

CONTROVERSY OF ISLAMIC LAW ON THE DISTRIBUTION OF INHERITANCE TO THE HEIRS OF DIFFERENT RELIGION

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Abstract. The ability and willingness to have sufficient property is always desired by people because the generations that have enough supply of life is better than the begging ones. However, the ownership or transfer of property rights in Islam is clearly regulated through inheritance, sale, gifts, grants, endowments, alms, and other lawful means, such as loans and mortgages. The ownership or transfer of property through inheritance is an important part of Islam. Inheritance relationship between offspring was not easily done, both based on the particular culture and religion. Among the Hindus, especially in Bali, girls do not receive inheritance. The same also applies to Western society in England some time ago. In Padang-Muslim society, men do not receive it. In Javanese society, inheritance is divided equally, without differentiating boys and girls. Such inheritance is based on the cultural standards and anthropocentric paradigm (man as the center of everything). Interesting to be studied is the case in which Muslim whose parents or relatives are still non Muslims or live in a non Muslim state, when they died, the children are legally entitled to the inheritance of their parents or relatives, while in the hadith narrated in Bukhari and Muslim explicitly stated the prohibition of inheritance of different religion.

Abstrak. Kemampuan kemauan memiliki bekal yang memadai selalu dicita-citakan oleh setiap orang dan hiasan hidup manusia karena generasi yang cukup memiliki perbekalan hidup lebih baik dari yang meminta-minta. Namun, kepemilikan atau pindahnya hak milik dalam Islam sudah diatur dengan jelas melalui kewarisan, jual-beli, hadiah, hibah, wakaf, sedekah, wasiat, dan cara-cara lain yang halal, seperti pinjaman dan gadai. Kepemilikan atau pindah hak milik lewat warisan merupakan bagian penting

dalam Islam. Hubungan kewarisan antar keturunan ternyata tidak mudah dan tidak begitu saja dapat dilakukan, baik yang berdasarkan kebudayaan tertentu maupun agama. Di kalangan Hindu, (Mazhab Bali khususnya) anak perempuan tidak menerima warisan, sebagaimana masyarakat Barat (Inggris) beberapa waktu lalu, sementara di masyarakat Padang- Muslim, justru laki-laki tidak menerimanya. Masyarakat Jawa, lain lagi. warisan dibagi rata, gono-gini, dengan tidak membedakan anak laki-laki dan perempuan. Demikianlah kewarisan dengan standar kebudayaan dan paradigma antroposentris (manusia sebagai pusat segalanya). Menarik untuk dikaji adalah orang muslim yang orang tuanya atau kerabatnya masih kafir, bahkan yang tinggal di negara kafir. Ketika mereka meninggal, secara undang-undang anaknya berhak menerima warisan orang tua atau kerabatnya, sementara dalam hadis Bukhari dan Muslim secara eksplisit disebutkan larangan warisan beda agama.

Keywords: controversy, inheritance, different religion

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Introduction

Indonesian as a society that have different ethnic groups, cultures, and religions demands its people the ability to create harmonious social relationships. Religion is certainly very influential on family formation. In a society, it is frequently found one family which have different religions. They can live harmoniously without being disturbed by the different beliefs. Nevertheless, this harmony is often disturbed by the issue of the division of inheritance.

In the past, it is common in the view of the majority of the community that religious differences are believed to be one of the factors that prevent a person from obtaining inheritance from his or her parents. But such a view seems to be neglected in society today. Religious differences are sometimes unquestioned in distribution of inheritance. This is supported by some progressive

court decisions that win the demands of children or wives to gain inheritance from parents or husbands of different religions.¹

In the Islamic perspective, one of the barriers to inheritance rights is religious differences. The children who have different religious beliefs from their Muslim parents are automatically prevented from obtaining the right of inheritance. The division of inheritance in Islam is described in the Quran (Chapter al-Nisa') as the legal basis for the division of inheritance. The division of the property aims to avoid disputes in distributing inheritance. Inheritance is distributed if the deceased person leaves a useful property for his or her heirs. However, before the inheritance is given to the heirs, there are three things that must first be spent from the heritage; all costs associated with the funeral process of the deceased, the testament of the deceased, and debts. When the three things above have been fulfilled, the property inherited from the deceased is given to the family and also the eligible relatives.

The law of Islamic inheritance basically applies to Muslims anywhere in the world. The style of an Islamic state and people's life in that country or region has an influence over the law of inheritance, including in Indonesia. Islamic inheritance law is also an important expression for Islamic family law, and every Muslim should study the law of Islamic inheritance. Prophet Muhammad affirmed that studying Islamic inheritance law means studying the

¹The High Religious Court (Pengadilan Tinggi Agama) Jakarta and the Supreme Court (Mahkamah Agung) considered that although Sri Widyastuti was not among the heirs because of different religion, she remained entitled to the inheritance of her parents. The High Religious Court argued that the right of inheritance of the sons of different-religion is based on a mandatory testimony (*wasiat wajibah*), but the amount is only three quarters of the share of a daughter of an heir. While the Supreme Court alters the amount is equal to the share earned by a female heir. Considerations and decisions of the Supreme Court that recognize the rights of children of different religions are contained in the case register no. 368K / AG / 1995. "Putusan MA Saudara Beda Agama Boleh Mendapatkan Harta Warisan," *Hukum Online*, last modified 2017, accessed November 15, 2017, <http://www.hukumonline.com/hol13857/putusan-ma-saudara-beda-agama-boleh-mendapatkan-harta-warisan>.

half of the knowledge possessed by humans, that had existed for a long time and still continue to operate in the midst of Muslim society since the early days of Islam until medieval and contemporary times.

The law of inheritance in Islam gets a great attention because the distribution of inheritance often leads to unfavorable consequences for the families left by their testators.² A person's death often results in a dispute among the heirs regarding his or her heritage. Such a thing is very likely to occur, when the parties are inconsistent with the established signs. One of the things that make disputes of inheritance occur is the religious difference between the owner of the property and the heirs in the family.

The inheritance of the people of different religions is one of the contemporary issues in Islamic legal thought today. Along with the development of time, the cases that occur in the law of inheritance of the people of different religions are increasingly widespread. One of the contributing factors is disagreement of the heirs (non-Muslims) to the unfair division of property. Based on the consideration of this case, the Supreme Court is encouraged to issue new decisions in the law of inheritance of the people of different religions. However, the Supreme Court's verdict is judged to be incompatible with what Islamic law regulates on the inheritance of the people of different religions. This paper will discuss this controversy in Islamic law about the division of inheritance of the people of different religions.

² To fulfill the element of justice, explanation about it in detail was delivered by the Prophet in his hadith. Nevertheless, in its application it still raises a discourse and discussion among the experts of Islamic law which is then formulated in the form of a normative teaching. Riyanta, "Keawarisan Beda Agama (Studi Pandangan Muaz Bin Jabal)," *Jurnal Ilmu Syari'ah dan Hukum* 46, no. 1 January-June (2012): 163.

Law of Inheritance in Islam

In the Islamic perspective, the law of inheritance is governed fairly and transparently. Islam establishes the right of the ownership of property for every individual both male and female in a very humanist way. Islamic law also prescribes the right of transfer of ownership of a person after death to his or her heirs, of all his or her relatives and offsprings, without distinction between men and women.

The Quran has explained the laws relating to the right of inheritance based on a sense of justice for anyone.³ The Quran becomes the main reference of the determination of the distribution of inheritance, in addition to the hadith of the Prophet and a consensus of the scholars (*ijma*). Even in Islamic shariah, there are few Quranic verses speak about a normative law in detail, except the law of this inheritance. This is because inheritance is one form of legal ownership justified by Allah.

The Definition of Law of Inheritance

Law of inheritance according to Islamic law is laws on the distribution of estate to those who are entitled to receive it. In Arabic, the word *mirās* is infinitive word from *warīsa-yarīsu-iršan-mīrāsan*, which means, “transfer of something from one person to another, or from people to the other”.⁴ While in terminology, the meaning of *mirās* (inheritance)⁵ is the transfer of ownership rights

³ The portion that must be received by the heirs is described in accordance with the status of lineage to the heirs, whether they are as a child, father, wife, husband, grandfather, mother, uncle, grandchildren, or even half brother/sister with the same father/mother (QS al-Nisa' 11).

⁴Mulyadi, *Hukum Waris Tanpa Wasiat* (Semarang: Badan Penerbit Universitas Diponegoro Semarang, 2008), 33.

⁵ The law of inheritance, according to the Civil Code, is the laws or rules that govern the rights and duties concerning one's wealth at the time of his death and how they are to be transferred to another living person. See Idris Ramulyo, *Perbandingan Hukum Kewarisan Islam Dengan Kewarisan Kitab UU Hukum Perdata* (Jakarta: Sinar Grafika, 2004), 89.

from the deceased to his or her heirs, either in the form of property (money), land or other properties which are legal according to the Sharia.⁶

The law of inheritance in Islam is known as *farā'iḍ* which describes the procedure of dividing the property of a deceased person to the heirs entitled to receive it. The word inheritance itself can mean either the inherited as a subject or a process. The first refers to “the one who receives the inheritance”, while the second refers to “the transfer of property from the deceased to the living”. The latter is used in legal terms.

According to the Compilation of Islamic Law, Article 171 letter a, the law of inheritance is a law that regulates the transfer of ownership rights from the deceased as a testator, determines who is entitled to be the heirs, and the portion for each heirs.⁷ In a more general context, inheritance can be interpreted as the transfer of material rights from the deceased to the living heirs.⁸ The inheritance includes all properties related to the assets and rights that depend on it, such as debits and credits, and compensation rights.

In Indonesian, the inheritance is called as heritage, that is, the property and the right left by the deceased to be distributed to the rightful to receive it.⁹ The division of inheritance in Islam is

⁶H.R. Otje Salman and Mustofa Haffas, *Hukum Waris Islam* (Bandung: Refika Aditama, 2006), 6.

⁷Mulyadi, *Hukum Waris Tanpa Wasiat*, 76.

⁸In another text, Hasby Ash-Shiddieqy argued that the law of inheritance is the law that governs who inherits and who does not, the portion of inheritance and the ways to distribute. See Ahmad Rofiq, *Fiqh Mawaris* (Jakarta: Raja Grafindo Persada, 2002), 4.

⁹The meaning of heritage among the Muslim jurists (*fuqaha*) is everything left by the testator, either in the form of property (money) or other. Therefore, in principle everything left by the deceased is declared as inheritance. Included in it is debits and credits either related to the essence of the property (such as loot property) or personal liability that must be fulfilled such as credit or dowry payments not yet given to his wife). See Suhrawardi K.

commonly referred to as *farā'id*, that is, the division of estate for those who are entitled to receive it. According to Syamsul Rijal Hamid the definition of inheritance is the transfer of rights and obligations on everything both property and guarantee from the deceased to his surviving family.¹⁰

Inheritance law is a part of family law that plays an important role, even it determines and reflects the system and form of law that occurs in society. The law of inheritance in Islam is a form of law that specifically regulates the transfer of the property from the deceased to the living, because the law of inheritance contains the rules to regulate the process of transfer of property and goods from one generation of another.

The wealth of a deceased person under Islamic law of inheritance is distributed in such a way that all children, wives or husbands, fathers, mothers and siblings (male or female) as the immediate family receive the portion of estate. Similarly, it regulates the heritage of the deceased and the ways to calculate it properly. The law of inheritance in Islam contains principles which are also valid in the law of inheritance which is solely derived from human reason. In addition, Islamic inheritance law has its own characteristics.

Rights Related to Inheritance

The rights to be fulfilled in relation to the estate include; first, all funeral financing should be from the deceased's property, with the annotation that it should not be excessive. The funeral financing includes everything that is required of the dead, from his death to his funeral such as, among others, bathing costs, purchase of shrouds, funeral expenses, and so on.

Lubis, *Hukum Waris Islam (Lengkap Dan Praktis)* (Jakarta: Sinar Grafika, 2004), 88.

¹⁰Syamsul Rijal Hamid, *Buku Pintar Agama Islam* (Bogor: Cahaya Salam, 2011), 366.

Secondly, the debts of the deceased should be payed first. That is, the entire property of the deceased is not allowed to be distributed to the heirs before the debt is first payed. This is based on the hadith, “The soul of the believer depends on his debt until it is fulfilled.” The hadith speaks about the debt of the deceased towards his or her fellow human beings. As for if the debt is related to Allah, such as not paying alms (*zakat*), or not yet paying a vow to God (*nazar*), or not yet fulfilling fines (*kaffārat*), the scholars have little difference of opinion on this issue.

The scholars of the Hanafi school believe that the heirs are not obliged to fulfill it. While the majority of scholars argued that it is mandatory for the heirs to fulfill it before the inheritance is distributed to the heirs. The scholars of the Hanafi school argued that performing this act is deemed as worship, whereas the obligation of worship falls if someone died.¹¹ In fact, according to them, the practice of worship should be accompanied by intention and sincerity, and it can not be done by the deceased. However, even though the obligation is declared void for the deceased, he or she will still be subject to sanctions on the Day of Judgment because he or she did not fulfill his/her duties while they are still alive. This is certainly God’s decision.

While the majority of ulama, who argued that the heir is obliged to pay the debt of the deceased against Allah, reasoned that it is the same as debt to fellow human beings. According them, this is a practice that does not require intention because it does not include pure worship (*‘ibadah mahdah*), but it is included in the rights related to the estate of the deceased. It is therefore mandatory for the heirs to fulfill it, whether or not the heirs are entrusted. Even in the view of the scholars from Shafi’i school of law, it must be fulfilled before fulfilling the rights related to the right of fellow human beings.

¹¹Saifudin Arif, *Praktek Pembagian Harta Peninggalan Berdasarkan Hukum Waris Islam* (Jakarta: PP. Darunnajah, 2007), 51.

While the Maliki school of law argued that the rights associated with God must be fulfilled by the heirs just as they are required to pay the debts of the deceased to fellow human beings. However, this school more prioritized the debt related to fellow servants rather than debt to God. Meanwhile, the scholars from the Hanbali school equates between debt to fellow servants with debt to God. Both shall be simultaneously fulfilled before all the estate of the deceased is distributed to every heirs.

Third, it is obligatory to fulfill all testament of the testator for as far as it is not exceeding one third of the total property. This is if it is intended for the non-beneficiary, and there is no protest from one or even all of his heirs. The testament is done after a portion of the property is taken to finance a deceased's funeral needs, including his or her debts. Only then will all the heritage be distributed to the heirs according to the rules of the Quran, al-Sunnah, and the consensus of the scholars (*ijma*). In this case, it begins by giving inheritance to *aṣḥāb al-furūd* (the prescribed heirs whose their share and portion are determined, such as mother, father, wife, husband, etc.), then to *‘aṣabah* (relatives of the dead who are entitled to receive the inheritance if available)

Controversy of Inheritance from the People of Different Religions

Inheritance from the people of different religions is the practice of dividing inheritance involving two or more persons of different faiths between one Muslim and another non-Muslim either as a testator or heir. Inheritance from the people of different religions is a very complicated practice in modern times, especially when those who are entitled to inheritance are Muslims from non-Muslim parents or relatives, as it is the case in some places in Indonesia.

In Islamic law, there are obstacles to accept inheritance. It is called *mawani’ al-irs’* or things prevent the heirs from receiving the

inheritance of testator (*al-muwāris*). This includes murder, different religion and slavery.¹²

In relation to inheritance between Muslims and non-Muslims, it has been determined that the different religions which becomes a barrier is if between the testator and heirs, one of whom is Muslim, the other is not Muslim. For example, the testator is Muslim and the heir is non-Muslim, or vice versa. So if there is person who died as Buddhist, while the heirs are Hindus, there is no obstacle to inherit. Nor does it fall within the sense of different religion, if the Muslims are in different sect, one Sunni and the other Shi'a.¹³

The urgent case that occur at this time is the number of Muslims whose parents or children are not Muslims. When they die, children by law are entitled to receive the inheritance of their parents or relatives. Nevertheless, Umar ibn Khatab, in certain cases, differed from the Companions' view, that the Muslims received inheritance from non-Muslim for some reason, though the truth of this narration is still disputed. The heirs of different religious are also a barrier to receive estate in the law of

¹² The scholars agree that non-Muslims cannot be the heirs of Muslim testators. They made an analogy from to the case of murder. If murder can sever the kinship ties and deprive the right of inheritance, so it also applies to religious difference, because the Islamic inheritance law does not apply to non-Muslims. Yusuf Qaradhawi, *Fiqih Minoritas Fatwa Kontemporer Terhadap Kehidupan Kaum Muslimin Di Tengah Non Muslim*, Indonesian translated by Abdilah Obid (Jakarta: Zikrul Hakim, 2004), 176.

¹³ By law children are entitled to receive the inheritance of their parents or relatives, while in the hadith narrated by Bukhari and Muslim explicitly stated, "*Lā yariṣu al-muslim al-kāfir walā al-kāfir al-muslim*" (Muslim does not inherit the unbelievers, and vice versa). In another hadith, it is mentioned, "*Lā yatawāraṣu ahl millatain syatta*" (people from two different religions do not inherit each other) (narrated by Ahmad, Abu Dawud, and Ibn Majah). The above hadiths are the basis of the majority of scholars's view, and it has even been imposed since the time of Khulafa al-Rashidin and became one of the important points of discussion of the four leaders of schools of islamic law.

inheritance.¹⁴ Thus, the unbelievers cannot inherit the Muslims' property and vice versa. The Muslim jurists agreed that the unbelievers can inherit each other when they have the same belief.

The majority of scholars argued that all religions or beliefs other than Islam are considered one. With this opinion, then the disbelievers can mutually inherit one another, whether one religion or not, because all religions besides Islam is basically error. According to the scholars from Maliki school of law, other non-Muslim groups are divided into three, namely Jewish, Christians and other religions which are considered a religion. According to the scholars of Hanbali, the unbelievers have a diverse religion, so the adherents of a religion (other than Islam) can not inherit from different believers.

In addition, there are other opinions, in which apostates do not inherit others and are not inherited by others. Inheritance belongs to the Baitulmal (state treasury). Meanwhile, the Hanafi scholar argued that what they had gained before apostasy was inherited by their Muslim relatives, and what he had gained after apostasy became the property of the Baitulmal.

In the Compilation of Islamic Law (Kompilasi Hukum Islam, KHI), article 172 reads: Heirs are considered to be Muslims if they are known from Identity Cards or recognition or practice or testimony, whereas newborn infants who are immature, their religion is according to their father or environment. Inheritance essentially is transferred from the hands of the deceased to all heirs in the form of property in a clean state, which means it is free from debts and other payments caused by the death of the person who inherit.

¹⁴ In addition, the relations of relatives who are different religions are only limited to social good relationship, and does not concern with the realm of shari'ah. Wahbah Al-Zuhaili, *Al-Fiqh Al-Islāmī Wa Adillatuh*, 9th ed. (Damascus: Dar al-Fikr, 2007), 198.

In the KHI book II, chapter I on general provisions, it can be concluded that Islamic inheritance law separates the concept between heritage and inheritance.¹⁵ Heritage are treasures left by the the testator in the form of property and rights belonging to him. In Islamic law of inheritance, there are two inheritors, that is, the *asabat* which is considered as the heirs by itself since long time ago before Islam according to the law in Arab land, and *aṣḥāb al-furūd*, that is, those who are added by the Qur'an as the heirs.

According to the majority of Muslim jurists, the measure to determine of religious difference is the time of testator's death. When a Muslim dies, his or her sons of different religion are hindered from inheritance even if he or she converts to Islam before the division of inheritance takes place. This means, the territory of inheritance law does not apply to non-Muslims. In addition, the relationship between relatives of different religions in everyday life is limited in communication and social relations, and this does not include the implementation of sharia law, including the right to obtain the inheritance or heritage from the parents or husband of different beliefs or religion.¹⁶

¹⁵Akhmad Haries, *Hukum Kewarisan Islam*, 2nd ed. (Samarinda: P3M STAIN Samarinda, 2010), 77.

¹⁶In a legal perspective, there are different ways of resolving issues of inheritance of different religions. The example includes the case of married couple, Mr. Armaya Renreng who embraced Islam and Ms. Evie Lany, who is a Protestant Christian in the verdict of Supreme Court.16K /AG/2010. Mr Armaya died in a Muslim state and according to the Islamic law of inheritance, he cannot bequeath his property to Ms. Evie Lany. Nevertheless all the Armaya's wealth is still in the mastery of Ms. Evie Lany, who in fact is the legal wife of the deceased. The mother and siblings of the deceased objected to this and decided to settle the distribution of this inheritance in the Religious Court in order to solved according to the Islamic law of inheritance (*faraidh*). In this case, when connected with the Islamic law of inheritance, the wife is not entitled to inheritance rights because of different religions as in Article 171 point (c) the Compilation of Islamic Law (KHI) which states that the heirs must be Muslim. Nevertheless, it is unfair for a non-Muslim wife whose husband left her to death because during her lifetime she has served her husband sincerely and has devoted herself long enough. Then Ms. Evie Lany submitted a request for a

The majority of ulama, including four leaders of school of Islamic law, argued that people of different religions should not inherit each other. This is different from the opinion of some ulama who claim to rely on the opinion of Mu'adz bin Jabal who said that a Muslim may inherit the unbelievers, but not bequeath to them. Their reason is that Islam is "superior, and no one surpass it" (*ya'lū wa lā yu'lā 'alaih*).

Some scholars added one more thing that inhibits the right of inheritance, that is, apostasy. People who came out of Islam are declared apostates. In this case, scholars come to an agreement that apostates fall into the category of religious differences. Therefore, apostates cannot inherit Muslims. Meanwhile, there are different views among scholars about relatives of apostates, whether or not they inherit. Or, can a Muslim inherit the property of his/her relatives who converted to other religions?

According to the Maliki, Shafii, and Hanbali schools of law, a Muslim has no right to inherit the property of relatives who had apostatized, because, they argued, the apostate had come out of the teachings of Islam so that he or she automatically had become *kafir*. Therefore, as the Prophet said, "Between Muslims and non-believers cannot inherit each other." Meanwhile, according to the Hanafi school of law, a Muslim may inherit the property of relatives who had apostatized. Even the Hanafi scholars agree that all the wealth left by the apostates are passed on to their Muslim relatives. This opinion is narrated from Abu Bakr as-Siddiq, Ali ibn Abi Talib, Ibn Mas'ud, and others.¹⁷

cassation and from that consideration, she was granted a mandatory testimony (*wasiat wajibah*) for the appellant in the verdict of the Constitutional Court No.16K / AG / 2010 as a form of legal discovery on this case which is basically not regulated in the KHI.

¹⁷ According to the author, the opinion of the Hanafi scholars is stronger than others, because the inheritance of the deceased who does not have the heirs must be submitted to the Baitulmal. However, in the present time, we do not meet Baitulmal which is managed properly, both nationally or internationally.

As for the case of inheritance of different religions in which the testator is non-Muslims and the heirs are Muslims, the scholars are divided into two groups: first, the group that rejects with the argument that most of the salaf scholars claimed that a Muslim does not inherit non-Muslims, as the unbelievers do not get the inheritance from Muslims. This opinion is known among the four leaders of school of law and their followers. They claim that the hadith of the prohibition of inheriting due to different religions is absolute and cannot be made an analogy.

Secondly, the group that allows argued that the hadith which prohibits the inheritance of different religions, used the letter *lā nafiyyah*,¹⁸ which means “negation”, not *lā nahyi*, which means “prohibition”. The letter *lā nafiyyah* contains the “negation” in which there is no legal action taken. However, it does not become consensus (*ijma'*), because some Companions do not agree and argue that the infidel (*kāfir*) in the hadith is still general and requires specialization (*takhṣīṣ*), if this word is when considered general (*muṭlaq*). The word *kāfir* (the infidel) here refers to *kāfir ḥarb*, not *kāfir zimmi*.

Umar bin Khatab, Muadz and Mu'awiyah did not apply the practice of hadith above. Even, as it is narrated, they take the heirs of the unbelievers, but not vice versa. Of the contemporary Muslim scholars apparently agreed with the opinion of the above scholars.¹⁹ However, the validity of this narration is doubted by Ibn

¹⁸ The words of the Prophet related to the prohibition of inheriting between people of different religions: (1) Hadith narrated from Usamah bin Zaid from the Prophet “*Lā yariṣu al-Muslim al-kāfir walā al-kāfir al-muslim*”, does not inherit the disbelievers to Muslims, so Muslims to kafir (Hadith narrated by Bukhari and Muslim). Another Hadith from Amr bin Syaib from his grandfather Abdullah bin Amr who narrated from the Prophet, “*Lā yatawāraṣu ahl millatain syatta*,” (The adherents of two different religions do not inherit each other” (Ahmad, Abu Dawud, and Ibn Majah).

¹⁹ This is the opinion of Muadz bin Jabal, Muawiyah bin Abi Sufyan, Muhammad ibn al-Hanafiyah, Abu Ja'far al-Baqir, Said ibn al-Musayyab, Masruq bin Ajda, Abdullah ibn Mughaffal, al-Syu'bi, al-Nakha'i, Yahya bin Ya'mur, and Ishaq ibn Rahawaih . They said, “We get their inheritance and they do not get it

Qudamah. Among Hanbali scholars there is difference of opinion regarding this kind inheritance. It is true that rejection of inheritance between Muslims and the unbelievers (*kāfir*) is essentially based on the two hadiths above. So, this becomes the basis for rejecting the inheritance of the atheist (*zindīq*), hypocrite (*munāfiq*), and apostate (*murtad*). In fact, according to Ibn Taymiyya, in a *sunnah mutawatirah*, it is clear that the Prophet made them apparently the same as Muslims, in terms of mutual inheritance.

From the two hadiths above, the following problems arise: (1). The property that Muslims should have taken may fall on others, even to non-Muslim religious institutions which are subsequently used to convert Muslims to other religions; (2) Many new Muslim converts are miserable, while their families are rich; (3) It is possible that someone who does not convert to Islam for being fear of not getting the inheritance from his or her rich parents. (4). The mastery of property from non-Muslims is justified by the legislation of the state that is set in modern countries now. It maybe in the form *hibah* (grant), *wasiat* (testimony), *hadiyah* (gift), or even buying and selling. It is a loss if the property is left no “owner”.

In the hadith *lā yariṣu al-Muslim al-kāfir walā al-kāfir al-muslim*, what is meant by the word *kafir* is *kāfir ḥarb*, not *kafir zimmi* as Hanafi scholars said. If it is from sharia still objected and is considered to violate the principles of shariah, the wealth may be taken in a moderate way (*tawassuṭ*), as Yusuf al-Qardawi argued, “The heirs take the property in accordance with the laws of the country, but for public benefit, Islamic da'wah and education, while another take personally in order to cover the basic needs of

from us, as we can marry their women, but not vice versa” Riyanta, “Keawarisan Beda Agama (Studi Pandangan Muaz Bin Jabal),” 169.

his life rather than asking people for help everywhere, especially a Muslim new convert (*muallaf*).²⁰

As it is known, the principles of implementation of inheritance been determined in the Quran (al-Nisa: 11-14, 176; al-Anfal: 72-75). In the Quran itself, there are about 24 words of *waris* with various derivations and different meanings. Furthermore, the hadiths of the Prophet have much to say about this inheritance. Nevertheless, the ideas of inheritance had developed in the early days of Islam.

Since the days of the companions, a progressive idea or *ijtihad* to understand the distribution of inheritance has developed, especially when the complicated things happen, such as the case of *al-radd* and *al-'awl*. That means, although the division of inheritance law is absolute (*qat'ī*) with explicit numbers in certain respects, more analysis is still needed in the form of *qawā'id ushuliyah* (rules of Islamic laws) and *qawā'id fiqhiyah* (legal maxims) in deriving Islamic law.

In the Quran, it is clear that the provision of inheritance is Allah's instruction (*wasīat*), which in the verses, it is referred to as "mandatory from Allah" (*farīḍatan min Allāh*) and "those are Allah's laws" (*tilka hudūd Allah*). The words *waṣiyyah*, *farīḍah* and *hudūd* certainly indicate to the obligations, which must be implemented. This means, no heir is harmed under that provision, as far as the principles of justice and trustworthy are always held firmly.

²⁰ Someone who just converted to Islam is called *muallaf*. Among *muallafs* there are those who live below a standard of life, whereas the property of their parents or brother who are infidels is quite a lot. On the one hand, they desperately needed the money, and on the other hand the Prophet warned not to be accepted. Then, the other issue is that if the money is not taken by the child, the state will give it to religious institutions, NGOs, perhaps missionaries, as funds to convert Muslims from Islam. Istiqamah, "Tinjauan Yuridis Pembagian Harta Warisan Pasangan Suami Istri Beda Agama, Perspektif Hukum Islam dan KUHP," in *Jurnal Jurisprudentie*, Vol. 4 No. 1 (June 2017), 79.

The provision of inheritance in Islam has been conceptualized in such a way that it is not necessarily disputed, even if in terms of blood relationship, for example, a person is entitled to inheritance, but in certain cases, he or she may be blocked because of the presence of a more eligible person or somethings that block it, such as different religion or murder. However, there is other meaning regarding the recipients of inheritance who are blocked in the case of religious differences. The hadith about it is interpreted based on public welfare (*al-maṣlahah al-‘āmmah*).

Inheritance in any part of the world is not only regulated by religion or customs, but also by state law. So if it is based on particular reasons, the person does not inherit due to obstacles according to the system of Islamic inheritance law, and without receiving the share of inheritance, it will endanger the religion, the wealth, and the people, so what should the *mujtahids* do? In this case, a mujtahid should be smart in using method of deriving laws, in order this teaching of Islam is in harmony with the general goals of Islamic law (*maqāṣid al-sharī‘ah al-‘āmmah*) which certainly does not violate the basic principles of sharia (*uṣūl al-sharī‘ah*).

Rights of the Heirs of Different Religion

The basic principles used in establishing the law is *amānah* (trustworthy), *‘adālah* (justice), and *maṣlaḥat ‘āmmah* (public welfare), and does not violate the principle of monotheism. These principles are used as method of deriving laws that is implemented by the Muslim scholars from the beginning. Indeed, the change of law or fatwa (*taghayyur al-fatwa wa al-aḥkām*) possibly occurs, if there is a different ratio legis (*‘illah*). Ibn Qayyim in *I‘lam al-Muwaqqi‘in ‘an Rabbil ‘Alamin* formulated a method, “*taghayyur al-fatwa bi taghayyur al-azminah, wa al-amkinah wa al-aḥwāl wa al-‘awāid*” (the fatwa changes according to changes in times, places, conditions, and habits).

In Article 2 of Law Number 3 Year 2006 stated that the Religious Court is one of the executor of judicial power for the Muslims seeking justice on certain cases. Certain cases under the jurisdiction of the Religious Courts are outlined in Article 49 of Law Number 3 Year 2006 that the Religious Courts have the duty and authority to examine, decide, and resolve cases at the first level between Muslim people in the field of marriage, inheritance, will, grant, endowment, alms, charity and sharia economy.

The Compilation of Islamic Law (KHI), affirms that testator and the heirs must be Muslim, having blood relations or marital relationships, and being not hindered by law to become the heirs (Art. 171 letters b and c), whereas the case of religious differences between the testator and the heirs is not clearly regulated. In the case of inheritance, it is possible that there are people of different religions. When the testator died as Muslim, the heirs may be Muslims and non-Muslims, or vice versa.

In the practice of the application of law within the Religious Court, a non-Muslim heir may obtain a share of the estate from Muslim testator through the mandatory testimony (*wasiat wajibah*) from the Cassation Decision Number 368 K/AG/1995 dated July 16, 1998. In the verdict, a non-Muslim daughter get the share of inheritance from her parents *wasiat wajibah* as much as the female heirs. The verdict has become a jurisprudence, which is followed by judges in the Religious Courts.

No single verse is found in the Quran that clearly and strictly prohibits the inheritance of different religion. The legal basis for this prohibition is found in the hadith narrated by Bukhari, which reads, "The Muslims do not inherit from the unbelievers, and the unbelievers are not inherited from the Muslims." Based on KHI Article 171 letter b "Heir at the time of death must be Muslim." When associated with Article 171 letter c, "Testators shall be persons who at death have blood relation or marriage relationship

with the heirs, Muslim and are not hindered by law to become the heirs.”

Explicitly KHI requires the same religion, that is, Islam, in order to mutually inherit. KHI does not regulate if the testator is an apostate, whether or not his or her property can be inherited by Muslims or not. The system of Islamic inheritance embraces the kinship system, both in *nasabiyah* (relationship of blood) as well as *hukmiyah*. This kinship system is more important if compared with religious differences as inheriting barriers, because inheritance law contains more elements of social relations (*mu'amalah*).

The kinship between a person and another will never be severed even if their religion is different. A child still recognizes her biological mother even if her birth mother is not the same religion as him or her. Islam does not teach hostility by breaking horizontal ties with non-Muslims, especially those with blood connections.

Since Islamic law of inheritance in Indonesia contains an egalitarian principle (one should be treated equally), non-Muslims relatives who have blood relation with the testator, are still entitled to part of inheritance though mandatory testimony (*wasiat wajibah*) as far as not exceeding equivalent the share of the heirs. The judges of the Religious Court should prescribe them as the recipient of *wasiat wajibah*, and not as the heirs, due to different religions from the Muslim testator.²¹

From the previous discussion of inheritance law, it is mentioned that one of the barriers to inheritance rights is religious differences between the testator and the heirs. For example, a testator is non-Muslim, while the heirs are Muslims, or vice versa. Difference of religions is a serious impediment to the existence of inheritance rights, as the hadith narrated by Bukhari states, “A

²¹ Legal consideration that is used is based on Jurisprudential Verdicts of the Supreme Court, of the Republic of Indonesia, Number 368 K/ AG/1995 date 16 July 1998 and Number 51 K/AG/1999 date 29 September 1999.

Muslim does not inherit a *kāfir*, and vice versa.” Another hadith also says, “*Lā yatawāraṣu ahl millatain syattā.*”

In the context of the rights of non-Muslims to inheritance, the classical and contemporary Muslim scholars differ. Imamiyah scholars argue that a Muslim has the right to inherit non-Muslims. If one of the deceased’s children is a non-Muslim, and then converted to Islam after the testator died, and the estate has been distributed to the owner, then, according to the agreement of the scholars of the school of law, the person is not entitled to the inheritance.

But in the above context, the classical scholars disagreed if the non-Muslim child converts to Islam after the inherited person dies but his property has not yet been distributed. The scholars from Imamiyah and Hanbali schools of law argued that the person is entitled to inheritance, while Abu Hanifah, Malik and Shafi’i said that the person is not entitled to the inheritance.²²

Nevertheless, in general, schools of, Hanafi, Maliki, Shafi’i and Hanbali agree that Muslims cannot inherit each other with non-Muslims. They hold on to the literal of hadith. However, Shia Imamiyyah said that if the Muslim heir is only one, then only he who receives inheritance. A person’s Islam then has no effect whatsoever on the right to inherit.

Included in the barrier of inheritance due to religious differences is apostates. Apostasy is generally defined by the classical scholars as the discharge of someone who originally embraced Islam and then denied it. The exodus of a person either by converting or not embracing a religion is generally considered by Islamic teachings as *kufr*. In relation to inheritance, the status of apostates is likened to the unbelievers. It means that they have the same position as the unbelievers. Therefore, apostates cannot

²²Miftahul Hakim, “Tinjauan Hukum Islam Tentang Ahli Waris Beda Agama (Analisis Terhadap Putusan Mahkamah Agung RI Nomor 16K/AG/2010)” (Universitas Islam Negeri (UIN) Walisongo Semarang, 2014), 90.

become the testators (*muwarris*) for their Muslim heirs or vice versa. The legal basis in this case is the hadith narrated by Usama bin Zaid.

Rabi'a ibn Abdul Aziz and Ibn Abi Al-Lail said that "if a Muslim has apostatized, then his property cannot be inherited by the Muslim heirs. Therefore, his property becomes the right of Muslims placed in Baitulmal." Al-Zarqani said that the hadith of Usamah bin Zaid had become the agreement of the earlier scholars and was followed by later scholars. There is no dispute between them.

Imam al-Shafi'i also commented on the hadith of Usamah bin Zaid with a question, regarding apostate, which is closer? to *kufir* or Islam. According to him, apostate is clearly *kāfir*; therefore, he or she is included in the category of hadith above. Ibn Hazm also argued that apostates and unbelievers are the same, and as a result, their inheritance are the same. All the wealth obtained after the apostasy automatically become the right of Muslims and submitted to the Baitulmal whether he or she died in a state of apostasy, murdered or joined in the enemy country.

Ibn Qudamah also mentions some narrations of Ahmad Ibn Hanbal about the inheritance of apostates. One opinion said that apostates's treasures become *fay'* submitted to the Baitulmal for the benefit of Muslims. Others said that apostates' property becomes the right of their Muslim heirs, and while others said the property of the infidels is the right of their heirs of the same religion. However, Ibn Qudama declares that the first opinion becomes his school of law's opinion.

The opinion of Al-Qurtubi and Al-Kiya Al-Harrasi is the same as the general opinion of the above scholars. According to them, the status of apostates and unbelievers in the matter of inheritance is that they are prevented from inheriting each other with their Muslim inheritors. They based their opinion on the hadith of

Usama ibn Zaid ibn Kahab which covers infidels in general, either because of apostasy or not.

The classical ulama generally said that religious differences are preventing inheritance. This is opposed by some contemporary thinkers. Abdullah Ahmad An-Na'im, for example, said that one of the discrimination of family law and sharia law is related to the difference of religion. Religious difference is a barrier of all inheritance, so a Muslim will not be able to inherit from non-Muslim, and vice versa. According to An-Na'im, ignoring historical justifications, various issues of discrimination against women and non-Muslims under sharia are no longer justified.

Abdullah Ahmed An-Na'im also said that discrimination in the name of religion and gender under the Shari'ah has also violated the enforcement of human rights.²³ Discrimination on the basis of religion has been built with the great causes of international conflict and war because these countries agree with non-Muslim minorities which were torture, and then may be encouraged to act in favor of victims of religious discrimination, thereby creating a situation of international conflict and war. Discrimination based on both gender and religion is morally opposed and politically unacceptable now. An-Na'im emphasized that the provisions of sharia that teach discrimination should be abrogated by the more universal sharia provisions.

In line with the opinion of An-Na'im is Asgar Ali Engineer. According to Asgar, Islamic society do not recognize any discrimination of any kind, whether based on race, ethnicity, religion, or class. According to Asgar, monotheism is not merely pure monotheism, but extends to the sociological dimension. It must be remembered that human unity should not be reduced only to unity of faith alone. Because, in principle, the real humanity crossed the lines of belief. Asgar said, the spirit of the Quran is one

²³ Riyanta, "Keawarisan Beda Agama (Studi Pandangan Muaz Bin Jabal)," 166.

thing more important than the opinions of medieval jurists, and hence, in this case, the whole books of Islamic jurisprudence as formulated by the early Muslim jurists (*fuqaha*) should be reviewed in depth. The Justice should be more emphasized.

The formation of Islamic law must be linked to the existing context and the circumstances under which the law was born, all of which are intended for human benefit. In modern times, the of context of human benefit (*maṣlaḥat*) must be associated with freedom, equality of rights and status. In the context of the inheritance of the people of different religions, Asgar Ali Engineer assumed that it is allowed in the present situation based on *maslahah*. The conception of *kāfir* (non-Muslim) as formulated by classical scholars is considered irrelevant applied in the present condition.²⁴

In the study of Islamic law, law is divided into two major areas: *ibādah* (worship) and *mu'āmalah* (social relationship). *Ibadah* is rules related to the relationship between man and his God, such as prayer, fasting, going on pilgrimage, and others, while *mu'āmalah* includes such activities as buying and selling, lease, divorce, marriage, inheritance, criminal laws and others. According to Asgar, the verses pertaining to the matter of *ibadah* can be put in action without reinterpretation in understanding the related verses. In contrast to worship, inheritance is included in *mu'āmalah* (social relations).

Inheritance law in Indonesia generally still uses three legal bases, firstly, inheritance law under Islamic law, customary law, and western law. The absence of nationally binding law resulted in the implementation of inheritance law highly dependent on the choice of its citizens. Although law is not imperative, but the reality showed that the Presidential Instruction-based Compilation of

²⁴ With more explicit explanation, Asgar rejects the inheritance barrier due to religious differences because it is related to social relation worship which can be contextualized in terms of status. *Ibid.*, 163.

Islamic Law is almost used by Religious Court judges in deciding cases, and is made as a reference by the officials of the Office of Religious Affairs and some members of the community.

In the context of Islamic inheritance law, the reform of Islamic family law was first marked by the enactment of Law No. 1 Year 1974 on Marriage. Several years later, Islamic Law Compilation (KHI) was compiled through Presidential Instruction No. 1, Year 1991 which is materially used by the Religious Courts to resolve cases related to marriage, inheritance and endowment.

In relation to the rights of inheritance for non-Muslims, KHI refers more to the opinions of the classical "Ulama" who argued that the religious differences between a testator and the heirs become a barrier to the inheritance process. This can be read in article 171, point b, which states "The testator is a person who, at the time of his or her death or declared dead by a judgment of the Islamic Court, leaves the inheritors and the property".

In the same article 171 point c states "Heirs shall be those who at the time of death have a blood or marriage relation to the heirs, Muslims, and are not hindered by the law to become the heir". The religiosity of a person may be determined by his/her identities, and this is evident in article 172 which reads "Heirs are considered to be Muslims if they are known from identity card or recognition or practice or testimony, while the religion of newborns or immature children according to their father or environment."

The provisions in the Compilation of Islamic Law (KHI) are very clear that the right of inheritance is automatically severed when it comes to religious differences. The rules in KHI are based entirely on the opinions of the 'classical' Muslim scholars, especially al-Shafi'i. Even in the Circular Letter of the Bureau of Religious Justice, 18 February 1958 Number B/ I / 735, material law which is made as guidance in the KHI is sourced on 13 (thirteen) Shafi'ite books of Islamic jurisprudence.

The dominance of classical scholars' opinion in KHI encouraged some Muslim thinkers in Indonesia to change the material in it because it is considered irrelevant to the this contemporary situation. The thinkers proposed the Counter Legal Draft of the Compilation of Islamic Law (CLD-KHI).²⁵ This text according to the drafting team offers a number of reforms of Islamic family law compiled in the Islamic Marriage Law Bill, the Law of Islamic Inheritance, and the Law of Islamic Endowment.

The ideas of Islamic family laws in KHI which has been applied in Indonesia firmly rests its opinion on the classical scholars especially al-Shafi'i. While the ideas in CLD-KHI were firmly inspired by the ideas of contemporary Muslim thinkers such as Abdullah Ahmad An-Na'im, Asgar Ali Engineer, and other Muslim contemporary thinkers.

Conclusion

From the above discussion, it can be concluded that the controversy on the issue of inheritance of the people of different religions can be seen in three points. First, the classical scholars argued that a Muslim is entitled to inherit non-Muslims, but not vice versa. Second, majority of Muslim jurists represented by four schools of laws—Hanafi, Maliki, Shafi'i, and Hanbali—agreed that Muslims cannot inherit each other with non-Muslims. Third, non-Muslim status does not become a barrier to inheritance because it contradicts the universal value of the Quran.

The differences of opinion about inheritance rights are preceded by disagreements about the terms of *kafir* (infidels) and *murtad* (apostates). According to the classical scholars, *kufir* refers

²⁵ The idea of CLD-KHI arose after 2003. the Ministry of Religious Affairs submitted the draft Law on Applied Religious Court (RUU HTPA) to the House of Representatives (DPR). This This draft law refines the materials of the President Instruction based on KHI and improves its status from Presidential Instruction to Law. In response to the draft law, on 4 October 2004 the Working Group on Gender Mainstreaming of the Ministry of Religious Affairs (Pokja PUG Depag) launched a draft on Islamic law formulation called CLD-KHI.

to the act of associating God with things like idolatry, apostasy and atheism. Contemporary thinkers such as An-Na'im and Asgar Ali Engineer said that the pagan conception must be contextualized. An-Na'im said, if there is a content of the shariah which is discriminatory, then its existence must be abrogated (*mansūkh*) with the more universal shariah provisions.

The differences of opinion between classical scholars and contemporary Muslim thinkers have influenced the instrumentation of Islamic family law in Indonesia. Islamic laws expressed by Muslim scholars especially al-Shafi'i became the basis of family law in the Compilation of Islamic Law (KHI) as stated in Presidential Instruction No. 1 of 1991. According to the rules of KHI Article 171 (b, c), religious differences become a barrier to inheritance rights. While the opinion of contemporary Islamic thinkers consider the issue of different religions is not the cause of the inheritance-inheritance process.

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