

# JUDICIAL DISCRETION IN INHERITANCE CASE RESOLUTION: TOWARDS PROGRESSIVE LEGAL JUSTICE IN INDONESIA

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**Abstrak:** Hasil kreativitas hakim dalam melakukan penemuan hukum dengan berbagai metode memungkinkan adanya putusan yang mengandung diskresi hukum dalam rangka mewujudkan keadilan hukum yang berkeadilan. Adanya diskresi untuk memperbaiki segala kelemahan, kemandirian sangat penting dalam aspek sumber hukum. Melalui penelitian mendalam dengan menggunakan kajian hukum normatif terhadap beberapa putusan Pengadilan Agama di Kalimantan Selatan, ditemukan bentuk diskresi bebas ketika hakim dalam pemurnian harta warisan memberikan sebagian harta warisan melalui penetapan wasiat wajibah kepada mantan istri dan membenarkan penggunaan harta warisan untuk pembayaran hutang ritual arwah. Diskresi hakim yang demikian dikategorikan sebagai diskresi yang ideal karena sangat progresif, di mana hakim tidak hanya menggunakan penafsiran normatif melainkan menggunakan penafsiran sosiologis dan menghubungkan hukum dengan kemanusiaan dan moralitas.

**Kata kunci:** Keadilan, Warisan, Kebijaksanaan.

**Abstract:** The results of the creativity of judges in conducting legal discovery with various methods allow for decisions that contain legal discretion in order to realize progressive legal justice. The presence of discretion to correct all weaknesses, independence is very important in the aspect of legal sources. Through in-depth research using normative legal studies on several decisions of the Religious Courts in South Kalimantan, it was found that a form of free discretion was found when the judge in the purification of the inheritance gave part of the inheritance through the establishment of a mandatory will for the ex-wife and justified the use of the inheritance for the payment of the spirit ritual debt. Such discretion of judges is categorized as ideal discretion because it is very progressive, where judges not only use normative interpretation but rather use sociological interpretation and connect the law with humanity, and morality.

**Key words:** Justice, Inheritance, Discretion.

## INTRODUCTION

In resolving legal cases that do not yet have a codified source of material law, judges are required to conduct legal discovery through legal excavation and understand and follow the legal values and sense of justice that live in society,<sup>1</sup> such as the settlement of inheritance disputes. This also happens to judges at the Religious Courts in South Kalimantan.

The results of the creativity of judges in conducting legal discovery with various methods allow for decisions that contain legal discretion in order to realize progressive law. Legal discretion, hereinafter referred to as judge discretion, can occur when judges are faced with cases that, if based on existing legal norms, appear to be legal injustice, do not have complete legal norms or even the case at hand has no legal norms at all.<sup>2</sup>

<sup>1</sup> See article 5(1) of Law No. 48 of 2009.

<sup>2</sup> Stanley L. Paulson, "Remarks on the Concept of Norm," *Journal of the British Society for Phenomenology* 21, no. 1 (1990): 3-13. <https://doi.org/10.1080/00071773.1990.11006873>.



In the Indonesian judicial foundation, there is no legislation that expressly regulates the use of discretion. However, the use of discretion is implied in Article 24 of the 1945 Constitution and Article 21 of Law No. 48 of 2009 on Judicial Power, which states that judges are actors of independent judicial power, and Article 5 paragraph 1 states that judges must explore, follow, and understand the sense of justice that exists in the community.<sup>3</sup>

It is different in the system of government administration and the police where the use of discretion is regulated. In Law No. 30 of 2014 concerning Government Administration. In article 1 number 9 which mentions the term discretion.<sup>4</sup> Then in article 6 paragraphs (1) and 2 it is stated that government officials have the right to use authority, one of which is the discretionary authority.<sup>5</sup> In this case, the practice of discretion can be called broad authority or freedom to act. Discretion is the authority to intervene in existing policies on a case that has not or is not regulated in a standard provision.<sup>6</sup>

However, judges are juridically given the legal freedom to adjudicate independently in accordance with their own convictions without the assistance of extra-judicial parties. It is forbidden for other parties outside the judiciary to be involved in judicial affairs except in matters permitted by law.<sup>7</sup> Being law enforcers, judges have a crucial position and also have a very heavy burden of duty. This is because it is through judges that legal products are created through which all forms of injustice can be prevented and minimized so as to ensure public peace.<sup>8</sup>

In general, discretion has a crucial role in all aspects of the life of the nation and state.<sup>9</sup> The presence of discretion to improve all weaknesses, independence is very important in the aspect of legal sources. This is also the case with the settlement of inheritance cases in the Religious Courts. In South Kalimantan. The settlement of inheritance cases of Muslim communities juridically does not yet have a well-codified source of material law. For this reason, the discretion of judges is needed which is expected to be carried out not only considering juridical aspects but also the sociological and anthropological conditions of the Banjar Muslim community (living in South Kalimantan) which has an Islamic inheritance system (*bilateral individual*) and also a combined inheritance system between the individual system and the majorate inheritance system.<sup>10</sup>

When the division of inheritance is resolved through the court, then before the distribution of the inheritance, the judge takes several steps to purify the inheritance, as happened in Decision Number: 48/Pdt.G/2016/Bjb issued by the Banjarbaru Religious Court stipulating the acquisition of mandatory wills for ex-wives with the consideration that

<sup>3</sup> Nofaldi Nofaldi dkk., "The Ambiguity of Using the Statement of Absolute Responsibility Based on Minister of Home Affairs Regulation Number 109 of 2019: Study in Dharmasraya Regency, West Sumatra Province, Indonesia," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 23, no. 1 (29 Juni 2023): 108, <https://doi.org/10.30631/alrisalah.v23i1.1358>.

<sup>4</sup> Discretion is a decision and / or action determined and / or carried out by government officials to overcome conflicts related to the administration of government in the event that the laws and regulations that provide options, are not approved, incomplete or unclear, and / or the existence of government stagnation.

<sup>5</sup> Article 6 (1) Government Officials have the right to exercise authority in making decisions and/or taking actions". Then in article 6 paragraph (2) letter e states that one of the rights of government officials is "to use discretion in accordance with its objectives".

<sup>6</sup> Agus Dwiyanto, *Public Bureaucracy Reform in Indonesia* (Yogyakarta: UGM PRESS, 2021).h. 5.

<sup>7</sup> M. Syamsuddin, *Recognizing the Typology of Judges in Deciding Cases*, Legal and Judicial Information Media Magazine of the Judicial Commission, May-June 2013 Edition, p. 17. 17.

<sup>8</sup> Musda Asmara, Rahadian Kurniawan, dan Linda Agustian, "Teori Batas Kewarisan Muhammad Syahrur dan Relevansinya dengan Keadilan Sosial," *De Jure: Jurnal Hukum dan Syar'iah* 12, no. 1 (15 Juni 2020): 17, <https://doi.org/10.18860/j-j-fsh.v12i1.7580>.

<sup>9</sup> J. Beatson and M. Matthews, *Administrative Law: Text and Materials*. by Mark Elliott. (Oxford University Press Inc, 2005).h.113-114.

<sup>10</sup> The individual inheritance system is an inheritance system that states that each heir receives a share of the inheritance, which allows them to own or control it.... While the majorate system is a system of inheritance that does not distribute inheritance to heirs but is controlled by one of the heirs.

the ex-wife has proven to be instrumental in the life of the testator and aims to distribute justice to people who have contributed.<sup>11</sup>

Historically, it is known that the emergence of the concept of compulsory bequest among scholars is used as part of the will for the heirs or relatives who are veiled as part of the heirs. The Compilation of Islamic Law then formulates the existence of the concept of compulsory bequest which is defined as an action taken by a judge or state authority to force or make a decision on compulsory bequest for a deceased person given to a certain person in a certain situation.<sup>12</sup> Then in article 209<sup>13</sup> that the person who gets the mandatory will is limited only to adopted children and adoptive parents. So when the judge determines the ex-wife as the recipient of the mandatory will in the decision, the author considers that there has been a deviation from the provisions outlined in the existing regulations. These deviations are what the author hereinafter refers to as the free discretion of the judge.<sup>14</sup>

Departing from the above description, it is interesting to conduct an in-depth study of the form and nature of the discretion of other judges in the decision of inheritance disputes in several Religious Courts in South Kalimantan with the formulation: "What are the forms and nature of the judge's discretion to purify the inheritance in the inheritance decision of the Religious Court in South Kalimantan.

## METHOD

This paper is the result of normative legal research with a case approach and an analytical approach to legal materials. The legal material in question is inheritance decisions obtained from the directory of decisions taken from the Supreme Court website as primary legal material.

This court decision is used as primary legal material because court decisions are the result or product of institutions that have *authoritative* value. While secondary legal materials are laws and regulations and unwritten laws sourced from related doctrines and tertiary legal materials, namely in the form of complements that provide guidance and explanation of primary legal materials and secondary legal materials, namely in the form of dictionaries, both general and legal dictionaries used to provide a clear understanding of the terms used in this study.

Legal materials are collected through searches and inventories of literature studies which, after being collected and classified, are then studied for materials that are relevant to the subject matter. Then study it to find legal issues related to the existence of judge discretion in inheritance dispute decisions, especially in the legal considerations contained in the decision. Finally, it is presented in the form of a narrative / descriptive which then analyzes the legal material with systematic thinking steps where legal material is analyzed with normative steps.

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<sup>11</sup> Wahidah Ideham, "Substitute Heirs in the Compilation of Islamic Law: An Overview from Gender Equality Perspective Case Study of the Religious Courts in Banjarmasin," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (31 Desember 2022): 1046, <https://doi.org/10.22373/sjhk.v6i2.12466>.

<sup>12</sup> Roihan Rasyid, *Surrogate Heirs and, Compulsory* (Jakarta: Logos Wacana Ilmu, 1999).h. 88-89.

<sup>13</sup> Article 209 KHI (1) Parties entitled to compulsory wills consist of adoptive parents and adopted children. (2) The condition that must be met by the recipient of the mandatory will is that the parents and adopted children are not actually given a will by the testator. (3) The portion that can be received by parents and adopted children is a maximum of 1/3 of the inheritance.

<sup>14</sup> Sri Lumatus Sa'adah, Saifuddin Zuhri Qudsy, dan Nur Quma Laila, "Sigar Semongko and Gilir Waris: The Controversy of Customary Law and Islamic Law in The Inheritance System," *AHKAM: Jurnal Ilmu Syariah* 23, no. 2 (30 Desember 2023), <https://journal.uinjkt.ac.id/index.php/ahkam/article/view/31266>.

## RESULTS AND DISCUSSIONS

There are various meanings for the word discretion, in the Big Indonesian Dictionary discretion is defined as the freedom to make their own decisions in every situation faced.<sup>15</sup> The word *discretion* in English has several meanings, namely *wie conduct*, *individual judgment*, and *free decision making*.<sup>16</sup> Discretion is defined as freedom, either freedom to choose, interpret, consider or make decisions. In Dutch, it is called *descreatie* which in the *Black Law Dictionary* is defined as discretion in terms of deciding an action not based on the provisions of laws and regulations or applicable law but on the basis of discretionary consideration or justice.<sup>17</sup> Wisdom in question is an alternative way of making decisions.<sup>18</sup> Judges are required to exercise discretion in carrying out court functions.<sup>19</sup>

The discretion of judges in the court itself aims to create wisdom and justice but on the other hand will face other potentials, namely concerns about legal uncertainty.<sup>20</sup> The term Discretion is different from *Talfiq* in Islamic law terms, which is the making of a legal decision in Islam by sourcing from various madhhabs.<sup>21</sup>

In Indonesian legislation, the term discretion is found, among others, in Law No. 30 of 2014 concerning Government Administration in article 1 point 9 which states that discretion is: "Decisions and or actions determined and or carried out by government officials to overcome conflicts related to government administration in the event that the laws and regulations that provide options, are not approved, are incomplete or unclear, and or the existence of government stagnation". Whereas in the police environment according to Dermawan as quoted by Ni Ketut Sari Adnyani, discretion as a police authority cannot be used carelessly, in carrying out discretion it must be used for logical and rational reasons but still selective and proportional.<sup>22</sup>

In the study of Islamic law, the term discretion is not explicitly mentioned. However, Islam recognizes *ijtihad* which is translated as the use of independent legal reasoning to provide an answer to a problem when the text of the Qur'an and hadith does not state it. This *ijtihad* led the lawmakers to the statement that the agreement of the community or religious leaders on a matter should be one of the sources of law, based on the Qur'an and hadith.<sup>23</sup> The ushul fiqh scholars suggest that *ijtihad* terminologically is the direction of all abilities by a jurist or mujtahid to gain knowledge of the laws of shar'i law.<sup>24</sup>

In the judicial power environment, independence as the essence of legal discretion is the independence and power of judges to take appropriate action. The essence of such discretion is actually in line with the position and authority of judges as law enforcers within the judicial power actors. In legal science, the term *contra legem* is known, an expression that

<sup>15</sup> Department of Education and Culture, *Big Indonesian Dictionary* (Jakarta: Balai Pustaka, 2011).h.208.

<sup>16</sup> Bryan A. Garner, *Black's Law Dictionary* (USA: Thomson Reuters, 2009).h.534.

<sup>17</sup> Marwan Effendy, *Discretion, Legal Discovery, Corporations & Tax Amnesty in Law Enforcement* (Jakarta: Referensi, 2012).h.9.

<sup>18</sup> Wendy Lacey, "Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere" (2004), *Melbourne Journal of International Law* 5 (n.d.): 108-113.h.111.

<sup>19</sup> Aduaka, "The Concept Of Judicial Precedent Under The Nigerian Jurisprudence" (2019). P.42 <http://seahipaj.org/journals-ci/june-2019/IJBLR/full/IJBLR-J-13-2019>

<sup>20</sup> Sean J. Mallett, "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just," *Victoria U. Wellington L. Rev.* 46 (2015): 533.h.530.

<sup>21</sup> Muhammad Istiqamah et al., "The Concept of Al-Talfiq and Its Law in One Worship According to the Perspectives of Four Mazhabs," *Bustanul Fuqaha: Journal of Islamic Law* 4, no. 1 (2023): 134-151.h.138.

<sup>22</sup> Ni Ketut Sari Adnyani, "Discretionary Authority of the Indonesian National Police in Criminal Law Enforcement," *Scientific Journal of Social Sciences* 7, no. 2 (2021): 135-144.h.136. <https://doi.org/10.23887/jiis.v7i2.37389>

<sup>23</sup> Abdullah Ahmed an Na'im, *Deconstruction of Shari'ah*, (Terj Ahmad Suaeidy and Amiruddin Arrani, Yogyakarta, LkiS, 1994, p. 54. 54.

<sup>24</sup> Abdullah Ahmed an Na'im, *Deconstructing Shari'ah*, p. 250.

explains that judges have the authority to deviate from the provisions of existing written law to realize justice and benefit in the midst of community life. If you use this *contra legem*, you must make the legal considerations clear and detailed by considering various legal aspects.<sup>25</sup>

Religious Courts as one of the actors of judicial power in Indonesia are authorized to accept, examine, decide, and resolve cases between people of the Muslim religion, one of which is Islamic inheritance,<sup>26</sup> in which there is a determination of inheritance. Before the determination of the inheritance by the judge, several actions are taken to purify the inheritance so that it can then be called the inheritance (to be distributed to the heirs).<sup>27</sup>

There are several judges' discretion related to the purification of inheritance, namely:

Providing part of the inheritance through mandatory wills for ex-wives (decision number; 0448/Pdt.G/2016/Bjb) because they are considered to have contributed to the heirs in obtaining the inheritance and the justification for using the inheritance for the payment of debts for the ritual needs of the spirits<sup>28</sup> in decision number: 258/Pdt.G/2019/PA.Blcn.<sup>29</sup>

The determination of the ex-wife getting a share through the *mandatory will* is categorized as a form of discretion of the judge that is free because the judge has deviated from the provisions governing the mandatory will, both the provisions contained in the doctrine of *fiqh*, as well as the provisions of other sources. In *fiqh*, the will is included in the discussion of inheritance law which contains a very important meaning addressed to distant relatives who do not get inheritance or to other people. In principle, the will in the Islamic inheritance system in *fiqh* contains a very important meaning to ward off chaos and division in the family.<sup>30</sup>

The emergence of the concept of mandatory will is the result of scholars' interpretation of the Qur'an surah al-Baqarah verse 180:

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا مَّا لَوْلَا دِينٍ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ ۝

Imam Ash-Shafi'i explained that it is permissible to make a will to one's parents or other heirs in all circumstances, provided that they are not entitled to inheritance for some reason.<sup>31</sup> Then Ibn Hazm argued that relatives who do not get inheritance because they are slaves or disbelievers or those who are prevented from getting inheritance property are obliged to be given a will. This obligatory will is excluded for parents and relatives who have received inheritance.

<sup>25</sup>M. Fauzan and Ahmad *Kamil*, (Jakarta: Kencana Prenada Media Group, 2008).h.9.

<sup>26</sup>What is meant by inheritance is the determination of who is the heir, determination of the inheritance, determination of the share of each heir, and carrying out the distribution of the inheritance, as well as a court decision on a person's application regarding the determination of who is the heir, determination of the share of each heir."

<sup>27</sup> Anugrah Reskiani dkk., "Reform Methods of Islamic Inheritance Law in Indonesia in Jurisprudence," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (9 Juni 2022): 39, <https://doi.org/10.31958/juris.v21i1.5564>.

<sup>28</sup> The rituals are in the form of ceremonies (day, 7 days, 25 days, 40 days, 100 days and 1 year after the death of the pewais).

<sup>29</sup> Muhammad Yusron, "Penalaran Rasional dan Masalah: Ijtihad Umar ibn al-Khattab pada Kasus-Kasus Kewarisan Islam," *Journal of Islamic Law* 2, no. 2 (5 Agustus 2021): 197, <https://doi.org/10.24260/jil.v2i2.327>.

<sup>30</sup> Akhmad Kamil Rizani, "Musyawarah Sebagai Alternatif Penyelesaian Sengketa Waris Beda Agama: Avidence Based Solution From Indonesia," *El-Maslahah* 10, no. 2 (30 Desember 2020): 52, <https://doi.org/10.23971/maslahah.v10i2.2063>.

<sup>31</sup> Abu Abdullah Muhammad Bin Idris Ash-Shafi'i. *al-Umm* Juz IV (Beirut: Dar Al Fikri, 1983).h.103-104.

Kinship ties can occur because of the relationship of nasab (*nashabiyah*) and can also be due to marital relations (*shababiyah*). For relatives who do not receive inheritance property, it is still obligatory to give a will because it is their right and if the mandatory will is not given, then he has wronged him.<sup>32</sup> Thus, among the scholars, the obligatory will is used to give a share to the heirs or relatives who are prevented or veiled in receiving inheritance.<sup>33</sup>

The Compilation of Islamic Law then formulates the existence of a will in article 171<sup>34</sup> regulating when the will is executed, the level of the will in article 195 paragraph (2) and article 201 regarding the necessity of the heirs' consent if the will exceeds the existing provisions.<sup>35</sup> Compulsory testament by the Compilation of Islamic Law is defined as an action taken by the ruler or judge as a state apparatus to force or give a compulsory testamentary decision for a person who at the time of death is given to a certain person in certain circumstances.<sup>36</sup> The implementation of compulsory testament is not influenced or does not depend on the will or the will of the person who died. This will must still be implemented whether it is spoken or not spoken, whether it is desired or not desired by the person who died.<sup>37</sup>

Then in article 209<sup>38</sup> that the person who gets the mandatory will is limited only to adopted children and adoptive parents. The provisions contained in article 209 in the practice found in the study of the decision of the Religious Court in South Kalimantan in reality there are deviations in the determination of people who receive mandatory wills.<sup>39</sup>

When the judge in his decision determines that the ex-wife receives a share through the mandatory will is a deviation. The deviation in question is because it gives a share of the inheritance to a person who no longer has kinship ties with the testator, namely the ex-wife. This deviation is what the author further calls the discretion of the judge which is free.<sup>40</sup>

Kinship ties in the form of marital relations are characterized by a bond in the form of a marriage contract and will end in the event of divorce. This divorce also causes no inheritance relationship for the couple. Therefore, the ex-wife in decision number: 48/Pdt.G/2016/Bjb. does not get a share of the inheritance but is given a share of the testator's estate through the establishment of a *mandatory will*, because the person concerned is considered to have contributed to the life of the testator so that it is considered to have a share in the acquisition of inheritance property. So it is considered very fair if people who have contributed are rewarded in the form of giving the testator's inheritance through

<sup>32</sup> Abu Muhammad Ali Ibn Hazm, *Al-Muballa bi Al Asar*, Volume VIII, pp. 353-354.

<sup>33</sup> Eka Susylawati, "Kewenangan Peradilan Agama Dalam Menangani Perkara Waris Setelah Berlakunya Undang-Undang Nomor 3 Tahun 2006," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 2, no. 1 (2007): 138, <https://doi.org/10.19105/al-lhkam.v2i1.2618>.

<sup>34</sup> "A gift of an object from the testator to another person or institution that will take effect after the testator dies".

<sup>35</sup> The amount of the will cannot be more than 1/3 of the testator's estate, unless all heirs agree to it. This limited provision is done so as not to harm the heirs.

<sup>36</sup> Roihan Rasyid, "*Surrogate Heirs and in Compulsory*" (Jakarta: Logos Wacana Ilmu, 1999).h.88-89.

<sup>37</sup> Fathur Rahman, *Science of Inheritance*, (Bandung: Al Ma'arifh. 62.

<sup>38</sup> Article 209 KHI (1) Parties entitled to compulsory wills consist of adoptive parents and adopted children. (2) The condition that must be met by the recipient of the mandatory will is that the parents and adopted children are not actually given a will by the testator. (3) The portion that can be received by parents and adopted children is a maximum of 1/3 of the inheritance.

<sup>39</sup> Amelia Rahmania, Syamsul Anwar, dan Rahmani Timorita Yulianti, "Kerakatan and Baparcayaan in Diamond Transactions Through Pengempit (The Anthropology of Islamic Law Study)," *Syariah: Jurnal Hukum Dan Pemikiran* 20, no. 2 (5 Desember 2020): 105, <https://doi.org/10.18592/sjhp.v20i2.3880>.

<sup>40</sup> Kamarusdiana Kamarusdiana, Muhammad Ilham Fuadi, dan Muhammad Ishar Helmi, "Keadilan Waris Islam Dalam Kedudukan Anak Perempuan Sebagai Hajib Hirman Terhadap Saudara Dalam Putusan Mahkamah Agung," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (1 Desember 2021): 221, <https://doi.org/10.24090/mnh.v15i2.4960>.

a mandatory will. The action of the judge in his discretion to give part of the testator's inheritance to the ex-wife is in line with the purpose of discretion, namely to create justice for several legal cases that have not been accommodated by statutory regulations.<sup>41</sup>

This discretion arises because in the provisions governing mandatory wills there is no allocation to ex-wives. Because basically discretion involves decision-making that is not strictly bound by law where personal judgment also plays a role. Thus, if elaborated further, referring to Wayne's opinion, it means that discretion is a complement to the source of written law.<sup>42</sup>

In the context of the authority of judges when adjudicating a case, discretion is a form of freedom to determine attitudes and policies, freedom of thought and freedom to take action on a problem at hand. Because the law has given enough freedom to judges as a form of judicial independence when they are trying cases.<sup>43</sup>

Likewise, the determination of the use of inheritance assets for the payment of debts for the purposes of spirit rituals<sup>44</sup> in decision number: 258/Pdt.G/ 2019/PA.Blc. This is a form of free discretion because the payment of debts for the purposes of death rituals (*selamatan*), not debts for the needs of the deceased during his lifetime. Whereas the ritual needs of spirit rituals in the form of *selamatan* ceremonies are not mandatory in religion, only in the form of local community traditions.<sup>45</sup>

In the doctrine of fiqh doctrine, it is described that the purification of the estate is completed first some of the obligations related to it, namely the cost of managing the body of the deceased, paying the debts of the heir, giving to relatives and the will, as also stated in article 171 letter e.<sup>46</sup> However, the definition of the cost of managing the body of the deceased is limited to the cost of bathing, shrouding, praying and burying only. As for arwahan activities, the costs should not be taken from the estate of the deceased.<sup>47</sup>

Debt is something that must be paid and is a reward for services previously received. So far, the understanding of the debt in question is the debt of the heir during his lifetime and must be paid using the inheritance of the heir. Even the payment of this debt must take precedence over other obligations related to the heir's estate. Because the payment of this debt is a way to release the obligation of accountability in the hereafter, as said by the Prophet SAW:<sup>48</sup>

عَلَيْهِ وَسَلَّمَ قَالَ لَا تَرَأَى نَفْسَ ابْنِ آدَمَ مُعَلَّقَةً بِدُنْيِهِ حَتَّى يُقْضَى عَنْهُ عَنْ أَبِي هُرَيْرَةَ عَنِ النَّبِيِّ صَلَّى اللَّهُ

So what is meant by debt is the debt of the testator during his lifetime and has not been paid until the testator dies, so when the judge in his legal considerations states that one of the things that must be fulfilled is the payment of debts for the purposes of the salvation ceremony is a discretion that is free. Because the payment of debts for the purposes of the arwahan ritual does not have a juridical basis that can be accounted for, but is based on the custom of the local community who consider the arwahan ritual is something

<sup>41</sup> Juan Vicente Sola, "Rules vs. Discretion: The Judicial Alternative," *Contemporary Readings in Law and Social Justice* 3, no. 2 (2011): 48-69.h.65.

<sup>42</sup>Soekanto Soerjono, *Factors Affecting Law Enforcement* (Jakarta: Grafindo Persada, 1983).h.15.

<sup>43</sup>Witanto, "Judge Discretion...", p.67.

<sup>44</sup> The rituals are in the form of ceremonies (day, 7 days, 25 days, 40 days, 100 days and 1 year after the death of the pewais).

<sup>45</sup> Ali Muhtarom dan Yuli Sutoto Nugroho, "Grants as a Model of Inheritance Prospective Distribution in the Coastal Santri Community," *Al-Ahkam* 32, no. 2 (30 Oktober 2022): 169, <https://doi.org/10.21580/ahkam.2022.32.2.12557>.

<sup>46</sup>"The inheritance is the inherited property plus part of the joint property after being used for the needs of the testator. during illness until death, the cost of managing the body (*tajhiz*), payment of debts and gifts to relatives".

<sup>47</sup>Wahidah and Faridah, *The Practice of Inheritance Settlement in Banjar Society* (Antasari Press Banjarmasin, 2018).h.85.

<sup>48</sup> Maktabah Syamilah, *Musnad Ahmad*, Volume 21, hadith no. 10194, p. 238. 238.

sacred and requires a lot of money. The judge considered the payment of debts for the needs of the dead as something that did not have to be charged to the heirs but could be charged to the estate.<sup>49</sup>

The spirit ritual is a custom of the Banjar people living in South Kalimantan, a religious tradition that must be respected and carried out, although there is no clear guidance in Islam, but this is done in order to fulfill the demands of the customs and social structure of the community which is the will of the people which contains cultural values in the form of togetherness, humanity and religion and is used as a guide in future life.<sup>50</sup>

As a legal system that applies in society, customary law aims to realize a peaceful and serene life order so as to create legal justice for them. The meaning of justice here focuses on the balance of all fields in various aspects of individual and group life, even to the spiritual point of view.<sup>51</sup>

The existence of customary law related to dispute resolution M. Rogers argues that developing countries need to examine and pay attention to the socio-cultural aspects of development problems, especially those related to behavior, views and beliefs and existing habits.<sup>52</sup> So that the success or failure of development, including legal development, is greatly influenced by attention to the socio-cultural values of the local community or also known as local wisdom.<sup>53</sup>

In Islamic studies the term custom or habit known as *urf*<sup>54</sup> can be used as a consideration in Islamic law. Urf/customs can be used as a guideline for the schools of fiqh so that fiqh law products are based on the reality of local customs. Even the rule of *al-a'datu mubkamah* is found.<sup>55</sup>

This is in line with Derrida's deconstruction theory that the law is not only in the form of legal texts but also in other forms. Behavior, actions, norms, mimics, values, thoughts, conversations, objects and historical objects and so on are texts. Everything that can be understood, that has meaning and can be processed with reason is text.<sup>56</sup>

The judge's appreciation of the custom of spirit rituals so that the costs are charged to the heir's estate is more indicative of the manifestation of flexible Indonesian Islamic law/fiqh. This is in line with the meaning of discretion put forward by Wayne La Farve who emphasized that what is more dominant in discretion is personal judgment compared to rigid law.<sup>57</sup>

According to Derrida, reality, which is considered objective, homogeneous, singular, is deconstructed so that reality is clearly seen to be plural, heterogeneous, and fragmentary.

<sup>49</sup> Iman Fadhilah Iman dkk., "Exploring the Monogamy Principle in the Samin Community's Customary Marriages in Kudus: Harmonisation of Tradition and State Law," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 23, no. 2 (2023): 281, <https://doi.org/10.18326/ijtihad.v23i2.281-304>.

<sup>50</sup> Libat Koentjaraningrat, *History of Anthropological Theory I*. (Jakarta: UI Press, 1987).h.71

<sup>51</sup> Gusti Muzainah, "Legal Principles of Women's Position in the Customary Inheritance Law of the Banjar Community," *DIH, Journal of Legal Science* 8, no. 15 (2012): 10-19.h.10.

<sup>52</sup> M. Rogers, in Guswah Hakim, (Dissertation), *Principles of Kolasari Customary Law*, Air Langga University Library, p. 12. 12. (<https://repository.unair.ac.id/32679/4/4.%20BAB%20I%20PENDAHULUAN.pdf>) accessed on Friday, November 18, 2022, at 09.32.

<sup>53</sup> Fakhurrrazi M. Yunus, Husni A. Jalil, dan Shafirattunnisa Shafirattunnisa, "Analisis Yuridis Terhadap Pembagian Harta Warisan Ahli Waris Pengganti Pada Putusan Mahkamah Syar'iyah No 245/Pdt.G/2017/MS.Bna.," *El-Ushab: Jurnal Hukum Keluarga* 5, no. 1 (25 Juni 2022): 183, <https://doi.org/10.22373/ujhk.v5i1.7730>.

<sup>54</sup> Urf and Adat have the same meaning, namely something that is familiarized by the general public and groups of people, henceforth interpreted as customary. See Abd Rauf, "The Position of Customary Law in Islamic Law," *Tabkīm Journal* 9, no. 1 (2013).h.23

<sup>55</sup> Abdul Wahab Khalaf, *Science of Ushul Fikih*, (Jakarta: Amani Library, 2003).h.90

<sup>56</sup> Frety Cassia Udang, "Berhermeneutic with Derrida," *Tumou Tou* 6, no. 2 (2019): 117-127.h.119.

<sup>57</sup> S. F. Marbun and Deno Kamelus, *Dimensions of State* (Yogyakarta: UII Press, 2001).h.78.



Through his deconstruction, Derrida abandoned modernism and killed the two heroes of myth and logos narratives.<sup>58</sup>

Furthermore, from the findings above, an ideal form of discretion is found which is expected to be a guideline for judges or other decision makers when dealing with legal cases that require judges' policies in this form of discretion. Such discretion of judges can be categorized as ideal discretion because it is very progressive. It is said to be progressive discretion because it is guided by the flow in legal discovery, namely the flow of progressive law.<sup>59</sup>

Progressive legal discovery departs from the concept of progressive law, that law is for humans, which includes the value of truth and justice which is the point of legal discussion, so that ethical factors and morality cannot be separated from the discussion. In this progressive discretion, the judge does not only use normative interpretation but rather the use of sociological interpretation. Thus, progressive legal discovery connects law, humanity, and morality. As a result, legal decisions made by judges as part of their judicial duties, which will ultimately result in their decisions.<sup>60</sup>

Thus the resulting judge's decision is not solely based on normative juridical provisions but is also based on conscience by considering non-legal matters. The truth championed by progressive legal discretion is substantive truth that is not constrained by normative rules.

Progressive law also teaches that the Law is not meant to be king, but as a tool to convey the basic humanity that brings good to the world and everyone. Progressives want to make law a morally principled institution rather than a technology that has no conscience....<sup>61</sup> This is in line with the purpose of *discretion* as stated by Thomas J. Aaron defining *discretion* as an authority based on conviction and consideration based on law and emphasizing moral considerations rather than law (*discretion is power authority ba law to action on the basis of judgment of conscience and its use is more than idea of morals than law*).<sup>62</sup>

This progressive discretion is also in line with responsive legal discovery, which means that the discretion exercised by judges should always respond to the conditions around them which refer to legal objectives. As the theory put forward by Nonet and Selznick, there is a shift in emphasis from rules to principles and legal objectives. This responsive discretion is found in the decision of inheritance decisions in the Religious Court which does not merely uphold legal certainty but should illustrate the existence of justice and benefit for the heirs.

This progressive legal discretion is also in line with the concept of *mashlahab* which gives legitimacy to new legal recommendations and allows jurists (including judges) to elaborate on the context of problems that are not emphasized by the *nash shara'*. Likewise, legal change will be achieved through the application of the concept of *mashlahab* if the pattern of *mashlahab-weighted* legal reasoning is applied by the jurists.<sup>63</sup>

## CONCLUSION

The form of discretion of judges related to the purification of inheritance in inheritance case decisions at the Religious Courts in South Kalimantan is found in

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<sup>58</sup> Mangihut Siregar, "A Critique of Derrida's Theory of Deconstruction, p.66.

<sup>59</sup> Satjipto Rahardjo, *Progressive Law (An Exploration of an Idea)*, (Law Newsletter 59, 2004).h.5.

<sup>60</sup> Satjipto Rahardjo, *Progressive Law*, p. 48.

<sup>61</sup> Satjipto Rahardjo, *Dissecting Progressive Law* (Jakarta: Kompas Publisher, 2006).h.228.

<sup>62</sup> Marwan Effendy, *Discretion, Legal Discovery, Corporations & Tax Amnesty in Law Enforcement* (Jakarta: Referensi, 2012).h.7.

<sup>63</sup> Felicitas Opwis, "Maslaha in Contemporary Islamic Legal Theory," *Islamic law and society* 12, no. 2 (2005): 182-223.h.183.

decisions that give part of the inheritance to ex-wives through mandatory wills and justify the use of inheritance assets for payment of spirit ritual debts. The nature of discretion in the judge's decision is free, namely when the judge is faced with a case that has no legal basis or if using the existing legal basis, it seems unfair. Such discretion of the judge can be categorized as ideal discretion because it is very progressive, where the judge does not only use normative interpretation but rather the use of sociological interpretation. In addition, progressive legal discovery connects law, humanity and morality.

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