

**LEGAL ANALYSIS OF TESTAMENT WAJIBAH FOR INTERFAITH
HEIRS (CASE STUDY: RELIGIOUS COURT DECISION
No.0554/PDT.P/2023/PA.Sby)**

Diva Pitaloka^{*}, Joko Jumadi^{}, Muhd. Hamka Maha Putra^{***}, Ridwan^{****},
Ria Wierma Putri^{*****}**

Faculty of Law, Universitas Mataram^{*}

Faculty of Law, Universitas Mataram^{}**

Faculty of Law, Universitas Lampung^{*}**

Faculty of Law, Universitas Sultan Ageng Tirtayasa^{**}**

Faculty of Law, Universitas Lampung^{***}**

Abstract

There are 3 (three) conditions that must be met in order to become an heir as regulated in Article 171 letter c of the Compilation of Islamic Law (KHI) namely that an heir is a person who at the time of death, he was related by blood or marriage to the testator, was a Muslim and was not prevented by law from becoming an heir. As in case number 0554/Pdt.P/2023/Pa .Sby. In this decision the Panel of Judges granted the applicant's request and determined the applicant to be a mandatory testator. This research method is normative legal research, conceptual approach and case approach. The result states that the judge granted the Petitioner to be the Legal Heir as a Testament Wajibah even though he had a different religion from the Muslim heir due to consideration of justice. Judges are not mouthpieces of the law, so for the sake of 'justice' judges carry out legal inroads (contra legem) into the provisions contained in the Compilation of Islam.

Keywords: *testament wajibah, heir, different religion*

A. Background

Death is an event that even a human cannot avoid, death is part of the human life process ¹or is usually called natural law (Sunnatullah). Every human being will sooner or later experience death.²

This death event can be categorized as a legal act on the basis that the obligations of the person who died will be transferred to the heirs left behind, all assets, whether movable or immovable, tangible or intangible, will change hands to the heirs who are entitled to get them (zaw al-furud).

One of the rules in Islamic law that requires the implementation of benefits is regarding the distribution of inheritance, as most Muslims believe that the system that has been regulated in the Islamic jurisprudence contains values of justice and benefits that can be accounted for. The application of inheritance law according to Islamic law is considered capable of bringing

* diva.pitaloka@gmail.com

¹ Banjar, A. K. (2017). Till death do us part: The evolution of end-of-life and death attitudes. *Canadian Journal of Critical Care Nursing*, 28(3).

²QS al-'Ankabut: 87 and al-Nahl: 61: "Kull nafs zaiqat al-maut summa ilaina turja'un."

benefits to human life. Due to the great belief in the value of justice and benefit contained in the Islamic inheritance law system, the majority of Muslim communities accept the doctrine of inheritance jurisprudence as it is without making people think again about the consequences that will arise when they apply the Islamic inheritance law system that has been established exists at the moment. This makes people's thinking tend to be static without paying attention to or even correlating the inheritance law system used by Muslims today with the benefits and objectives of the Shari'a or maqashid Shari'ah.³

Inheritance law is a rule that regulates human relations established by God, namely regarding property and ownership that arise as a result of death. Before Islam came, an inheritance system was in place during the Jahiliyah Era. In the Jahiliyah Era, people shared inheritance, upholding the customs that had been passed down by their ancestors, but Islam came and fundamentally overhauled the inheritance laws of the Jahiliyah Era which prohibited children and women from inheriting inheritance. The verses contained in the Qur'an clearly and firmly regulate the laws of inheritance according to Islam, almost all of which are found in Surah An-Nisa.⁴

For Muslims, the distribution of inheritance is technically regulated in *fara'id* science both in terms of the inheritance system (*nizam al-irats*), the people who have the right to inherit it (*al warits*), the level of inheritance that will be received by each heir (*al-furud al-muqaddarah*) property left by the heir (*al-muwarrits*) such as money, land, cars and other things which are called *alirats*, *al-turts*, *al-mirats*, *al-mauruts*, and *altirkah* (meaning all the same as *mutaradifat*), people whose inheritance rights are prevented (*alhijab*) or people who are prohibited from receiving their inheritance rights (*mawani' alurts*). In the context of *furud al-mukaddarah*, the Qur'an has determined the exact numbers, namely 1/2, 1/4, 1/8, 1/3, 2/3 and 1/6. These numbers can be seen directly or indirectly in Surah An-Nisa' verses 7, 8, 11, 12, 13, 14, 33 and 176 and Surah Al-A'raf verse 75. Those who directly mention the levels in detail. Inheritance is only found in 3 verses in Surah An-Nisa verses 11, 12 and 176.⁵

For people who do not get this figure (*al-qarabat*), Islam has recommended and even required *al-muwarrits* to bequeath some of their assets (*wasiat hajiah*) to *al-qarabat*. Or in other forms such as grants given to them before *al-Muwarrits* died. *Al-qarabat* is meant in the sense of biological children of different religions, or biological fathers and mothers who also happen to follow different religions. This position of *al-qarabat* in the Islamic conception means that they do not receive inheritance rights from *al-*

³Chamim Tohari, Reconstruction of Inheritance Laws from Different Religions in View from *Al-Ushūl Al-Khamsah*, *Journal of Islamic Legal Thought*, Vol XVI, No. 1 (June 2017), p 2

⁴Adji Pratama Putra et al, Analysis of the Inheritance of Different Religions in the Perspective of Islamic Law, *Journal of Sharia Economic Law* Vol. 01, No. 01, June 2023, p 2

⁵Maimun, Distribution of Inheritance Rights to Heirs of Different Religions Through *Wajibah Wills* in the Perspective of Islamic Inheritance Law, *Journal of Sharia Economic Law*, Volume 9 Number 1 (2017), p. 2

muwarrits, because normatively the Hadith of the Prophet SAW narrated by muttafaq alaih from Usmah bin Zaid confirms that unbelievers do not inherit from Muslims, and (conversely) Muslims do not inherit from unbelievers.⁶

The reasons why a person's relationship can receive inheritance from someone who has died include marriage, kinship, wala' (liberation of slaves and relations between Muslims). Meanwhile, in a relationship with someone who can receive inheritance, it does not guarantee that he or she has the right to receive inheritance. Because there are reasons that prevent someone from inheriting inheritance, namely murder, different religions, slavery and different countries.⁷

In the Islamic inheritance system contained in the Compilation of Islamic Law (KHI), there are 3 (three) conditions that must be met in order to become an heir as regulated in Article 171 letter c of the Compilation of Islamic Law (KHI), namely that an heir is a person who At the time of death, he was related by blood or marriage to the testator, was a Muslim and was not prevented by law from becoming an heir.⁸

One of the conditions that must be fulfilled by the heir is that he must be Muslim. If the heir is not Muslim then based on the Hadith of Rasulullah SAW narrated by Bukhari and Muslim "Muslims cannot inherit the property of non-Muslims and non-Muslims cannot inherit the property of Muslims". Where in determining the heirs they will take the most important role in determining the provision of inheritance and wills, this is because the obligations of people who have died require close family management regarding inheritance and wills.⁹ Regarding the existence of a will, Fiqh Ulama defines a will as a voluntary transfer of assets from a person to another party which takes effect after that person dies, whether the assets are in the form of material goods or in the form of benefits.¹⁰

In the Fourth Madzhab Fiqh, madzhab scholars agree that there are 3 (three) things that cause obstruction of inheritance, namely religious differences, murder and slavery. Meanwhile, other scholars who agree with this prohibition from among the Salaf include As-Syafi'i, Ibnu Qudamah, and As-Syaukani. The contemporary scholars who prohibit it are Mustofa as-Salabiy, Ali as-Shabuni and Sayid Sabiq. Although there are things that forbid a Muslim from accepting inheritance from non-Muslims, there are also schools of thought that allow them to be part of the Salaf group, including the Imamiyah school of thought. The Imamiyah school of thought allows a Muslim to inherit property from a non-Muslim. The scholars who also allow it are Ibn Taymiyah and Ibn Qayyim al-Jauzi. Of the contemporary ulama

⁶Ibid.

⁷Ibid.

⁸Article 171 letter c Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law.

⁹Ahmad Azhar Basyir, *Islamic Inheritance Law*. Yogyakarta: UII Press, 2001 p. 3.

¹⁰Alip Pamungkas Raharjo, and Elok Fauzia Dwi Putri, *Analysis of the Granting of Wajibah Wills to Heirs of Different Religions After the Supreme Court Decision Number 331 K/AG/2018*, *Suara Hukum Journal*, Volume 1 Number 2 September 2019, p. 173.

group, the one who allows Muslims to inherit property from non-Muslims is Yusuf al-Qaradawi. The second opinion which allows Muslims to inherit property from non-Muslims does not appear to be well known and is rarely included in books discussing Islamic inheritance, especially contemporary books.¹¹

Even though the definition of inheritance law is not stated in the Civil Code (Civil Code), the procedures for regulating inheritance law are regulated by the Civil Code (Civil Code). Apart from that, based on Presidential Instruction Number 1 of 1991 regarding the dissemination of the Compilation of Indonesian Islamic Law, the definition of inheritance law is the law that regulates the transfer of ownership rights to inherited property. Heirs and how much each share will be.¹²

However, as time goes by, many cases occur between heirs and heirs of different religions, where the heir is Muslim and the heir is non-Muslim. There is the *Het Recht Hink Achter De Feiten Aan adage* which says that the law is always struggling to keep up with the times, so that to achieve legal justice in society, the law must also keep up with the times.¹³

As time progresses, many cases occur between heirs and heirs of different religions, where the heir is Muslim and the heir is non-Muslim. This kind of situation makes a judge one of the law enforcement officers to give decisions regarding inheritance by a Muslim heir to non-Muslim heirs. The aim of this determination is to provide mutual benefit and avoid divisions between people, especially those who are still bound by one family even though they have different beliefs.

As in case number 0554/Pdt.P/2023/PA.Sby, the Petitioner in this case is the biological child (heir) of a parent named late. Pamuji Winarya and the late. Sri Murniati, this couple is blessed with 5 (five) children, of which the petitioners are 4 of their children (four applicants), it is known that 4 of the children have different religions, namely Christians, the applicant asks the Panel of Judges to grant the Petitioner's application as heirs. The legal right of the heir to be able to divide the inheritance of the heir to his siblings. In this decision, the Panel of Judges granted the applicant's request and determined the applicant to be a mandatory testator.

The regulation of mandatory wills was initially regulated in the Compilation of Islamic Law (KHI) Article 209 paragraph (1) and (2) Compilation of Islamic Law which states that mandatory wills are regulated for parents who adopt a child with the distribution of adoptive parents who do not accept the will. to be given a will of up to 1/3 of the inherited assets of their adopted children and for adopted children who do not receive a will to

¹¹Ibid, p. 4

¹²Budi Hariyanto, Juridical Review of the Distribution of Inheritance from Different Religions According to the Civil Code (KUH Perdata) and the Compilation of Islamic Law (KHI), IUS Journal Vol.VIII No.02 September 2020, p. 29.

¹³Yohanes Jeriko Giovanni et al, Internalizing Pancasila Values as a Legal Profession Mediator in the Context of Building Integrity, Journal of Citizenship Vol.7No.1June2023, p 925

be given a mandatory will of up to 1/3 of the inherited assets of their adoptive parents.¹⁴

Prof. Dr. H. Abdul Manan stated that a mandatory will is an action carried out by the authorities or the law as state officials to force or give a will decision for a person who has died, which is given to certain people in certain circumstances.¹⁵

B. Identified Problems

1. What is the Ratio Decidendi or Judge's Considerations in deciding case Number 0554/Pdt.P/2023/PA.Sby?
2. How does the Judge's Legal Analysis Grant the Application of a non-Muslim Petitioner to become the legal heir of a Muslim heir?

C. Research Methods

This research was conducted using normative research. Normative research is research that places law as a system of norms, consisting of principles, norms, rules from statutory regulations, court decisions, agreements and doctrine.¹⁶

This research uses a statutory approach (statute approach), a conceptual approach (conceptual approach) and a case approach (case approach). The statutory approach (statute approach) is carried out by examining all laws and regulations relating to the legal issues involved. Handled, so that the legal ratio, ontological basis and philosophical basis of regulations relating to Islamic inheritance rights can be known. The conceptual approach is a conceptual approach that departs from the views and doctrines that develop in legal science. This approach is carried out with an understanding of the concepts put forward by experts in various literature, especially those related to the legal position of non-Muslim heirs. The case approach uses the judge's decision as a source of legal material. The judge's decision used is a judge's decision that has force permanent law. When discussing court decisions as primary law, it has been said that what has legal force is the ratio decidendi section, namely the legal reasons used by the judge in determining his decision (the judge's considerations) as stated in the Surabaya Religious Court Decision. Case Registration Number: Number 0554/Pdt. P/2023/PA.Sby concerning the legal position of non-Muslim heirs.

D. Research Findings and Discussion

1. **Judge's Legal Reasoning (Legal Reasoning) Judge's Decision Case Number: Number 0554/Pdt.P/2023/PA.Sby**

¹⁴Article 209 paragraphs (1) and (2) Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law.

¹⁵Abdul Manan Various Problems of Islamic Civil Law in Indonesia. Jakarta: PT. Kencana Prenada Media Group, 2008, p. 166.

¹⁶Depri Liber Sonata. "Normative and Empirical Legal Research Methods: Typical Characteristics of Legal Research Methods". *Fiat Justitia Journal of Legal Studies*. 2017, p 25

Case Sitting: The applicant in this case is the biological child (heir) of the parent named late. Pamuji Winarya and the late. Sri Murniati, this couple is blessed with 5 (five) children, of which the 4 children who submitted this application (four applicants).

It is known that 4 (four) of the 5 (five) children of the late couple. Pamuji Winarya and the late. Sri Murniati has left Islam (apostasy) to Christianity, Ruly Nurhayanto (Christian religion), Indra Guna (Christian religion), Happy Pujiastuti (Christian religion) and Uniek Sunarko (Christian religion) have died but are proposed to determine their own heirs. One of his children, Nanang Sumarsono, who is Muslim, participated in submitting this application. This couple had previously been legally married according to the Islamic religion, the late Pamuji Winarya had never married another woman and had never adopted a child.

The father and mother of the late Pamudji alias Pamuji Winarya bin KS Sugondo also died earlier than the deceased. The late Pamuji Winarya left assets in the form of land on which a building (house) stood, land, savings, and several other assets, where these assets are still registered in the name of the deceased.

The four applicants submitted an application to the Surabaya Religious Court with case registration Number 0554/Pdt.P/2023/PA.Sby, with the intention of changing names, buying and selling, changing the name of the land certificate on which a building (house) stands, land, carry out the process of dividing land/house documents, as well as to take care of letters or other legal documents, and also to be able to carry out other legal actions related to all the assets left behind by the deceased, while one of the requirements to be able to carry out this process, Requires Heir Determination from the Surabaya Religious Court.

Judge's Decision: The Judge's decision in this case was to grant the Petitioner's petition and grant the decision to the four children who had left the Islamic religion (apostasy), namely as Heirs, he said as recipients of the obligatory will.

Judge's Ratio Decidendi Granted the Petitioner's Petition:

1. In this decision the judge considered according to Article 174 paragraph (2) of the Compilation of Islamic Law, "If there are all heirs, then only children, fathers, mothers, widows or widowers are entitled to inherit.
2. The judge considered this decision based on the Al-Qur'an Surah An Nisa' verse 7: Meaning: "For men there is a right to share in the inheritance of their parents and relatives, and for women there is a right to share (also) in the property. Inheritance from parents and relatives, whether a little or a lot according to the division that has been determined."

This causes confusion in the application of the law that can be used when there is a problem of religious differences between the Heir and Heirs who have different religions. In fact, the previous inheritance law that applied to the parties was the religious law adhered to by the testator. In the past, there was indeed a choice of law (choice of law) and a choice of institution that adjudicated (choice of forum) for Heirs and Heirs who had different religions could choose which law would be used in determining the Heirs and choose an institution that would resolve if there was a dispute between Heirs and Heirs. However, since the enactment of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts, the choice of law and the choice of adjudicating institution (choice of forum) in resolving Islamic inheritance disputes are no longer valid. ¹⁷

The case above is included in Islamic inheritance because the Heir embraced Islam, so that in accordance with the provisions of Civil Law, the applicable law in dividing inheritance and resolving inheritance disputes is Islamic Law within the Religious Courts.

2 **Legal Analysis of Decision Number 0554/Pdt.P/2023/PA.Sby Regarding Muslim Heirs of Different Religions**

In Decision Number 0554/Pdt.P/2023/PA.Sby, it is determined that heirs who have different religions and heirs who are Muslim remain the legal heirs and have the right to obtain assets from the heirs who are referred to as obligatory will recipients.

A mandatory will is a will addressed to heirs who do not receive a share of the inheritance from the person who died because of something that causes the provision of the inheritance to be obstructed. The Compilation of Islamic Law (KHI) regulates issues regarding mandatory wills.

Article 209 paragraph (1) states "The inherited assets of adopted children are divided based on Articles 176 to Article 193 mentioned above, whereas adoptive parents who do not accept a will are given a mandatory will of up to 1/3 of their adopted child's inherited assets." Furthermore, paragraph (2) states "Adopted children who do not receive a will are given a mandatory will of up to 1/3 of the inheritance of their adoptive parents."

Obligatory inheritance is intended for cases of inheritance of adopted children. In the case of this decision, the heirs are biological children but are not Muslim, which is actually a new case in Islamic law inheritance. Compilation of Islamic Law (KHI) Article 171 letter c states that: "An heir is a person who at the time of death has a blood or marital relationship with the testator, is a Muslim and is not prevented by law from becoming an heir."

¹⁷Dhea Swasti Maharani, Legal Consequences of Children Who Have Different Religions From Their Parents Reviewed According to Inheritance Law in Indonesia (Case Study of Supreme Court Decision Number 1582 K/Pdt/2012), Private Law Vol : 6 No : 1 2018, p 201

Some scholars are of the opinion that a will for parents or relatives who do not receive an inheritance is obligatory, if the person who has died does not make a will for them then the heirs are obliged to remove a certain number of harya from the heir's assets and give it to them in a mandatory will. This opinion was expressed by Ibn Hazm and Muhammad Rasyid Ridha. The command to make a will is in the Al-Qur'an Surah Al-Baqarah verse 180, according to Ibn Hazm, it is obligatory and qada'i in nature, meaning that if someone does not make a will then the remaining relatives are obliged to spend a certain amount from the inheritance, which they think is appropriate. Relatives who do not have the right to inherit, however, this opinion is different from the opinion of the majority of scholars who understand that this will clause is governed by the inheritance clause. Ibn Hazm's view above finds a definitive obligation for Muslims to make a will that will be distributed to close relatives who are not heirs. He further argued that if the deceased person failed to fulfill this obligation while still alive, then the court should make a will in his or her name. In contrast to Rasyid Ridha's opinion, according to him, wills in inheritance law are specifically given to people who cannot inherit because they are prevented from inheriting even though they are of a different religion if they convert to Islam.¹⁸

A non-Muslim person dies while his parents are also not Muslims, so he is required to make a will to soften the hearts of his parents, as ordered by Allah SWT that he must be kind to both parents even though neither of them is Muslim. From the explanation above, it is clear that parents and relatives who cannot inherit due to religious differences must be given a will if a Muslim does not have a will at the time of his life. However, it is also necessary to explain who the relatives are who must be given the obligatory will. Ibn Hazm has defined that what is meant by relatives are all descendants who are related by the same father and mother all the way down.¹⁹

Abdul Manan also supports Ibn Hazm's view that a mandatory will is a decision determined and implemented by a judge as the state government to provide a mandatory will for a deceased person to a particular individual. According to Usman and Somawinata, a mandatory will is a will whose execution does not depend on the wishes of the person who died, but must be executed whether it is spoken or not. This distribution through a mandatory will is not due to proof of the will of the testator but for certain legal reasons. From the definitions outlined by experts, it can be concluded that a mandatory will consists of two elements:

¹⁸Deddy Nurcahyono, Division of Inheritance from Parents of Different Religions in the Perspective of Islamic Law, Study of Legal and Development Issues, Volume 24 Number 1 of 2019 January Edition, page 27

¹⁹Mughniyah, et al, Five Schools of Fiqh. Jakarta: Lentera, 2004, p. 588

- a. It does not require the willee's willingness to provide a will. This implies that even if the deceased does not declare a will, they are not considered to have a will.
- b. The judge acts as a testator to distribute assets of at most one third of the deceased person's assets to be distributed to relatives who are prevented from receiving the inheritance.²⁰

Religious differences in the Compilation of Islamic Law (KHI) do not explicitly state that differences in religion are a barrier to inheritance, but based on Article 171 letter c of the Compilation of Islamic Law (KHI) it states that heirs and heirs must be Muslim, if one of them is not religious. In Islam, the provisions on inheritance rights are automatically terminated when it comes to religious differences.²¹

The provisions in the Compilation of Islamic Law (KHI) do not expressly state that differences in religion are a barrier to inheriting, but Article 171 letter c of the Compilation of Islamic Law (KHI) states that the heir and heir must be Muslim, then between the two, if one of them is not Muslim, so neither of them can inherit from each other, so according to the provisions, inheritance rights are automatically terminated when it comes to differences in religion. Differences in religion are when one of the heirs and heirs is Muslim and the other is not. If someone dies and has assets to be divided among heirs of different religions, then there will be no inheritance between the two.

Inheritance in the Al-Qur'an does not mention the law of heirs of different religions and heirs, but in the Hadith Rasulullah SAW states that different religions between heirs and heirs are a barrier to mutual inheritance, the Hadith says which means:

"Yahya bin Yahya, Abu Bakr bin Abu Syaibah, and Ishaq bin Ibrahim have told us the lafazh of Yahya's hadith, Yahya said, Ibn Uyainah has told us, while the other two narrators of the blessing, Ibn Uyainah have told us, from Az-Zuhri from Ali bin Husain from Amr bin Uthman from Usamah bin Zaid that Rasulullah SAW said, "Muslims cannot inherit (the property of) unbelievers and unbelievers cannot inherit (property) of Muslims" (HR Bukhari and Muslim).²²

Based on this hadith, many people believe that families of different religions cannot inherit from each other. Jumhur Ahlu Sunnah also believes that Muslims cannot inherit property from non-Muslims. This opinion was previously conveyed by the Companions of the Prophet, namely Abu Bakar, Umar bin Khattab, Uthman, Ali, Usmah bin Zaid, Jabir and Urwah. Among the Mujtahid imams are Abu

²⁰Zakiul Fuady Muhammad Daud, *As-Salam Journal* Vol. 5 No. 1 January - June 2021, p 68.

²¹Budi Haryanto, "Judicial Review of the Distribution of Inheritance of Different Religions According to the Civil Code (KUH PERDATA) and the Compilation of Islamic Law (KHI)", *IUS Journal* Vol.VIII No.02 September 2020, p. 39

²²Imam An-Nawawi, *Syarah Sahih Muslim*, Jakarta, Dar al Sunnah, 2013, p 878

Hanifah, Malik, Syafi'i and Ahmad. Likewise among the Zhahiri ulama, with the argument from clear instructions from the Prophet who denied the mutual inheritance of Muslims and non-Muslims.²³

Muslims cannot inherit property inherited from their infidel slaves. Wahbah az-Zuhaili's opinion, a contemporary scholar of this century, stated in *Fiqh al-Islam wa Adillatuhu* that religious differences (Islam and Kafir) are a barrier to inheritance. According to him, people of different religions are one religion even though their Aqidah is different.

So according to Jumhur, apart from Malikiyyah, each can inherit the other, Jews and Christians can inherit each other without any difference, as Allah SWT says in QS Al-Anfal verse 73 "As for those who disbelieve, some of them become protectors for others."²⁴

In Islamic Law, there are several legal sources used in matters of inheritance, namely the Al-Qur'an, Hadith, Ulama Opinions and Compilations of Islamic Law.²⁵ Judges as law enforcers in this case, according to the author's opinion, carry out *ijtihad*, the phenomenon of inheritance between different religions at this time is one of the contemporary problems in Islamic legal thought, because on the one hand the Al-Qur'an does not explain about heirs for people of different religions, and neither does with Hadith, it does not regulate the distribution of heirs from different religions.

There are differences of opinion among the ulama themselves regarding inheritance from different religions. Some scholars say that Muslim heirs still receive inheritance from heirs of different religions. The majority of conventional scholars address two problems, firstly, the consensus above, in this case Abu Hanifah, Malik, Syafi'i and their followers, is that infidels should not inherit the *tirkah* of Muslims, or vice versa, whether it is due to the relationship of freeing slaves (*alwala'*), marital relations (*al-zujyyah*) and/or kinship relations (*alqarabah*). Likewise, if a Muslim dies and leaves behind a non-Muslim wife (*al-kitabiyah*) or non-Muslim relatives and then they convert to Islam before the *tirkah al-muwarrits* are distributed then they still do not get inheritance rights.²⁶

In contrast to conventional Jumhur ulama, Imam Ahmad bin Hambal is of the opinion that "unbelievers can inherit the *tirkah* of Muslims and vice versa due to the *al-wala'* of those who have different religions but are still in the same family of Allah's religion, non-Muslim wives and non-Muslim relatives who converted to Islam before the

²³Amir Syarifuddin, *Islamic Inheritance Law*, Jakarta, Prenada Media, 2004, p. 198.

²⁴Wahbah Az Zuhaili. *Wa Adillatuhu Islamic Fiqh 10*. Translator: Abdul Hayyie al Kattani, et al. Jakarta, Gema Insani 2011, p. 472

²⁵Ibid, p. 38

²⁶Maimun, "Dividing Inheritance Rights to Heirs of Different Religions Through *Wajibah Wills* in the Perspective of Islamic Inheritance Law", *Principles of Sharia Economic Law Journal* 9 (1), 2017, p. 5.

tirkah is distributed". While Mu'az bi Jabal, Mu'awiyah bin Abi Sofyan, Sa'id bin Al-Musayyab, Masruq, Al-Nakha'iy, Muhammad bin Al-Hanafiyyah, Muhammad bin 'Ali bin al-Husain, bin 'Ali bin Abi Thalib and Ishaq bin Ruwaihah argue that "Muslims can inherit from unbelievers but not vice versa. Mu'awiyah bin Abi Sofyan, Sa'id bin al-Musayyab, Masruq, al-Nakha'iy, Muhammad bin al-Hanafiyyah, Muhammad bin 'Ali bin al-Husain, bin 'Ali bin Abi Thalib, and Ishaq bin Ruwaihah argued that "Muslims can inherit from unbelievers, but not vice versa".²⁷

Law Number 48 of 2009 concerning judicial power Article 10 states that courts are prohibited from refusing to examine, try and decide on a case submitted on the pretext that the law does not exist or is unclear but must instead try it.²⁸ In line with this, Article 5 of Law Number 48 of 2009 concerning judicial power states that judges must explore, follow and understand the legal values and sense of justice that exist in society.²⁹

With the advancement of modern times and increasingly dynamic legal conflicts in society, there is a possibility that heirs of different religions will get justice in the division of inheritance from Muslim heirs. In this case the judge becomes *ulul amri* as a representative of the state who has the power to carry out *ijtihad* based on the Al-Qur'an and Hadith and consider the social impact in the family and society.

Before there was Decision Number 0554/Pdt.P/2023/PA.Sby which discussed mandatory wills for heirs of different religions compared to Muslim heirs, there was Decision Number 0140/Pdt.P/2012/PA Sby and Decision Number 218 K /Ag/2016 which provides a mandatory will to someone who is a non-Muslim.³⁰

The presence of this jurisprudence is a solution in cases of non-Muslims who want to obtain distribution of inheritance through a mandatory will. This is also in line with the concept of justice according to John Rawls, the concept of Distributive Justice which makes a country have a distribution center, where the state will always be the main protector whose aim is to create justice for all individuals who are in a disadvantaged position, this justice must be based on moral decisions. which exists.³¹

²⁷Hendri Susilo et al, Inheritance Rights of Children Who Have Different Religions From Their Parents Based on Islamic Law, *USM Law Review Journal* Vol 4 No 1 of 2021, page 181

²⁸Law Number 48 of 2009 concerning Judicial Power Article 10 (State Gazette 157 Supplement to State Gazette 5076)

²⁹Law Number 48 of 2009 concerning Judicial Power Article 5 Paragraph (1) (State Gazette 157 Supplement to State Gazette 5076)

³⁰Alip Pamungkas Raharjo, and Elok Fauzia Dwi Putri, Analysis of the Granting of *Wajibah* Wills to Heirs of Different Religions After the Supreme Court Decision Number 331 K/AG/2018, *Suara Hukum Journal*, Volume 1 Number 2 September 2019, page 179

³¹*Ibid.*

Apart from that, the implementation of a mandatory will can be intended for non-Muslims as well as an implementation of Aristotle's concept of distributive justice which states that justice will reward someone according to their services or distribution of rights according to their respective proportions.

Judge's Independence in Making Decisions

The independence and freedom of judges is one of the prerequisites for a rule of law state and is a guarantee for the upholding of law and justice. This principle is deeply embedded and must be reflected in the examination and decision-making process in depth and must be reflected in the examination and decision-making process for each case and is closely related to the independence and freedom of the judiciary as an authoritative, dignified and trustworthy state institution.³²

Even though judges are free and independent in carrying out their judicial duties, in deciding a case a judge cannot act as he pleases. It is not permissible that just for reasons of freedom, judges can abuse their power (abuse of power). So, to avoid this abuse, judges in carrying out their judicial duties are limited by the following limitations:

- a. The judge only decides according to the law.
- b. The judge decides solely to provide justice.
- c. In interpreting, constructing or discovering the law, judges must adhere firmly to the general principles of law and principles of justice.³³

A decision is said to be fair if each judge can exercise their right to express their views freely, openly and honestly using legal considerations until a collective decision is produced, even if in the end there is a dissenting opinion.

Roscoe Pound proposed three steps that judges can take when trying a case in order to obtain decisions that are fair or reflect the implementation of the judge's independence and freedom:

1. Finding the law determines which of the many rules in the legal system will be applied, or if none is applied, arriving at a rule for that case which may or may not be used as a rule for other cases afterwards or based on existing material in a certain way indicated by the legal system.

³²Dahlan Sinaga, *Independence and Freedom of Judges in Deciding Criminal Cases in a Pancasila Law State (A Perspective on the Theory of Dignified Justice)*, Bandung: Nusa Media, 2020. p 265

³³Bagir Manan, *Judicial Power of the Republic of Indonesia*, LPPM Bandung Islamic University, Bandung, 1995, p. 12.

2. Interpreting the rules chosen or established in this way means determining their meaning as it was when the rule was formed and with regard to its intended power.
3. Applying to the case at hand the rules discovered and interpreted thus.³⁴

One method that judges can take in exploring the law is by discovering the law (*rechtvinding*). According to Sudikno Mertokusumo, legal discovery is defined as the process of forming law by judges or other legal officers who are given the task of implementing law regarding concrete legal events.³⁵

There are 3 (three) legal discovery methods that can be used by judges, namely:

1. Interpretation or interpretation method.
2. Legal Construction Methods.
3. Refinement of Law.

In Decision Number 0554/Pdt.P/2023/PA.Sby Ratio Decidendi the Judge granted the applicant's request because:

1. In this decision the judge considered according to Article 174 paragraph (2) of the Compilation of Islamic Law "If there are all heirs, then only children, fathers, mothers, widows or widowers are entitled to inherit.
2. The judge considered this decision based on the Al-Qur'an Surah An-Nisa verse 7: "For men there is a right to share in the inheritance of their parents and relatives and for women there is a right to share (also) in the inheritance of their mothers and relatives. Father and relatives, whether few or many according to the division that has been determined."

In the author's opinion the judge carried out an extensive interpretation, namely a broad legal interpretation that the children referred to in the Compilation of Islamic Law and in the Al-Qur'an Surah An-Nisa verse 7 are not only children who are Muslim but also children who are non-Muslim.

So, based on the principle of fairness in the distribution of inherited assets belonging to the heir, children who are non-Muslims also receive inheritance assets as heirs with the distribution regulated by the Compilation of Islamic Law regarding inheritance with the same shares also given to the heirs of children who are Muslim.

³⁴Roscoe Pound, *Introduction to Legal Philosophy*, translated by Drs. Mohammad Rodjab, Bharata, Jakarta, 1996, p. 52.

³⁵Sudikno Mertokusumo et al, *Chapters Concerning Legal Discovery*, Jakarta: Citra Aditya Bakti, 1993, p 2

There are those who argue that judges may deviate from the provisions of the law because judges are not mouthpieces of the law, if there is a conflict between legal certainty and justice then justice must be put forward. Sudikno Mertokusumo and A. Pitlo also stated that it is a teaching about the freedom of judges. This teaching explains that judges are not only mouthpieces for forming laws, but are autonomous, creating, and exploring social processes.³⁶

E. Conclusions

Based on the explanations mentioned above, it can be concluded that the Ratio Legis Judge decided case Number 0554/Pdt.P/2023/PA.Sby Ratio Decidendi The judge granted the applicant's request because the Judge thought that the child referred to in Article 174 paragraph (2) of the Compilation of Laws Islamic heirs who have the right to receive inheritance from the heir are not only Muslim children, but also non-Muslim children, where in this case the Petitioner or the Heir's biological children, 4 (four) of whom are Christians. So for the sake of "justice" the Judge carries out a legal breakthrough or *contra legem* against the provisions of the Compilation of Islamic Law. Because judges are not mouthpieces of the law, if there is a conflict between legal certainty and justice then justice must be put forward.

In Decision Number 0554/Pdt.P/2023/PA.Sby the Judge used an Extensive Interpretation or interpretation of the legal interpretation that extends to 'children' as referred to in the Compilation of Islamic Law Article 174 paragraph (2) as well as in the Al-Qur'an Surah An- Nisa verse 7 includes not only children who are Muslim but also children who are non-Muslim, so for the sake of justice the judge granted the Petitioner's application as an Heir of a different religion, which is called the *Wajibah Will*.

³⁶Ibid, p. 7

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