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The Will of a Non-Muslim Wife Reviewed According to Maqashid Syariah (Analysis of Supreme Court Decision Number 16/K/AG/2010)

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ABSTRAK

Penelitian ini bertujuan untuk menganalisis pertimbangan hukum Hakim Agung dalam Putusan Mahkamah Agung Nomor 16/K/Ag/2010 serta meninjaunya berdasarkan perspektif maqashid syariah. Metode yang digunakan adalah penelitian kepustakaan dengan pendekatan normatif, di mana data primer berupa salinan putusan dianalisis menggunakan teknik deskriptif dan analisis konten. Hasil penelitian menunjukkan bahwa Hakim Agung memberikan wasiat wajibah kepada istri non-muslim dengan dasar pemikiran Yusuf al-Qardhawi yang menyatakan bahwa esensi kewarisan adalah semangat tolong-menolong, bukan sekadar kesamaan agama. Pendapat ini sejalan dengan pandangan Ibnu Taimiyah, Ibnu Qayyim, serta Fatwa MUI Nomor 5/MUNAS VII/MUI/9/2005. Ditinjau dari maqashid syariah, putusan tersebut telah memenuhi unsur kemaslahatan, khususnya dalam aspek menjaga jiwa (hifdzun nafs). Pemberian wasiat wajibah tersebut berfungsi sebagai instrumen perlindungan ekonomi bagi pemohon yang sudah memasuki usia senja tanpa memandang perbedaan keyakinan. Secara substantif, pertimbangan hukum ini berhasil mewujudkan keadilan bagi ahli waris non-muslim demi meringankan beban hidup dan mencapai kemaslahatan individu yang bersifat mendesak.

Keywords:
Mandatory Wills; Non-Muslim Wives; Maqashid Sharia; Rulings, Inheritance Law.

ABSTRACT

This research aims to analyze the legal considerations of Supreme Court Justices in Decision Number 16/K/Ag/2010 and evaluate them through the perspective of Maqashid Shariah. The method employed is library research using a normative approach, where primary legal materials from the Supreme Court decision are examined through descriptive and content analysis. The results indicate that the justices' consideration for granting a mandatory will (wasiat wajibah) to a non-Muslim widow is based on Yusuf al-Qaradawi's jurisprudence, which emphasizes mutual assistance over religious differences. This stance aligns with the views of Ibn Taymiyyah, Ibn al-Qayyim, and MUI Fatwa Number 5/MUNAS VII/MUI/9/2005. From the Maqashid Shariah perspective, this decision fulfills the objective of public interest (maslaha), specifically the protection of life (hifz al-nafs). By providing a portion of the estate, the ruling ensures economic security for the widow in her old age, regardless of her faith, thereby achieving substantive justice and social welfare.

INTRODUCTION

There is no formal definition of wasiat wajibah in the Islamic legal system in Indonesia. However, Bismar Siregar states that wasiat wajibah is a will intended for heirs or relatives who do not receive a share of the inheritance from the deceased due to a legal impediment[1].

Specifically, the provisions of a mandatory will are the result of the ijtihad of the ulama in interpreting verse 180 of Surah al-Baqarah. From the above verse, it can be concluded that Allah SWT has made it obligatory for a person who is showing signs of death (if he leaves behind wealth) to make a will with part of his wealth to his parents and relatives. This verse can be understood to mean that a mandatory will must be given to both parents (mother and father) and relatives or close family members or those who have family ties.

The Compilation of Islamic Law (KHI) also stipulates that an adoptive child and adoptive parents shall establish a mutual bequest relationship. Article 209 paragraphs (1) and (2) read: (1) The inheritance of an adopted child shall be divided in accordance with Articles 176 to 193 above, while adoptive parents who do not receive a mandatory bequest shall be given a mandatory bequest of up to 1/3 of the inheritance of their adopted child; (2) Adopted children who do not receive a will shall be given a mandatory will amounting to a maximum of 1/3 of the inheritance of their adoptive parents[2].

From the provisions of the articles in the KHI explained above, it can be concluded that (1) The regulation of mandatory wills in the Compilation of Islamic Law is very limited with regard to adopted children. The regulation of mandatory bequests in the KHI is only intended for adopted children who do not receive a bequest with a maximum share of 1/3 of the inheritance of their adoptive parents or, conversely, adoptive parents who do not receive a bequest are given a mandatory bequest of a maximum of 1/3 of the inheritance of their adopted children.

It is interesting to note here the consideration of the Supreme Court in its Decision Number: 16/K/Ag/2010, which states that: "The marriage between the heir and the appellant (his non-Muslim ex-wife) had lasted for 18 years, which means that the appellant had devoted herself to the heir for a long time. therefore, even though the Cassation Petitioner is a non-Muslim, she is eligible and entitled to obtain her rights as a wife to receive a share of the inheritance in the form of a mandatory will and a share of joint property in accordance with the jurisprudence of the Supreme Court and in accordance with a sense of justice." [3]

METHOD

This research is library research, a study that uses library literature by studying books, scriptures, decisions, as well as other information relevant to the scope of the discussion[4]. The object of this study is the mandatory will of a non-Muslim wife reviewed according to maqashid syariah (analysis of Supreme Court decision number 16/K/AG/2010). The data sources in this study are (a) The primary legal material in this study is Supreme Court decision number 16/K/AG/2010); (b) Secondary legal materials in this study include the books Fiqih As Sunnah, Fiqih Islam wa Adilatuhu, al Fiqh ala Mazahib al Arba'ah and others; and (c) Tertiary legal materials include dictionaries and encyclopedias.

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[1] Bismar Siregar, *Perkawanin, Hibah Dan Wasiat Dalam Pandangan Hukum Bangsa* (Yogyakarta: Fakultas Hukum UII, 1985). P.14

[2] Mahkamah Agung Republik Indonesia, *Kompilasi Hukum Islam* (Jakarta: Badilag, 2010). p.16

[3] See Decision of the Supreme Court of the Republic of Indonesia Number: 16/K/Ag/2010

[4] Bambang Sugono, *Metodologi Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2009). p.184

In analyzing the research data, the author used several methods, as follows: (1) The descriptive method, which is a system of writing that describes the reality of a phenomenon as it is, selected from the subject's perception [5], and (2) The content analysis method, which is a method used to identify, study, and then analyze what is being investigated[6]. According to Weber, content analysis is a methodology that utilizes a set of procedures to draw valid conclusions from a document.[7]

RESULTS AND DISCUSSION

The Supreme Court's consideration in Supreme Court Decision Number: 16/K/Ag/2010, which granted rights to the ex-wife who was a non-Muslim in this case, was that the issue of the status of non-Muslim heirs had been extensively studied by scholars, including Yusuf Al Qordhowi, who interpreted that non-Muslims who live together in peace cannot be categorized as kafir harbi (enemy infidels). Similarly, the Cassation Petitioner and the Heir lived together in peace and harmony despite their different beliefs, therefore it is appropriate and reasonable for the Cassation Petitioner to receive a share of the heir's estate in the form of a mandatory bequest.

Indeed, Yusuf Al Qordhowi, in his book entitled Fiqh Maqashid Syariah, explains that according to Yusuf Al Qordhowi, the reason behind inheritance issues is the spirit of mutual assistance, not religious differences. In Islamic teachings, Muslims who help dhimmis are entitled to receive inheritance from them, while dhimmis, due to their disbelief, do not help Muslims, so they do not receive inheritance from Muslims. Therefore, al-Qardawi believes that the basis of inheritance is not a bond of the heart. If this were used as a reason, then hypocrites would not receive or give inheritance. However, the Sunnah has explained that they do receive and give inheritance.[8] Nevertheless, the permissibility of receiving inheritance from non-Muslims is limited to blood relations and marriage, not beyond that.

Another opinion that permits obligatory bequests to non-Muslims is that expressed by Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah, based on the narration from Mu'adh ibn Jabal, Muawiyah bin Abi Sufyan, Muhammad bin Hanafiyah, Muhammad bin Ali bin Husain, Sa'id bin Musayyab, Masyruq bin Ajda', Abdullah bin Mughaffal, Yahya bin Ya'mar, and Ishaq. In one incident, Mu'adh bin Jabal once ruled on a case involving the inheritance of a non-Muslim heir to a Muslim heir. This decision began when two brothers complained to him about the inheritance of their parents who had died as disbelievers, leaving behind two sons, one Muslim and one non-Muslim. Seeing indications that each heir was insisting on controlling the property, Mu'adz bin Jabal made the decision to divide the property among all the heirs, both non-Muslim and Muslim. Although controversial, this decision had to be made because of the signs of conflict between the two, which, if not handled wisely, would cause even greater damage. Mu'adz's policy was based on the hadith of the Prophet SAW: al-Islam yazid wa la yanqus.[9]

Mu'adz's view is that the increase in the rights of Muslims is logical, because when an heir

[5] Abdurrahman Soejono, *Metodologi Penelitian Hukum* (Jakarta: Rineka Cipta, 1999). P.23

[6] Noeng Muhadjir, *Metodologi penelitian kualitatif*, iv, cet. 4 ed. (Yogyakarta: Rake Sarasin, 2000).p.49

[7] Lexy J. Moleong, *Metodologi Penelitian Kualitatif*, xv, 220 hlm. : il.; 24 cm eds. (Bandung: Remaja Rosdakarya, 2008).p.163

[8] R. Rohmawati, "Progresivitas Hukum Kewarisan Beda Agama Di Indonesia Berbasis Keadilan Dan Maṣlahah," *International Journal Ihya''Ulum al-Din* 20, no. 2 (2018): 217–40; Syaikh Dr Yusuf Al-Qaradhawi, *Fiqih Maqashid Syariah: Moderasi Islam Antara Aliran Tekstual Dan Aliran Liberal* (Pustaka Al-Kautsar, 2017). P.306

[9] Al-Qaradhawi, *Fiqih Maqashid Syariah: Moderasi Islam Antara Aliran Tekstual Dan Aliran Liberal*.

had rights to the inheritance of his non-Muslim relatives before converting to Islam, after he converted to Islam, his rights would certainly increase, not decrease. Another hadith that is used as a reference is: al-Islam ya'lu wa la yu'la 'alaih.[10] According to Mu'adz bin Jabal, Islam is superior. The superiority of Islam brings with it the superiority of the Muslim community. Evidence of the superiority of Muslims is that they have the right to inherit the property of their non-Muslim relatives, but the reverse is not true; non-Muslims cannot inherit from their Muslim relatives.[11]

Other literature also explains that Mu'adz bin Jabal, Mu'awiyah, and those who allow Muslims to inherit from non-Muslims say: "We inherit from them and they do not inherit from us, just as we marry their women and they cannot marry our women. "According to them, the hadith which states that Muslims cannot inherit from non-Muslims, nor can non-Muslims inherit from Muslims, can be interpreted by the Hanafi fiqh scholars as follows: "A Muslim may not be killed for killing a non-Muslim, "where the non-Muslim referred to in the hadith is a kafir harbi, because a kafir harbi wages war against Muslims, thereby severing the relationship between the two.[12]

Ibn Qayyim al-Jawziyyah also argued that the reason for inheritance is mutual assistance; a Muslim helps a dhimmi, so he has the right to inherit from them, whereas a dhimmi does not help a Muslim, so he does not have the right to inherit from them. In this regard, Ibn Qayyim states that this is actually a specific application of a general term, and that allowing Muslims to inherit from non-Muslims brings greater benefit to Muslims and Islam than allowing marriage to women of the People of the Book, and this does not contradict the principles of usul. This is because Muslims help the dhimmis, fight for them, and protect their families. Inheritance applies because of the spirit of mutual assistance, so Muslims inherit from them. Meanwhile, they do not help Muslims, so they do not inherit from them. Because the basis of inheritance is not loyalty of the heart; if that were the case, then hypocrites would not receive inheritance from Muslims, but in the Sunnah of the Prophet SAW, they inherit and bequeath [13].

In the Indonesian Ulema Council (MUI) Fatwa, even though Islamic inheritance law does not grant inheritance rights between people of different religions (between Muslims and non-Muslims), there is a provision stating that the transfer of property between people of different religions can be done in the form of grants, wills, and gifts. This opinion is in line with the Indonesian Ulema Council (MUI) Fatwa resulting from MUNAS Number: 5/MUNAS VII/MUI/9/2005, which was held on July 26-29, 2005, concerning Inheritance between Different Religions, which stipulates that:

a. Islamic inheritance law does not grant the right of mutual inheritance between people of different religions (between Muslims and non-Muslims);
b. The transfer of property between people of different religions can only be done in the form of gifts, wills, and presents.[14]

The Indonesian Ulema Council's fatwa No. 5/MUNAS VII/MUI/9/2005 on inheritance between different religions clearly states that Islamic inheritance law does not grant rights (loopholes) or mutual inheritance between Muslims and non-Muslims, or vice versa, between non-Muslims and Muslims. Furthermore, Muslims and non-Muslims, or vice versa, do not inherit

[10] Al-Qaradhawi, *Fiqih Maqashid Syariah: Moderasi Islam Antara Aliran Tekstual Dan Aliran Liberal*.
[11] Al-Qaradhawi, *Fiqih Maqashid Syariah: Moderasi Islam Antara Aliran Tekstual Dan Aliran Liberal*.
[12] Al-Qaradhawi, *Fiqih Maqashid Syariah: Moderasi Islam Antara Aliran Tekstual Dan Aliran Liberal*.
[13] Al-Qaradhawi, *Fiqih Maqashid Syariah: Moderasi Islam Antara Aliran Tekstual Dan Aliran Liberal*.
[14] See Fatwa of the Indonesian Ulema Council (MUI) Number: 5/MUNAS VII/MUI/9/2005 concerning Interfaith Inheritance

from each other, but the transfer of assets can be done in the form of grants, gifts, and wills. Giving grants from Muslims to non-Muslims, or vice versa, between non-Muslims and Muslims is permissible. Giving gifts from Muslims to non-Muslims or vice versa between non-Muslims and Muslims is permissible. Giving bequests from Muslims to non-Muslims or vice versa between non-Muslims and Muslims is also permissible.

The term wasiat wajibah is actually the result of a specific ijtihad, namely the ijtihad of contemporary scholars in interpreting Surah Al-Baqarah (2) verse 180. This verse explains the concept of wasiat in general. Scholars differ in their interpretation of the concept of wasiat in Surah Al-Baqarah (2) verse 180. Most fiqh scholars state that the law of wasiat is not obligatory.[15] Meanwhile, some other scholars state that the law of wasiat is obligatory.

The first view argues that the law of wills is not mandatory. This view is held by the four Imams, namely Imam Hanafi, Imam Malik, Imam Shafi'i, and Imam Hambali, the Zaidiyah sect, and the Imamiyah sect. There are several legal arguments they use to reinforce this opinion. Among the bases for these arguments are:

1. That there are no accounts from the companions of the Prophet SAW that most of them made wills during their lifetime;
2. That, like gifts, wills are voluntary donations from the giver, which are part of the virtue of the person making the will;
3. That the law of wills as understood from Surah Al-Baqarah verse 180, which commands wills, is considered to have been abrogated (nasakh) by verses explaining the law of inheritance[16] and the hadith of the Prophet SAW narrated by Imam At-Turmudzi, which states that "it is not permissible to make a will to heirs.[17]"
4. That the command to make a will is in order to increase good deeds (amalu al-shalih). This is based on a hadith narrated by Abu Darda' which states that the Prophet SAW once said:

   اِنَّ اللهَ تَصَدَّقَ عَلَيْكُمْ بِثُلُثِ اَمْوَالِكُمْ فِى اَخِرِ اَعْمَارِكُمْ زِيَادَةً فِي اَعْمَالِكُمْ

   Meaning:"Allah has commanded you to give one-third of your wealth as a bequest for additional charity for you[18].

Meanwhile, the second view is represented by Ibn Hazm Adh-Dhahiri, Ath-Thabari, and Abu Bakar bin Abdil Aziz from the Hanbali school of thought.[19] Ibn Hazm states that the law of bequest is obligatory. He even states that bequests to parents and close relatives who are not entitled to inheritance are obligatory, whether due to differences in religion, slavery, or because there are other closer heirs who take precedence (hijab).[20]

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[15] Ahmad Baihaqi, *The Application of Wajibah Wills in Decisions on the Settlement of Interfaith Inheritance Disputes from the Perspective of Islamic Law,* (Jakarta: Jurnal Krtha Bhayangkara, Volume 15, Number 1, 2021), p. 123, See Wahbah Al Zuhaili, *Fiqh Al Islam Wa Adillatuhu,* (Damascus: Dar' al-Fikr, 1996), p. 54

[16] *Ibid.,* p. 124, See, Ismail bin Katsir, *Tafsir Ibnu Katsir,* (Egypt: Dar al-Hadits, n.d.), Volume I, p. 112

[17] *Ibid.,* p. 124, See, Al-Turmudzi, *Sunan Al-Turmudzi,* (Beirut: Daar al-Fikr, 1980, Juz II, p. 292. See also Sri Hidayati, *Ketentuan Wasiat Wajibah di Pelbagai Negara Muslim Kontemporer,* (Jakarta: Jurnal Ahkam, Vol.XII, No.1, January 2012), p. 82

[18] *Ibid.,* p. 124, See, Ibn Qudamah, *Al-Mughni,* (Beirut: Dar' al-Kitab Al-Ilmiyyah, n.d.), Volume VI, p.415

[19] Muhammad Isna Wahyudi, *Melacak Ilat Hukum Larangan Waris Beda Agama,* (Jurnal Hukum dan Peradilan, Volume 10, Nomor 1, 2021), hal. 157, Lihat, Puslitbang Hukum dan Peradilan Badan Litbang Diklat Kumdil Mahkamah Agung RI, *Dinamika Hukum Kewarisan Islam Terkait Pembagian Harta Warisan Bagi Ahli Waris Beda Agama: Studi Analisis Putusan Peradilan Agama di Indonesia*, (Jakarta: Laporan Penelitian, 2016), hal. 122

[20] *Ibid.,* p. 124, See, Wahbah Al Zuhaili, *Op. Cit.,* p. 58

It is obligatory for every Muslim to make a will for relatives who do not inherit due to slavery, disbelief (non-Muslim), being veiled, or not receiving inheritance (because they are not heirs). In this case, there is no specific limit. If they do not make a will (for them), then it is not permissible for the heirs or guardians to administer the will to give it to them (relatives) according to what is appropriate.[21]

In fact, according to Ibn Hazm, if the heir did not have time to make a will during his lifetime, the heirs are obliged to give alms from part of the heir's estate to his relatives.[22] Ibn Hazm's opinion is reinforced by several arguments to strengthen his view. First, all verses of the Qur'an are basically muhkamat, the meaning of the words and their apparent meaning are clear and cannot be changed. Therefore, there is no such thing as abrogation or abrogated laws (nasikh-mansukh) in the Qur'an. Thus, the legal provisions of Surah Al-Baqarah verse 180 are not abrogated by the verses on inheritance law (mawaris), but rather explained by the verses on inheritance law.[23]

Surah An-Nisa verses 11 and 12 relate to the implementation of inheritance law after the fulfillment of the obligation to pay bequests and debts. The second opinion was then understood and developed by some scholars in response to changes and legal demands in society. The provision that bequests are obligatory was then introduced by scholars in several countries as obligatory bequests to respond to the legal needs of their communities.[24]

There is an opinion that all verses of the Quran are muhkamat, meaning that there is no nasikh-mansukh in the Quran. So verse 180 of Surah al-Baqarah about wills is not naskh (deleted or removed from the law, either by verses (mawarits) of the Quran or Hadith. Ibn Kathir's opinion is as follows:

اِنَّ هَذِهِ الْاٰيَةَ غَيْرُ مَنْسُوْخَةٍ وَاِنَّمَا هِيَ مُفَسَّرَةٌ بِاٰيَةِ الْمَوَارِثِ

Meaning: That this verse is not abrogated, but explained or interpreted by the verses on inheritance.[25]

Meanwhile, al-Qurtubi mentions in his interpretation that:

وَمَعْنَاهَاالْخُصُوْصُ فِى الْوَلَدَيْنِ لاَيَارِثَانِ كَافِرِيْنَ وَالْعَبْدَيْنِ فِى الْقَرَابَةِ غَيْرِ فِى هِيَ مُحْكَمَةٌ ظَاهِرَهَا ظَاهِرُ الْعُمُوْمِ الْوَرَثَةِ

Meaning: The verse is muhkamat, outwardly the verse is general in nature, but its meaning is specific, namely for parents who do not receive inheritance, such as those who are disbelievers or slaves, or for relatives who are not included as heirs.[26]

Egyptian law formulates the form of a will into a mandatory will, which is something that is obligatory and imposed on the heir to carry out, as stated in Qonun No. 71 of 1946.[27] The provision of a mandatory will is given to grandchildren as substitute heirs of their parents who died before their grandparents, with the same share that their parents would have received if they were alive. This provision is also followed by several other Muslim countries, such as Syria, Tunisia, Morocco, Kuwait, Iraq, Jordan, and Pakistan. However, in the application of mandatory bequests, there are several differences, namely regarding which grandchildren are eligible to

[21] Muhamamd Isna Wahyudi, *Op., Cit.,* p. 158. See, Ibn Hazm, *Al-Muhalla,* (Beirut: Dar Al-Alaq, n.d.), Juz IX, p. 314.

[22] Ibid., p. 124, See, Ibn Hazm, *Al-Muhalla,* (al-Qahirah: Maktabah al-Jumhuriyyah al-Arabiyyah, 1970), Juz X, p. 422

[23] *Ibid.,* p. 125

[24] *Ibid.,* p. 125

[25] Ibn Kathir, *Tafsir Ibn Kathir,* (Bayrut: Dar al-Fikr, n.d.), p. 372.

[26] Al-Qurthubi, *Jamiul Ahkam fi Tafsir al-Qur'an,* (Bayrut: Dar al-Fikr, n.d.), p. 262.

[27] *Ibid*., hal. 125, Lihat Sri Hidayati, *Ketentuan Wasiat Wajibah di Pelbagai Negara Muslim Kontemporer*, (Jakarta, Jurnal Ahkam, Vol. XII, No.1 Januari 2012), hal. 83

receive mandatory bequests.

In Kuwait's Qonun al-Washiyah al-Wajibah 1971 law, the provision of a mandatory bequest can only be given to male children from the male line (Ibn al-Ibn) and so on down the line. Meanwhile, for the female line of descent, only the first line of descent is entitled to receive the mandatory bequest. This provision is not much different from the provisions on mandatory bequests in Morocco.[28]

Meanwhile, Syria and Jordan have different rules from some other Muslim countries. Their laws only stipulate that mandatory inheritance is only for grandchildren of male descendants, while grandchildren of female descendants have no right to mandatory inheritance. [29]

The provisions of the obligatory inheritance in Kuwait also apply to the provisions in Morocco, which grants obligatory inheritance to the children of the first generation of daughters. Meanwhile, children of sons are not limited to the first generation, whether one or many, with the provision that the share of a son is twice that of a daughter. This is regulated in the Moroccan Family Law of 2004, articles 369-372.[30]

Provisions regarding mandatory wills in Indonesia can be found in the Compilation of Islamic Law (KHI) through Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law. The only provision that mentions mandatory wills is Article 209, which regulates the granting of mandatory wills from adoptive parents to their adopted children, or vice versa. Meanwhile, regarding the application of mandatory wills in the context of inheritance between people of different religions, the KHI does not explicitly explain this. The article that mentions mandatory wills in Article 209 of the KHI only regulates the distribution of inheritance between the heir and their adopted child or vice versa. In its provisions on wills, the KHI never mentions the provisions of wills or mandatory wills for people of different religions, but only explains who is entitled to receive a will along with the conditions and requirements. Thus, the KHI never explains the issue of wills or mandatory wills in relation to inheritance between people of different religions. However, the KHI also does not regulate any article that prohibits giving a will or mandatory will to heirs of different religions.[31]

In essence, the ending or ultimate goal of maqashid sharia is a benefit or wisdom or justice. This is as explained by al-Ghozali in his book Al-Mustashfa Fi'ilm al-Ushul as follows:

نَعْنِي بِالْمَصْلَحَةِ اَلْمُحَافَظَةَ عَلَى مَقْصُوْدِ الشَّرْعِ، وَمَقْصُوْدُ الشَّرْعِ مِنَ الْخَلْقِ خَمْسَةٌ وَهُوَ أَنْ يَحْفَظَ عَلَيْهِمْ دِيْنَهُمْ وَنَفْسَهُمْ وَعَقْلَهُمْ وَنَسْلَهُمْ وَمَالَهُمْ فَكُلُّ مَا يَتَضَمَّنُ حِفْظَهُ هَذِهِ الْأُصُوْلَ الْخَمْسَةَ فَهُوَ مَصْلَحَةٌ وَكُلُّ مَا يَفُوْتُ هَذِهِ الْأُصُوْلَ فَهُوَ مَفْسَدَةٌ وَدَفْعُهَا مَصْلَحَةُ

What we mean by maslahah is to preserve the intentions and objectives of sharia and the objectives of sharia for creatures, which are five in number, namely: preserving their religion, preserving their lives, preserving their minds, preserving their offspring, and preserving their wealth. Therefore, any effort to preserve these five principles is considered a maslahah, and anything that eliminates these principles is considered a mafsadah, and avoiding mafsadah is a maslahah. [32]

The benefit that can be derived from a non-Muslim wife still receiving a mandatory bequest is that with the mandatory bequest that has been given to the ex-wife who does not

[28] *Ibid.,* p. 125
[29] *Ibid.*, p. 125, Sri Hidayati, *Ibid.,* pp. 84-85
[30] See, Morocco Family Code 2004.
[31] *Ibid.,* pp. 125-126
[32] Al Ghazali, *Al-Mustashfa Fi'ilm al-Ushul,* (Beirut al-Kutub al-Ilmiyah, 1983), p. 74

share the same faith as her husband, amounting to 1/3, at least 1/3 of that property can be used to meet the daily needs of his ex-wife, Evie Leny Mosinta, until her old age. Moreover, Evie Leny Mosinta has been married for 18 years and has accompanied her husband, meaning that the Appellant has devoted herself to the Deceased for a long time. Therefore, even though the Appellant is a non-Muslim, it is fair and just for her to receive her rights as a wife to obtain portions of the inheritance in the form of a mandatory will and a share of the joint property, in accordance with the jurisprudence of the Supreme Court and in line with the sense of justice.

Women are weak creatures who must be protected, especially since the Defendant/Appellant/Petitioner in this case, Evie Leny Mosinta, was already elderly at the age of 40 when this case reached the court. The evidence that women are weak creatures and need to be protected is found in Islamic law, which states that women who are divorced or separated from their husbands are still entitled to their rights during the iddah period, including iddah maintenance, mut'ah, and madhliyah maintenance, until they are truly divorced or the iddah period has ended. Women are gentle and loving creatures because of their delicate feelings. In general, women are characterized by beauty, gentleness, humility, and nurturing. This is the image of women that we often hear around us. Anatomical and physiological differences also cause differences in behavior, and there are also differences in abilities and selectivity towards intentional activities that are purposeful and directed by female nature. Etymologically, the word "woman "comes from the word "empu, "which means "valued.[33]"

Where women have the right to be respected and understood by men. Women must also be loved because women have tender hearts and cannot be treated harshly in any way. Meanwhile, scholars such as Plato say that women are weaker than men in terms of physical strength and spiritually and mentally, but this difference does not cause any difference in their talents.[34]

Because women are weak creatures, they need and must be protected both personally and by state regulations. There are many state regulations governing the protection of women's human rights, including the following:

1. The 1945 Constitution;
2. Law Number 39 of 1999 concerning Human Rights;
3. Law Number 23 of 2004 concerning the Elimination of Domestic Violence;
4. Law Number 12 of 2006 concerning Citizenship;
5. Law No. 21 of 2007 concerning the Eradication of Criminal Acts of Trafficking in Persons;
6. Law No. 2 of 2008, revised by Law No. 42 of 2008 concerning Political Parties);
7. Presidential Instruction No. 9 of 2000 on Gender Mainstreaming (PUG);
8. Presidential Regulation No. 181 of 1998, amended by Presidential Regulation No. 65 of 2005 on the Establishment of the National Commission on Violence Against Women or Komnas Perempuan.

Among the rights of women that must be protected are the rights of women after divorce. Among the rights of women after divorce are:

1. The right to receive mut'ah. Mut'ah (consolation) is clothing or property given by the husband to his divorced wife in excess of the dowry or in lieu of the dowry, as in the case of a mufawwidhah woman, to console her and alleviate the pain of separation.[35]
2. The right to receive iddah maintenance. Iddah maintenance (maintenance during the waiting period) is maintenance that must be provided by the ex-husband to his ex-wife who has been

[33] Zaitunah Subhan, *Qodrat Perempuan Taqdir atau Mitos*, (Yogyakarta: Pustaka Pesantren, 2004), p. 43

[34] Murtadlo Muthahari, *Hak-hak Wanita dalam Islam*, (Jakarta: Lentera, 1995), hal 107

[35] Wahbah Az-Zuhaili, *Fiqih Islam Wa Adillatuhu, Trans. By Abdul Hayyie al-Kattani et al.,* (Jakarta: Gema Insani, 2011), Volume 9, p. 285.

divorced while the ex-wife is undergoing the iddah period (waiting period), unless the ex-wife has committed nusyuz (rebellion).

3. The right to receive madhiyah maintenance. Madhi in Arabic means past or previous. Madhiyah alimony is alimony that is past due, which has not been paid by the husband during the marriage. When a divorce occurs, the wife is allowed to demand this alimony.[36]Madhiyah alimony is a term used in Religious Court decisions to determine past alimony.

The above rights are protected by law, including Law -Law Number 1 of 1974, which has been revised by Law Number 16 of 2019 concerning Marriage in Article 41 letter c, which states that: "The court may require the former husband to provide living expenses and/or determine certain obligations for the former wife."[37]

Article 149 of the Compilation of Islamic Law also states: "If the marriage is dissolved due to divorce, the former husband is obliged to: (a) provide appropriate mut'ah to his former wife, either in the form of money or property, unless the former wife is qobla al dukhul; (b) provide maintenance, food, and clothing to the former wife during the iddah period, unless the former wife has been granted a ba1in or nusyur divorce and is not pregnant; (c) pay the entire outstanding dowry, and half if qobla al dukhul; (d) provide hadhanan costs for children who have not reached the age of 21". [38]

To protect these rights, the Supreme Court has issued Supreme Court Circular Letter Number 3 of 2018, refining what is stated in Supreme Court Circular Letter Number 07 of 2012, which states that: "In determining madhiyah alimony, iddah maintenance, mut'ah, and child maintenance, must consider fairness and propriety by examining the economic capacity of the husband and the basic living needs of the wife or children."[39]

It is important to note that with the enactment of SEMA Number 3 of 2018, wives are entitled to mut'ah and idah maintenance in divorce cases, provided that they are not proven to be nusyuz. This is because under the previous regulations, these four rights could only be obtained through talak divorce. Therefore, following the enactment of this regulation, women's rights after divorce can be obtained either through talak divorce, which is a divorce petition filed by the husband, or through divorce by lawsuit filed by the wife, provided that the wife has not committed nusyuz.

To strengthen the safety net in protecting women's rights before the law, the Supreme Court also issued Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Adjudicating Cases Involving Women. This regulation contains various guidelines for judges in examining cases involving women as parties. The examination process of cases involving women must truly prioritize gender justice and eliminate discrimination against women. Not only that, in 2021 the Directorate General of Religious Courts issued a decree Number 1669/DJA/HK.00/5/2021 concerning Guarantees for the Fulfillment of the Rights of Women and Children after Divorce. This decree contains recommendations that must be taken into account by every Religious Court in providing services to women.

Essentially, even though the appellant in this case, Evie Leny Mosinta, is a non-Muslim, her name is still female and does not reflect her religion. Therefore, by granting her a mandatory inheritance from the deceased's estate, at the very least, it can ease her burden of life until her old age, considering that the appellant in this case, Evie Leny Mosinta, was no longer young

[36] Adib Bisri and Munawwir Al Fatah, *Kamus Al Bisri, (*Jakarta: Pustaka Progresif, 1999), p. 174

[37] See Law No. 1 of 1974, revised by Law No. 16 of 2019 concerning Marriage

[38] See Supreme Court Circular Letter No. 3 of 2018 concerning the Enforcement of the Results of the 2018 Supreme Court Plenary Meeting as Guidelines for the Implementation of Court Duties.

[39] Decision of the Directorate General of Religious Courts Number 1669/DJA/HK.00/5/2021 concerning Guarantees for the Fulfillment of the Rights of Women and Children after Divorce.

when this case reached the court, namely 40 years old. This mandatory bequest is also in line with the objectives of maqashid syariah, namely to protect the soul (hifzul nafs), which ultimately aims to achieve the benefit of a person. The benefits that can be obtained by the appellant in this case, Evie Leny Mosinta, include a portion of the mandatory bequest and the distribution of joint assets to meet or ease her daily living needs until her old age.

CONCLUSION

The legal basis for the Supreme Court's decision in Case No. 16/K/Ag/2010, which ruled that non-Muslim wives are still entitled to a mandatory inheritance, is the opinion of Yusuf Al Qordhowi in his book entitled Fiqh Maqashid Syariah, which essentially explains that according to Yusuf Al Qordhowi, the 'illat of inheritance is the spirit of mutual assistance, not religious differences. In Islamic teachings, Muslims who help dhimmis are entitled to receive inheritance from them, while dhimmis, due to their disbelief, do not help Muslims, so they do not receive inheritance from Muslims. This opinion is in line with that of Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah, which is based on the narration from Mu'adh bin Jabal and the MUI Fatwa resulting from MUNAS Number: 5/MUNAS VII/MUI/9/2005. When viewed according to maqashid syariah, it is actually in line with the ultimate goal of maqashid syariah, which is maslahah (public interest). In essence, even though the appellant in this case, Evie Leny Mosinta, is a non-Muslim, her name is still female and does not reflect her religion. Therefore, by giving her a mandatory bequest from the deceased's estate, at least it can ease her burden of life until her old age, considering that Evie Leny Mosinta was no longer young when this case reached the court, namely 40 years old year. This mandatory bequest is also in line with the objectives of maqashid syariah, namely to protect life (hifzul nafs), which ultimately aims to achieve the best interests of a person. The best interests that Evie Leny Mosinta can obtain include a portion of the mandatory bequest and the distribution of joint assets to meet or alleviate her daily needs until her old age.

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