diversity of *ijtihad* of the *mujtahid*s gave birth to different understandings of Islam because it was based on the experience of textual interpretation and contextual interpretation (Kustiawan et al., 2023). This contemporary era, along with the development of modern science and information technology, certainly has implications for the emergence of human life problems in various dimensions, including issues in the contemporary Islamic inheritance law developed in the Supreme Court. In several of its decisions, the Supreme Court has provided legal alternatives in the form of *wasiat wajibah* (compulsory testaments) for non-Muslim heirs to enjoy the inheritance

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of Muslim heirs. This is because it is well known that people of different religions cannot inherit from each other.

Islamic inheritance law in fiqh books written in the last 15 centuries is often unable to answer various problems of Muslims in the modern era that continue to develop dynamically and complexly. As a result, confusion usually arises in the application of inheritance law because the law offered is no longer able to provide legal solutions (Maimun et al., 2021). Facing the dynamism of legal issues that continue to emerge, the texts of Islamic inheritance law must be understood more contextually with the social dynamics that develop in the community where Islamic law will be applied so that it will be able to answer various new legal issues (M. Usman, 2015).

The renewal of Islamic inheritance law to respond to and provide answers to contemporary Islamic inheritance law issues that developed in the Supreme Court is evidence that *ijtihad* has a tremendous impact in formulating the provisions of a law. The phenomenon of compulsory testaments given to non-Muslim heirs seems to have colored the religious courts in Indonesia in this contemporary era. Research conducted by HM Sutomo reinforces this that the jurisprudence of the Supreme Court related to the inheritance of different religions since 1991-2001 shows a significant shift in the dynamics of Islamic inheritance law thinking (Sutomo, 2011). Kamaruddin also asserted that the compulsory testament given to non-Muslim heirs is based on the principles of Islamic law that require changes in the law, the existence of emergency law (the doctrine of necessity), and the evolving legal needs (Kamarudin, 2015). Meanwhile, Sidik Tono explained that the obligatory will given to non-Muslim heirs is a product of Islamic law that has nuances of justice and responsiveness in the 20th century because, in several Islamic countries, they first gave obligatory wills to orphaned grandchildren who were *mahjub* (Tono, 2013).

The central questions to be answered in this research are: first, are the theoretical rules and regulations regarding the limitation of the scope of the ijtihad still binding for a *mujtahid* in the contemporary era? *Second*, how is the implementation of *ijtihad* in addressing contemporary Islamic inheritance issues that develop in the Supreme Court? Such as legal alternatives in the form of compulsory testaments for non-Muslim heirs. Starting from the role of *ijtihad* in the renewal of Islamic inheritance law to respond and provide answers to contemporary Islamic inheritance law issues developing in the Supreme Court, this study aims to examine and deconstruct further the rules and theoretical rules of *ijtihad* and its implementation in addressing contemporary Islamic inheritance issues developing in the Supreme Court, such as legal alternatives in the form of compulsory testaments for non-Muslim heirs.

2. METHODS

This field research uses a descriptive-analytical method to explain the conception of ijtihad comprehensively. Traditionally, *ijtihad* has been viewed as a binding process. However, it can also be used as a scientific tool to determine laws not specified in the Qur'an (*nash*) or Hadith or to adopt regulations that are no longer relevant due to modern changes. In addition, this research also explains the implementation of *ijtihad* in addressing contemporary issues developing in the Supreme Court, such as legal alternatives in the form of compulsory testaments for non-Muslim heirs so that they can enjoy the inheritance of Muslim heirs. The primary data for this research came from interviews and observations. Interviews were conducted by hand with several religious

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and high court judges. The criteria for judges chosen were random because they adjusted the busyness of the judge's profession. The questions asked were unstructured. This means that all of the judges' answers during interviews with researchers are used as data. The duration of the interview was approximately one hour per judge. Meanwhile, observation was conducted in several religious courts and high religious courts. The observation technique was unstructured because the research focus developed during the observation. Secondary data came from library data such as Supreme Court decisions on compulsory testaments for non-Muslim heirs. In addition, this library data is also supported by classical books (yellow book), scientific articles, internet websites, etc., related to the research topic. In more detail, this study dissects and discusses several Supreme Court decisions that have provided legal alternatives in the form of compulsory testaments for non-Muslim heirs. This study analyzes several Supreme Court decisions that provided legal options in the form of mandatory testaments for non-Muslim heirs. Critical decisions include, *First,* Supreme Court decision number 16 K/AG/2010; this decision shows that a wife (non-Muslim) who lives together and coexists harmoniously with her husband has the right to enjoy her husband's inheritance, even though it is not regulated in Islamic inheritance law. *Second*, Supreme Court decision number 218 K/AG/2016; in this decision, it can be illustrated that non-Muslim heirs consist of wives and daughters. *Third*, Supreme Court decision number 331 K/AG/2018; in this decision, it can be described that non-Muslim husbands have the right to enjoy the inheritance of their wives by way of compulsory testaments.

3. RESULTS AND DISCUSSION

Ijtihad and Its Scope

The term *ijtihad* in Arabic literature is a masdar form which means trying or endeavoring (Tiwana, 1972). Etymologically, *ijtihad* means to use one's abilities seriously, either physically or in terms of thinking, to carry out heavy and difficult activities. In its application, *ijtihad* is used to solve legal problems and find the rule of law. As for *ijtihad* in terminology, it is an effort to think by exerting all the abilities possessed by a person (*mujtahid*) to explore legal rules based on detailed legal arguments using unique methods (Sodiqin, 2013).

In the literature of Islamic law, the term *ijtihad* is defined by many scholars of useful fiqh with various editorials. However, the many definitions of usual fiqh scholars have the same core. The following are some definitions of *ijtihad* expressed by *ushul fiqh* scholars: *First*, al-Syaukani stated that he exerted all his abilities in thinking to find or determine the provisions of Islamic law that are amaliyah through several methods of istinbath Islamic law (Al-Syaukani, n.d.). *Secondly*, al-Ghazali stated that the exertion of the ability to think seriously to gain knowledge related to *shara'* law (Al-Ghazali, n.d.). *Thirdly*, al-Shirazi stated that thinking with all the power he has and devoting all his efforts to explore the *shara'* law (Al-Syirazi, 1999). *Fourth*, Muhammad Khudhari Bik stated that exerting all the abilities possessed by a *mujtahid* or fiqh expert to obtain the rules of *shara'* law (Bik, 1981).

Based on the various explanations conveyed by the Islamic jurists above, at least three elements must be fulfilled in carrying out *ijtihad*. First, *ijtihad* is carried out with serious effort. The seriousness of ijtihad indicates that not everyone can do it absolutely, so people who can do it have met the qualifications as a *mujtahid*. Second, the purpose of implementing *ijtihad* is to determine the legal provisions that have not been explained in the Qur'an or Hadith or have been explained in detail in the Qur'an or Hadith. Still, the legal requirements are no longer relevant and established

if applied in a different place or time. Third, the process of *ijtihad* is based on detailed arguments according to the instructions from the contents of the Qur'an and Hadith.

Thus, *ijtihad* must be based on a straightforward method of extracting the law so that the resulting law will lead to aspects of benefit. The *ijtihad* method used by the *mujtahid* in istinbath al-ahkam will be the link between the legal product and its legal source, either from the Qur'an or Hadith (Ali, 2014). *Ijtihad* occupies a very broad legal area, namely all legal issues that have not been explained by legal provisions either in the Qur'an or Hadith directly, or the legal requirements are found, but the legal requirements are *zhanny*. The scope of the *ijtihad* area can be detailed as follows:

Firstly, all legal issues explained by the nash are *zhanny*, either in terms of their intentions, indications or existence (Zuhaily, 1998). For example, the ruling on the pillars of ablutions, i.e., wiping only part of the head or the whole head (Mughniyah, 2010). Secondly, all legal issues whose legal provisions have been explained by the *qath'i nash* (Zuhaily, 1998). For example, they divide the inheritance into a 2:1 formulation. The scholars have agreed that the ratio of 2:1 is final (wajib) to be implemented. (Rusyd, 1995). Third, no legal issues have been explained in explicit and detailed legal provisions in the Qur'an or Hadith (Siroj, 2017). For example, the law of IVF, family planning, and praying in congregations in mosques in the COVID-19 era.

From the above explanation, it can be understood that the area of *ijtihad* cannot be carried out on legal issues that already have *qath'i nash*. Historically, the limitation of the scope of *ijtihad* continues to develop and is crystallized by Islamic jurists into the following rules (Khallaf, 1978): "There is no room for *ijtihad* in legal issues in which there is a clear and *qath'i* text". The birth of this rule indicates that all legal issues that have explicitly determined the law based on a *qath'i* text cannot be made efforts for *ijtihad*.

Reformulation of *Ijtihad* as a Method of Islamic Law Reform

The characteristics of Islamic law based on the revelation of the Qur'an and Hadith, and assisted through *ijtihad* with rational thinking are the characteristics and differences with other legal systems. Embryonically, *ijtihad* significantly impacts the renewal of Islamic law in the modern era. It is well known that the legal texts in both the Qur'an and Hadith are very limited in number, while new legal problems always arise without being stopped. Therefore, *ijtihad* efforts are needed to dissect in more detail the very limited number of legal texts so that all legal events that legal provisions have not explained can find legal provisions (Bakr, 1967). Historically, Imam Syafi'i's thoughts, written in his work entitled ar-Risalah, had a significant influence on and role for the next generation in building Islamic legal methodology to create an integrated and systematic legal system. In his work entitled *ar-Risalah*, he divides knowledge into two kinds:

The *first* is general knowledge, which contains knowledge that should not be left behind for anyone mature and mentally healthy under any circumstances. This knowledge is an absolute obligation because it is the most essential thing in Islam, such as commands and prohibitions for every Muslim. The *mujtahid*s are convinced there is no room for *ijtihad* in this science. *Secondly*, specialized knowledge discusses every Muslim's obligation in detail. This specialized knowledge is a continuation of general knowledge. It is this knowledge in which there is room and opportunity for a *mujtahid* to perform *ijtihad* so that legal provisions are found (As-Syafi'i, n.d.).

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The mapping of general knowledge in which *ijtihad* is not allowed by the generation after Imam Syafi'i was categorized as *qath'i* law. Meanwhile, special sciences in which there is room and opportunity for *ijtihad*, the results of which are relative, are then categorized as *zhanny* laws. This area of law is the field of *ijtihad* for a *mujtahid*. As a continuation of Imam Syafi'i, Islamic jurists, both classical and modern in their works, provide limitations on the scope of the *ijtihad* area, although in their presentation using different editorials and language styles. Regarding the limitation of the scope of the *ijtihad* area, al-Hudari explained that all Islamic legal issues are allowed to be *ijtihad* as long as the legal provisions are not based on *qath'i* texts. As for legal issues based on *qath'i* texts, such as the command to pray, fast, and pay *zakat*, *ijtihad* cannot be applied (Al-Hudari, 1981).

Similarly, al-Amidi also stated that the legal issues in which *ijtihad* can be carried out are all legal issues whose legal provisions are based on *zhanny* texts. Legal issues that refer to *qath'i* texts, such as the command to perform fard prayers, are not an area for *ijtihad* (Al-Amidi, n.d.). More broadly, al-Shirazi classifies the scope of the *ijtihad* area into two parts: First, legal issues in which *ijtihad* is not allowed, including sharia law which has *al-dalalah qath'i* (axiomatic) and sharia law which is based on the results of *ijma'* of the companions and *fuqaha*. The second is legal issues, which are still a possibility of dispute and debate among scholars. In this case, *ijtihad* is open to be carried out in order to find the rule of law (Al-Syairazi, n.d.).

Meanwhile, Mahmud Syaltut stated that Qur'anic texts that have *qath'i* legal force and do not give rise to other meanings are not subject to *ijtihad*, such as the command to perform the five obligatory prayers and the prohibition of adultery. He affirmed that the Qur'anic texts that have the force of *qath'i* law cannot be refuted and denied; whoever refutes and denies them has left Islam (Syaltut, 1980).

From the various statements made by Islamic jurists above, it can be concluded that for all legal issues that have been explicitly explained using *qath'i* texts, there is no room and opportunity for *ijtihad*. In the era of globalization, the concept methodologically needs to be deconstructed by reformulating it using adaptive and innovative ijtihad reasoning so that the scope of the *ijtihad* area is broader and more complex. Armed with the human mind, *ijtihad* is not only carried out on *zhanny* texts and legal issues that have no legal provisions but can also be done on *qath'i* texts that are deemed unsuitable and relevant to the times (Maimun, 2013).

Allah Swt. words have encouraged and taught humans to use their minds constantly. If traced further, many verses of the Qur'an contain commands from Allah swt. addressed to humans to always use their minds, for example, QS. al-Baqarah (2): 164, QS. Al-Ra'd (13): 4, QS. al-A'raf (7): 184–185, Qaf (50): 6, and al-Nahl (16): 12. The use of reason aims to enable humans to understand and explain the will of Allah Swt. for the realization of happiness and benefit for humans. Therefore, the theoretical limitation of the area of *ijtihad* is the prohibition of touching the qath'i nash, as well as the limitation of the role of human reason in interpreting and criticizing the will of Allah swt. (Riyanta, 2012).

The prohibition of touching the *qath'i* text causes a dichotomy and a gap between the *qath'i* text and *ijtihad*. Ideally, the relationship between the text and *ijtihad* should be encouraging and complementary, not contradictory and distant, which is inconsistent with the intention of Allah to give humanity reason (Riyanta, 2012). The existence of dichotomies and antagonistic gaps must be

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changed to be interactive-complementary so that legal texts have applicative and adaptive substance (Supena & Fauzi, 2002).

Ijtihad as a scientific tool to explore legal texts so that active and responsive meaning is born is something that cannot be denied. The need for *ijtihad* applies not only to legal issues with no legal provisions or *nash* that are *zhanny* but also to *qath'i* laws. Therefore, it is necessary to pay attention to the relevance of the content of the *nash* with the situation and conditions in which the law will be applied. It may be that the *qath'i nash* is "case" and temporal according to the situation and conditions when the Qur'anic revelation was revealed, which, when applied in this contemporary era, is no longer relevant (Riyanta, 2012). Thus, the interpretation of the *nash* that is considered *qath'i* and *zhanny* does not have to be understood rigidly and eternally, but must be understood situationally and conditionally in order to realise happiness and benefits that reflect the values of justice in society.

Efforts to apply Islamic law that are carried out situationally and conditionally have been made by the Prophet's companions, for example, the *ijtihad* that Umar ibn Khattab carried out during his reign. Several legal decisions are considered controversial and have deviated from the existing text. Firstly, the person who commits the crime of theft during a famine, the punishment of cutting hands him can be suspended (Thabrani, 2015). Secondly, the abolition of the share of *zakat* for the *muallaf* because at that time, the Muslim *ummah* had become stronger and more widespread than at the previous time (Syihab, n.d.). Third, the spoils of war were not directly distributed to the soldiers, but the land continued to be cultivated by local farmers with the stipulation that the farmers had to pay taxes to the state (Al-Khashif, 1982).

The *Ijtihad* performed by Umar ibn Khatab was an attempt to respond to the dynamics of life in a society that had changed from the previous era. He made legal decisions based on his very sharp view of *maqasid sharia* (Asa'ari et al., 2021). Therefore, it is not uncommon for legal decisions to be controversial (Siroj, 2017). If understood textually, what Umar ibn Khatab has done seems to have violated and far from the provisions of Islamic law, but in fact, what Umar ibn Khatab has done is to apply Islamic law carefully combined and harmonized with the situation and conditions of the times (Al-Khadimi, 1998).

In principle, the process of *ijtihad* can be applied to a *qath'i* text of the Qur'an or Hadith, either in terms of the existence of the text or in terms of its legal guidance as long as the application of *ijtihad* to realize *maqasid sharia* (Witro, 2020). For example, a *nash* whose legal *illat* can be explored, then the *mujtahid*s can reformulate the legal *illat* whether it still exists or not because the presence or absence of a legal *illat* can affect the legal status (Siroj, 2017).

This provision is also relevant to the statement made by Ibn Qayyim al-Jauziyah in one of his works that the existence of legal *illat* greatly influences the legal provisions that will be determined by a *mujtahid* (Al-Jauziyah, n.d.). This means that the legal provisions that have been applied to an event may be only valid and bring benefits at the time and place when the event occurred, but if the legal provisions are applied at a different time and place it may no longer be relevant and bring the values of benefit (Nurjaman & Witro, 2021). Thus, if Islamic law based on *qath'i nash* is no longer relevant and brings benefit values, it is necessary to reform the law through reformulation of *ijtihad* methodology and contribution of more progressive thinking so that Islamic law remains a reference and solution in every changing place and increasingly modern times.

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Compulsory Testament as an Alternative for Non-Muslim Heirs

Normatively, both the Qur'an and Hadith have explained the provisions of Islamic inheritance law in detail. However, it still raises new ideas and debates among Islamic legal theorists and practitioners in this modern era. Islamic inheritance law can be said to be the most modern legal system in the 15th century era, but in this modern era it can be a law that loses its spirit of justice in the dynamics of a society that continues to develop by upholding gender equality and pluralism (Spencer, 2002).

Many Muslim scholars have tried to reform Islamic law, such as Abdulllah Ahmed an-Naim who introduced and developed the theory of *nasikh-mansukh*. In his theory, he seeks to adapt the text of the Qur'an and Hadith to the current situation and conditions. In the field of Islamic inheritance law, he argues that a woman's share of inheritance should be equal to that of a man if she is in the same position as the heir of the testator (An-Na'im, 1994). Muhammad Syahrur introduced and developed the theory of limits (*nazariyyah al-Hudud*) which sets minimum and maximum limits for all human actions (Witro, 2021a). In the field of Islamic inheritance law, she argues that the share of girls who only get one share is the minimum limit, so that girls can get a share equal to that of boys (Putra, 2022).

In Indonesia, Hazarin was the first to reform Islamic inheritance law and formulate the theory of bilateral inheritance. Hazarin believed that some of the Qur'anic verses used as the basis for Islamic inheritance law aspired to form a bilateral society. Therefore, Islamic inheritance law is not a static and eternal law for all Muslims, but rather a legal product that must be understood temporally and partially in resolving inheritance issues (Hazairin, 1981). While Munawir Syadzali offers the idea of the theory of reactualisation of Islamic law that seeks to update and actualise Islamic law and allows it to interact with the circumstances, situations and conditions of life today. According to him, the verses of inheritance must be understood more contextually with the social dynamics that develop in the community where the law will be applied (Syadzali, 1977). Munawir Syadzali is known as a very strong figure in encouraging Muslims to conduct honest and courageous *ijtihad* (Yulisa et al., 2020).

The ideas introduced and developed by Indonesian Muslim scholars all lead to the idea that Islamic inheritance law is not always a *ta'abbudi* law, but there are parts of it that contain *ta'aqquli* law, so that Islamic inheritance law can be used as a dynamic law in any situation and condition. Historically, the emergence of the Compilation of Islamic Law (KHI) is clear evidence of the first renewal of Islamic inheritance law in Indonesia (S. Usman, 1997).

The main points of Islamic inheritance law contained in the Compilation of Islamic Law (KHI) are as follows (Riadi, 2012):

1. The Compilation of Islamic Law (KHI) prioritises the nuclear family of the testator, so that lateral family members do not get inheritance property while there are still descendants of the testator;
2. For adopted children or adoptive parents who do not receive inheritance, the Compilation of Islamic Law (KHI) provides an alternative law in the form of compulsory testaments.

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3. The Compilation of Islamic Law offers the concept of substitute heirs which aims to protect orphaned grandchildren, so that the orphaned grandchildren can replace the status and position of their parents to obtain inheritance rights.

Although the Compilation of Islamic Law (KHI) has undergone legal reform from conventional fiqh to modern Indonesian fiqh, it seems that there are still some articles in the Compilation of Islamic Law that are still gender biased regarding the formulation of 2:1 inheritance division for women and men. In addition, using the Compilation of Islamic Law in the courts of first instance still causes many diverse interpretations. Some judges still use the conventional fiqh system in interpreting the texts of Islamic inheritance law; others have interpreted the texts of Islamic inheritance law using the bilateral theory that was introduced and developed by Hazairin.

In Islamic inheritance law, the Supreme Court has made several legal reforms that are more progressive than the Compilation of Islamic Law, such as the existence of legal alternatives in the form of compulsory testaments for non-Muslim heirs to obtain inheritance property.

Among Islamic legal thinkers, some scholars often cite several verses of the Qur'an as the legal basis for the prohibition of mutual inheritance between a Muslim and a non-Muslim. For example, QS. an-Nisa (4): 13 and 141, QS. Hud (11): 45-46, and QS. at-Tahrim (66): 6. The prohibition of mutual inheritance between a Muslim and a non-Muslim is generally based on the Hadith of the Prophet Muhammad, which states that a Muslim will not inherit a non-Muslim and a non-Muslim will not inherit a Muslim (Bukhari, 1987). Based on this evidence, most scholars agree on the prohibition of mutual inheritance between Muslims and non-Muslims (Rahman, 1981).

The above provisions also align with Article 171 letters b and c of the Compilation of Islamic Law, which explain that the heirs and the testator must have the same religious relationship, namely Islam. In addition, the compilation of Islamic law also does not explain how to transfer inheritance from Muslim heirs to non-Muslim heirs through any means, including the use of compulsory testaments. Meanwhile, several Supreme Court decisions contain updates to Islamic inheritance law, such as giving inheritance to non-Muslim heirs through the institution of compulsory testament.

Even though several Supreme Court decisions have provided compulsory testaments for non-Muslim heirs only as a minority school of thought in Islamic law, it deserves to be appreciated as an effort to actualize Islamic inheritance law in Indonesian society, which is diverse in ethnicity, race, culture, and religion. Regarding the position of non-Muslim heirs in Islamic inheritance law, the Indonesian Ulema Council (MUI) has issued a fatwa that Islamic inheritance law does not give the right to inherit each other between the heir and heirs of different religions. The legal alternatives that can be applied to heirs of different religions are grants, wills, and gifts. Commenting on several Supreme Court decisions in this regard, SY, one of the Judges of a Religious Court in East Java, argued that:

The law of mutual inheritance between Muslims and non-Muslims, both in conventional *fiqh* and the Compilation of Islamic Law (KHI), is evident that it is prohibited. Nevertheless, judges have the freedom to exercise *ijtihad* in order to realize justice among the heirs, so judges provide compulsory testaments to non-Muslim heirs. In deciding cases of inheritance of different religions, in addition to referring to the Al-Qur'an and hadith as well as the KHI, judges also refer to

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jurisprudence and the Supreme Court Circular Letter (SEMA) relating to Islamic inheritance law (Interview with SY, 11 May 2024).

According to SY above, granting compulsory testaments to non-Muslim heirs is based on the *ijtihad* of judges by referring to the jurisprudence of judges and the conscience of judges. He also added that the concept of compulsory testaments in the Compilation of Islamic Law (KHI), which only gives an inheritance to adopted children or adoptive parents, needs to be extended to non-Muslim heirs, adulterous children, or stepchildren.

First, the Supreme Court decision No. 16 K/AG/2010. This decision shows that a wife (non-Muslim) who lives together and coexists harmoniously with her husband has the right to enjoy her husband's inheritance, even though it is not regulated in Islamic inheritance law. In this decision, the wife was still given an inheritance from her husband through an alternative law in the form of a compulsory testament. The cassation application was filed against the decision of the Makassar High Court of Religion Number 59/Pdt.G/2009/PTA.Mks and the Makassar Religious Court Number 732/Pdt.G/2008/PA decision.Mks.

Regarding the rights of non-Muslim wives, the first instance decision did not grant inheritance rights or compulsory testaments to non-Muslim wives, which was upheld at the appeal level. Meanwhile, the decision at the cassation level, the Supreme Court, through the compulsory testament, has given the property of the husband to the non-Muslim wife. The cassation judgment reads:

1) Stating that Defendant is entitled to 1/2 of the aforementioned joint property and the other 1/2 is the inheritance property, which is the right or share of the heirs of the deceased Ir. Muhammad Armaya bin Renreng, with details of each share as follows with the subject matter of 60 shares;

    a) Halimah Daeng Baji (biological mother) gets 10/60 parts;

    b) Evie Lany Mosinta (wife) compulsory testament gets 15/60 parts;

    c) Dra. Hj. Murnihati binti Renreng, M.Kes. (sister) gets 7/60 parts;

    d) Dra. Hj. Mulyahati binti Renreng, M.Si. (sister) gets 7/60th parts;

    e) Djelitahati binti Renreng, SST. (sister) gets 7/60 parts;

    f) Ir. Muhammad Arsal bin Renreng (brother) gets 14/60 parts;

The cassation judgment can be compared to the first instance judgment, as below:

2) Declare that the Defendant is entitled to 1/2 of the aforementioned joint property and the other 1/2 is inherited property, which is the right or share of the heirs of the deceased Ir. Muhammad Armaya bin Renreng, with details of each share as follows with the subject matter of 30 shares:

    a) Halimah Daeng Baji (biological mother) gets 1/6 x 30 = 5 parts;

    b) Dra. Hj. Murnihati binti Renreng (sister), gets 1/5 x 25 = 5 parts;

    c) Dra. Hj. Mulyahati binti Renreng (sister), gets 1/5 x 25 = 5 parts;

d) Djelitahati binti Renreng (sister), gets 1/5 x 25 = 5 parts;

e) Ir. Muhammad Arsal bin Renreng (brother) gets 2/5 x 25 = 10 parts;

Based on the decision of the cassation level and the first level, it can be concluded that in the first level decision, the wife is not given the right to get the inheritance from the testator. In contrast, in the cassation-level decision, the wife is given the right to get the inheritance of the testator with an alternative law in the form of a compulsory testament.

One of the decision's legal considerations is quoting the opinion of Yusuf al-Qardawi. According to him, non-Muslims who live harmoniously and peacefully with Muslims are not included in the category of kafir harbi, just as the cassation applicant whose status as a non-Muslim wife lives harmoniously and peacefully with the testator, despite having different beliefs. Therefore, the cassation applicant (non-Muslim wife) is entitled and deserves to get the inheritance of the testator through the compulsory testament.

With the issuance of the above decision, the Supreme Court hopes that this decision can assist religious court judges in resolving similar cases involving non-Muslim heirs. It should be noted that the position of non-Muslim heirs in this case is still positioned not as heirs but is given the right to obtain inheritance from Muslim heirs through compulsory testaments.

Second, Supreme Court Decision Number 218 K/AG/2016. In this decision, it can be illustrated that non-Muslim heirs consist of wives and daughters. The cassation application was filed against the decision of the Yogyakarta Religious High Court Number 16/Pdt.G/2015/PTA.Yk and the decision of the Yogyakarta Religious Court Number 0042/Pdt.G/2014/PA.Yk.

In the first instance decision, the panel of judges granted compulsory testament to Hadi Sarjono's children, while Hadi Sarjono's wife, who is a non-Muslim, was not granted compulsory testament. This can be seen in the first instance verdict:

1) Determining the share of Hadi Sarjono's children (Gregorius Priantono and Dwi Lestari) as recipients of the compulsory testament of the deceased Hadi Sarjono is 1/3 x 15.625% = 5.2083%;

2) Determining the estate of the deceased Hadi Sarjono after deducting the compulsory testament is 15.625% - 5.2083% = 10.4166%;

3) Determining the share of each of Hadi Sarjono's heirs, as mentioned in dictum 8, to the estate of the deceased Hadi Sarjono, as mentioned in dictum 12 is:

    a) Soeparno bin Martowirono (blood brother) gets 2/6 x 10,4166% = 3,4722%;

    b) Maryati binti Martowirono (blood relative) gets 1/6 x 10,4166% = 1,7361%;

    c) Siti Aminah binti Martowirono (blood relative) gets 1/6 x 10,4166% = 1,7361%;

    d) Saban bin Martowirono (blood brother) gets 2/6 x 10,4166% = 3,4722%;

The appeal decision corrected the first instance decision by granting a compulsory testament to the non-Muslim wife. This can be seen from the appeal decision which reads:

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4) Determining the shares of Hadi Sardjono's children and widow (Mrs Saminah binti Kromosentono, Gregorius and Dwi Lestari) as recipients of the compulsory testament of the late Hadi Sardjono as 1/3 x 15.625% = 5.2083%;

5) Determining the estate of the deceased Hadi Sardjono after deducting the compulsory testament is 15.625% - 5.2083% = 10.4166%;

6) Determining the share of each of Hadi Sardjono's heirs as mentioned in dictum 10 to the estate of the deceased Hadi Sardjono as mentioned in dictum 13 are:

   a) Soeparno bin Martowirono (blood brother) gets 2/6 x 10,4166% = 3,4722%;

   b) Maryati binti Martowirono (blood relative) gets 1/6 x 10,4166% = 1,7361%;

   c) Siti Aminah binti Martowirono (blood relative) gets 1/6 x 10,4166% = 1,7361%;

   d) Saban bin Martowirono (blood brother) gets 1/6 x 10,4166% = 3,4722%;

At the cassation level, the Supreme Court has rejected the appeal and affirmed that the court of appeal did not err in applying the law. In the decision, there were 3 (three) non-Muslim heirs, namely Hadi Sarjono's wife and his two children. In resolving this case, the panel of judges granted compulsory testament to the three people, which was 1/3 of the testator's property.

Starting from this decision, several legal rules can be formulated, including the following:

7) Compulsory testament applies to non-Muslim wives and children whether the will is given individually or jointly.

8) The maximum limit of inheritance given through compulsory testament is only 1/3.

9) The position of non-Muslim heirs who get a compulsory testament is still applied not as heirs although they can enjoy the testator's assets. This essence has implications for the rules of hijab and *mahjub*. If the testator's two children are Muslims, then their position is as *ashabah* who will spend the property after being taken by the testator's wife. The position of *ashabah* will automatically hijab the testator's siblings. With the condition of the two children (along with the testator's wife) as recipients of the compulsory testament, the testator's brothers are not veiled and the brothers become *ashabah* experts.

Third, Supreme Court Decision Number 331 K/AG/2018. In this decision, it can be illustrated that husbands who are non-Muslims have the right to enjoy the inheritance of their wives by way of compulsory testaments. This Supreme Court decision has become a landmark decision, which can be used as a standard for resolving the same case. Victor Sitorus bin L. Sitorus filed the cassation application against the decision of the Banten Religious High Court Number 78/Pdt.G/2017/PTA.Btn and the decision of the Tigaraksa Religious Court Number 2886/ Pdt.G/2014/PA.Tgrs.

In the cassation decision, the Supreme Court held that the ruling of the Banten Religious High Court, which had corrected the decision of the Tigaraksa Religious Court must be corrected again, so that the Supreme Court gave the right to the cassation applicant as a non-Muslim husband through a compulsory testament with the provisions of ¼ (one quarter) of the testator's property. The ruling of the cassation decision in granting the compulsory testament to non-Muslim heirs is as follows:

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10) Determining the inheritance of Anita Nasution Binti Amir Husin Nasution in the form of:
    - One-half or 50% of the joint property in number 3 (three) above;
    - Dr. Anita Nasution's assets or personal property in number 5 (five) above;
11) Determining the Defendant to receive a compulsory testament of ¼ (one quarter) share or 25% (twenty-five percent) of the estate of the testator (Dr. Anita Nasution) in number 6 above;

The consideration used by the panel of judges in granting the compulsory testament was that the cassation applicant, who was a non-Muslim, always accompanied and accompanied the testator during his lifetime until his death, even though the cassation applicant sacrificed his mind, energy, and material to accompany the testator to China for treatment. The life of the cassation applicant with the testator can be said to be very good and harmonious until the testator's death because both in joy and sorrow, the cassation applicant always accompanied the testator.

Starting from the three decisions above, the legal alternative in the form of compulsory testaments for non-Muslim heirs is also in line with the content of QS. an-Nisa' (59): 135, QS. al-Maidah (5): 8, and QS. an-Naml (16): 90, that every Muslim is required always to provide a sense of peace and do justice to all people, whether they are Muslims or non-Muslims. Thus, because non-Muslim heirs are not considered as heirs (*mahjub*), it is possible to obtain inheritance in other ways (not using the Islamic inheritance law system). The legal alternative that allows non-Muslim heirs to enjoy the inheritance of the testator is the obligatory will. NS, one of the Judges of the Religious Court in Papua, argues that:

> *"The rules contained in the Al-Qur'an and hadith and the Compilation of Islamic Law (KHI) are insufficient to solve the problems of Islamic inheritance law in the current era, so it is necessary to conduct a review of matters that have been considered final. The granting of compulsory testaments to Muslim heirs is generally based on jurisprudence."* (Interview with NS, 12 May 2024)

According to NS above, it can be understood that jurisprudence related to compulsory testaments to non-Muslim heirs needs to be used as positive law in legislation because jurisprudence cannot be binding in a final manner for religious court judges. On the one hand, religious court judges may follow it, but on the other hand, religious court judges may not follow it.

Apart from being based on existing jurisprudence, the granting of compulsory testaments to non-Muslim heirs is also based on two reasons. He was first analogizing non-Muslim heirs to adopted children or adoptive parents in Article 209 of the Compilation of Islamic Law (KHI). The article explains that adopted children and adoptive parents who are not related by blood can be given compulsory testaments. How is it possible that an adopted child with no nasal relationship can get his inheritance while the child himself does not get his rights from his parents?

Second, it is necessary to pay attention to the *asbabul wurud* of the hadith and the legal '*illat* regarding the prohibition of mutual inheritance between Muslims and non-Muslims. In this modern era, the texts of Islamic inheritance law must be understood contextually by the social dynamics that develop in Indonesian society. The legal provisions may have been relevant in

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ancient times but not in this modern era. In addition to paying attention to the *asbabun wurud* of the hadith and its legal '*illat*, he also argues that the Islamic nature between the heir (*pewaris*) and the heirs (*ahli waris*) in the future will be erased along with the times. This is based on QS. an-Nisa 1-12 only discusses the social dynamics that develop in society and does not discuss religious differences. Meanwhile, S, one of the Judges of the North Maluku High Court, argued that

> *"Non-Muslim heirs not being given inheritance from Muslim heirs does not reflect social justice in Indonesian society. The right legal step is to take a middle way that does not violate Sharia rules, namely through the institution of compulsory testaments. In this case, non-Muslim heirs are still positioned not as heirs. Hence, the assets received by non-Muslim heirs are not inheritance assets but assets obtained through compulsory testaments with a maximum provision of 1/3 of the assets of Muslim heirs."* (Interview with S, 11 May 2024).

From the above explanation, according to the author, the development of the concept of compulsory testament in the Supreme Court is clear evidence of the renewal of Indonesia's Islamic inheritance law system. The alternative law in the form of a compulsory testament given to parties outside the provisions of the Compilation of Islamic Law (KHI) is a judge's policy in order to conduct legal discovery (*rechtvinding*), which aims to distribute a sense of justice to parties, who are prevented from obtaining inheritance property.

4. CONCLUSION

In the treasury of Islamic legal thought, various legal decisions among Muslims are made using *ijtihad*, including contemporary Islamic inheritance law. In the era of globalization, the texts of Islamic inheritance law that have been considered *qath'i* do not have to be understood rigidly and eternally, but must be interpreted situationally and conditionally to achieve benefits. The birth of several Supreme Court decisions, such as decisions number 16 K/AG/2010, 218 K/AG/2016, and 331 K/AG/2018, which provide legal alternatives in the form of compulsory testaments for non-Muslim heirs, is a historical necessity that must be interpreted positively for the sake of future history. This alternative law provides an understanding that the law is not a standard rule that descends from heaven to earth but a community agreement used as a norm to be obeyed together. These findings highlight the importance of modern *ijtihad* in ensuring justice and adapting Islamic law to contemporary societal needs. This research has contributed to the Religious Court in resolving Islamic inheritance cases in the modern era, not only using material and formal sources of law. However, it must have the courage to carry out revolutionary ijtihad to obtain a just legal decision and realize peace. Religious courts also need to conduct legal socialization with the public regarding the regulation of Islamic inheritance law that applies in Indonesia so that people understand the rules that apply and know the modern inheritance issues that have developed. Moreover, the legislative and executive institutions need to improve the status of the Compilation of Islamic Law (KHI) into a law on Islamic family law by accommodating the latest issues. In terms of presentation, this research has limitations in finding data in the field. The author could not meet directly to conduct interviews with judges who decided cases. The author was only able to conduct interviews with 2 Religious Court judges and 1 Religious High Court judge to strengthen the findings in this study.

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