

## THE EXISTENCE OF ISLAMIC LEGAL COMPILATION IN ISLAMIC INHERITANCE LAW CONTEXT AS MATERIAL LAW ON RELIGIOUS COURTS

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*The research is financed by National Education Department of Indonesian Republic, under post graduate fellowship program*

### Abstract

Islamic Inheritance Law that organizes the position of the testator to bequeath, arranged in book II of Islamic Legal Compilation in Article 171 to Article 193.

Islamic Legal Compilation that have the form Presidential Instruction which the existence not yet entered in the Indonesia legal system and the substance there are many interpretations, supposed problem of inheritance should be included in it fully, so there is no disparity in the decision by the Religion Judicial Magistrate.

This type of research normative legal research, there are three approaches used in this study, is covering; Philosophical approach, conceptual approach, statute approach.

From this fact the substance of Islamic Legal Compilation cause the issue of (problematic) legal consisting of several sub-legal issues are:

1. There are different interpretations the existence of Presidential Instruction Number 1 Year 1991 about Islamic Legal Compilation in Indonesia legal system.
2. There are vagueness of the regulations regarding the administration of the experts testator according to Islamic Legal Compilation.

**Keywords:** Islamic legal inheritance position in Islamic Legal Compilation.

### 1. Introduction

Article 49 paragraph (1) of Act No. 7 of 1989 reads: “The Religious Courts duty and authority to examine, decide and resolve cases on the first level between people who are Muslims in sector : a. Marriage, b. Inheritance, Probate and grants are made based on Islamic law c. Endowments and Charity.”<sup>5</sup>

Although there is no word formulas that caused controversy in the chapter-in this case in point (b) is the existence of the phrase “which is based on Islamic law”, definite article in its entirety on implied meaning of the urgency applicable laws that would apply to Religious Courts. This understanding can be obtained also from the logic that if the provisions of the law associated with the provision of Article 63 paragraph (1) of Act No. 1 of 1974, that is the Religious Courts are Courts for Muslim. This is also reinforced by the provisions of Article 2 of Law No. 7 of 1989, which gave the provisions that religious courts is one of the implementing judicial authorities seeking justice for the people who are Muslims.

Is something that is not possible if the trial is intended for Muslims and will hear the case of Muslims will also apply non-Islamic law or law to the contrary to Islamic law, particularly those related to inheritance law.

In other words, the Religious Courts must wear the Islamic law, and should not use the Civil Code and Customary Law as the legal basis for prosecuting cases of inheritance for the justice seekers. In this context, the presence of clear law applied to religious courts in this case the material of Islamic law, it is urgent.

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<sup>5</sup>*Set Legislation in Religious Courts*, (Surabaya, Surabaya High Court, 1992), p. 299.

One of the important things discussed on this occasion was the presence of KHI. Therefore, in addition to the current in real terms has been the Number 1 Year 1991 and followed up with a decision of the Minister of Religious Affairs No. 154 of 1991 has also become a benchmark in the religious court judges deciding the case. Thus, on one side of the KHI is an alternative to The Religious Courts applied the law in addition to Law No. 1 of 1974, PP No. 9 of 1974 to issue marriage and Government Regulation No. 28 of 1977 to issue donation, on the other hand KHI position in the national legal system seems still weak because its existence the only supported by legal instruments Instruction are not included in the legal system in Indonesia.

Therefore not surprising if emerging discourse about the desire of Islamic jurists particular apparatus The Religious Courts (judges) to make KHI as applicable laws written in the form of legislation. The most urgent desire all in the perspective of national law and does not need to be debated, because KHI is in his second book on the Law of Inheritance organize what if there is no legal basis in the Indonesian legal system, the verdict will have implications for cases of the same disparity.

Review and study of Islamic inheritance law, which is commonly also called *Faraid*,<sup>6</sup> means reviewing half of human knowledge that has been and continues to live in the midst of community Muslims since the beginning of Islam until the mid-century, modern and contemporary times and in the future.<sup>7</sup>

For Indonesian Muslims, Allah rules of inheritance has been a positive law that is used in The Religious Courts in deciding cases or disputes relating to the division of the estate is. Thus Muslims who completed his case through the Court has conducted Religion means the law of Allah in the estate settlement, in addition have executed worship with implementing the rule Allah, in the same time to observe the rules state set.<sup>8</sup> This is in contrast with the Arabs before Islam came law, brother of testator to the position if the testator does not leave the boy that was great, and then his assets went to his brother to battle.<sup>9</sup>

The problem that is faced by a Religious Courts of law material or its application of law, the positive law which must be applied by a Religious Courts to resolve cases of inheritance posed to him.

Although hopes for unification of law is never extinguished and continues to fight for its formation, but it is still difficult to resolve pluralism inheritance law in this country. One of these circumstances is the result of a series of legacy cases are extremely complex that arise from interpersonal relationships among people who come from a Different legal background culture.<sup>10</sup>

Islamic inheritance law system, which also consists of pluralism teachings, such as the doctrine *Ahlusunnahwaljamaah* inheritance, Shiite teachings, the teachings of the most dominant Hazarin adopted in Indonesia is the teaching *Ahlusunnahwaljamaah* (madzhab Syafii, Hanafi, Hambali and Maliki) but the most dominant among the teachings of four (4) madzhab in Indonesia in addition to the teachings espoused Syafii Hazarin that took effect since 1950, in Indonesia as *ijtihad* to decipher the laws of inheritance in the Qur'an bilaterally.<sup>11</sup>

With reference to these books are intended to obtain legal certainty Islam. But in fact, the resulting decisions still vary, due to the absence of definitive reference for guidance.<sup>12</sup> Based on the *fiqh* books or the yellow bible, the religious court judges in making its decision as desired basis and thinking considered each according to his opinion.

Consequently, there cannot be, they would reference book of *fiqh* supporter's madzhab. Thus, it can be expected soon the birth of various religious court decision that is different for the same case (berdisparitas).<sup>13</sup>

Still possible the other magistrate then opinion and the decision different although regarding the same problem, according to the expression different judge different sentence.<sup>14</sup> To overcome these problems, the idea appears to construct Islamic Law Compilation which collects the applicable law applied within the religious court in carrying out

<sup>6</sup> Amir Syarifuddin, *Islamic Inheritance Law*, (New York, Prenada Media Group, 2008), p. 5.

<sup>7</sup> J.N.D. Anderson, *Islamic Law in the Modern World*, terj. Machnun Husein (Surabaya, Amarpres, 1991), p.66.

<sup>8</sup> Amir Syarifuddin, Op. Cit., p. 4.

<sup>9</sup> Ismuha, *Replacement Inheritance Law In Place, According to the Civil Code, Customary Law, and Islamic Law*, (Jakarta, Pustaka Bulan Bintang, 2004), p.28.

<sup>10</sup> Ratno Lukito, *Sacral Law and Secular Law*, (Jakarta, Pustaka Alvabet, 2008), p.347.

<sup>11</sup> Idris Ramulyo, M., *Comparison of Islamic Inheritance Law, Religion and Inheritance In Court pursuant to Civil Code (BW) in the District Court (A Case Study)* (Jakarta, Pedoman Ilmu Jaya, 1992) hlm 2.

<sup>12</sup> Amrullah Ahmad, *Dimensions of Islamic law in the National Legal Systems* (Jakarta, Gemainsani Press, 1996) p.1.

<sup>13</sup> Rachmad Budiono, A. *Islamic Inheritance Law Reform in Indonesia*, (Bandung, Citra Aditya Bakti, 1999), hlm 2-6.

<sup>14</sup> Mohammad Daud Ali (et.al), *Islamic Law and Justice Religion (Collected Writings)*, edition. 2 (Jakarta, PT Raja Grafindo Persada, 2002), p. 210.

its duties.<sup>15</sup>

Islamic Legal Compilation completed by the Project Team, then submitted to the President of the Republic of Indonesia through the Minister of Religious Affairs of the Republic of Indonesia to the letter dated March 14, 1988 Number MA/123/1988 MA/123/1988, then exit the Presidential Instruction No. 1 of 1991 on Islamic Legal Compilation. Therefore, Islamic Legal Compilation (KHI) is expected to be used as a guide uniform (unifikatif) for religious court judges and positive law that must be obeyed by all Indonesian Muslim nation.<sup>16</sup>

Abdul Rachmad Boediono stated: "The main purpose was held Compilation of Islamic Law is to ensure Islamic laws in Indonesia. In this regard Islamic law should be interpreted As an Islamic civil law."<sup>17</sup>

The existence of Islamic Law Compilation on the one hand makes it easy for the judges of religious courts in resolving the case, but in other respects the existence of Presidential Instruction No. 1 of 1991 on the Islamic law compilation that is expected to eliminate doubts the law will result from something that is not definite action against decision of the religious court magistrate, but because the articles are very limited, so the religious court judges in applying the material in the ruling Islamic Law Compilation varied as well, including in the case of inheritance relating finishing position of heir to heir. This can be seen in the articles of the Islamic law compilation only regulates a small part of Islamic inheritance issues.

This can be understood from the fact that the position heir testator in the inheritance of Islam, particularly in Islamic Law Compilation substances still poses some law issues (problematic).

Based on the description above, which is the case in this study are:

1. How does Islamic law compilation organize of Islamic Inheritance Law in Indonesia?
2. How to position Islamic law compilation as stipulated in Presidential Instruction No.1 of 1991 in Indonesia Legal system?

## 2. Methods

This study classified the types of normative legal research studies that examine the legislation in a coherent legal system.<sup>18</sup> In this case law as a positive norm prevailing at a particular time and published as a product of a certain political power that has legitimacy. There are also opinions which say that when issues of law studies and research objectives reflect the ideal realm of law (philosophy, general principles of law, the rule of law, logic, systematic and fundamental notions of law), then the research is normative or doctrinal.<sup>19</sup>

Method of approach as a research legal-normative perspective with regard to the position of heir to their relatives according Islamic law compilation, then in order to provide an understanding of the legal issues (legal issues) will be used in a more holistic approaches<sup>20</sup> are:

First philosophical approach, to this issue is the division of Inheritance in Islam and the division of inheritance according to Islamic Law Compilation which include the nature, value, knowledge and goals of Islamic Inheritance Law and Islamic Law Compilation.

Second conceptual approach, which examines the legal principles relating to Islamic Inheritance and Inheritance according to Islamic Law Compilation, includes *Ijbar* principle, individual principle, the principle of bilateral and Inheritance principle simply because of death.

Third statute approach, is chosen in this study because the focus of this study is to understand and explain the position of Presidential Instruction No. 1 of 1991 on Disseminate Islamic law compilation in Indonesia legal system, because the

<sup>15</sup>JaenalAripin, *Religious Courts in the Frame Law Reform in Indonesia*, edition.1,(Jakarta Kencana, 2008), p. 274.

<sup>16</sup>Rofiq,Ahmad, *Islamic law in Indonesia*,( Jakarta , PT Raja Grafindo Persada,2000), p. 43-44.

<sup>17</sup>Abdul RachmadBudiono, *The Religious and Islamic Law in Indonesia*,(Malang,Bayumedia Publishing,2003),p.55.

<sup>18</sup>SoetandyoWignjosebroto, *An Introduction to Coaching Research Direction Talk About Law In PJP II* : Jakarta : BPHN DepartemenKehakiman, 1995, p. 5.

<sup>19</sup>Paulus Hadisuprpto, "Normative Legal Research Methods, Approaches, Legal Materials, Engineering Materials Collection Law and Legal Materials Analysis", Papers, Legal Research Methods Seminar, Graduate Student Forum Communications Law, Faculty of Law, (UniversitasBrawijaya, Malang May: 2008), p.5.

<sup>20</sup>Use more than one approach because of legal science has undergone a process of differentiation and integration in research methods of thought, so that legal research requires a multidisciplinary approach that uses logic more than one branch of the law, even interdisciplinary approach that requires verification and assistance from other disciplines. Sunaryati Hartono, *Indonesian Legal Research at the End of the 20th Century*, (London Alumni, 1994), p. 123-124..

research is very closely related to the hierarchy of legislation. Therefore the legislation approach is used to seek information in order to answer the research.

Legal materials can be classified into primary legal materials, secondary and tertiary legal materials. Primary legal materials (primary legal resources) that is legally binding material derived from legislation relating to the protection of street children. Secondary law (legal recourse secondary) material that is legal explanation for primary legal materials such as books, Research results, scientific journals, articles and the like. Legal materials tertiary (tertiary legal resource) which is material that the law may provide guidance and explanation of the material Primary and secondary law such as legal dictionaries, encyclopedias and others.

The analytical tool used is the legal interpretation: grammatical interpretation that explain and elaborate on the meaning of the provisions of laws and regulations, using everyday language or the language of the law; teleological interpretation is to interpret legislation in accordance with its purpose. Further analysis using juridical analysis that examines, in depth and thoroughly explain and intertwined with each other, and evaluate legal material, as the elaboration of Islamic inheritance concept overall in Islamic law compilation in the future

### 3. Results and Discussion

Has become a commonly known fact that a product is very relevant laws of a country's political reality. As written by Mahfud M,D<sup>21</sup> among legal experts, there are two opinions regarding the causal relationship between politics and law. The idealists who composed the corner sollen das said that the law should be able to control and manipulate the development of society, including political life. Opinions such as stated by the Pound said Roscou Law as a tool of social engineering. As the desire is certainly reasonable if there is an attempt to put the law as a determinant of the direction of travel of society because such legal functions to ensure order and protect the public interest would be relevant. However, realists such as Van Savigny others argue that the law is always evolving in accordance with the development of society. This means inevitably bahaw legal position as independent variables in the outer upper state. In emperis level, Mahfud MD justify a second opinion that the law was born as a reflection of underlying political configuration. In other words, according to Mahfud MD, the sentences contained in the rule of law that no other is the crystallization of political will of mutually competing.<sup>22</sup> Actually signaled Mahfud MD is supported by experts. Other laws such as Sunaryati Hartono,<sup>23</sup> who said that the law was given fungsi as instruments for development program as the law is not really a goal. Due to the perspective of the law so then according to Abdul Hakim Garuda Nusantara<sup>24</sup> all laws are considered irrelevant the stability and economic growth should be changed and abolished. In observation SatjiptoRahardjo,<sup>25</sup> in fact the legislative activity does more to make political decisions rather than running legal work.

Empirically, the expert opinion at least according to the phenomenon of legal developments in the new order which gives us an idea that the birth of products Act depends on the political supremacy.

In explanation of the General constitution of 1945 determined that the Constitution law is written, it applies in addition to the basic unwritten law. Thus in Indonesia recognized two types of basic law, the basic law written like the Constitution of 1945 alone, and the basic laws are not written like a convention. The question we eat layout Islamic law and customary law that the two are not written as legislation in Indonesia.

Article II of the 1945 Rules reads: "The State Agency and all existing regulations still have not held directly apply for a new one according to this Constitution ". In this article it can be directly attributed to the existence of Article 131 IS as the existing regulations and provisions have not been regulated by the Constitution of 1945 law which divides the three groups, are western law, customary law and Islamic law. On the basis of the article that although Islamic law has not been all written, the laws invitations, its existence remains a recognized state. So how about the existence of Islamic Law Compilation.

In order to answer this question need to remember again the existence TAP MPRS XX/MPRS/1966 jo TAP MPR Number V/MPR/1873 jo TAP MPR Number IX/MPR 1978. According Attamimi types of state legislation on the basis of the MPR is:

1. Law and government regulation in lieu of law equivalent to constitutions.

<sup>21</sup>Moh. Mahmud MD, *Political Struggle and Law, First Printing*, (Yogyakarta, Gam Media, 1999), p.70.

<sup>22</sup>*Ibid*, p. 71.

<sup>23</sup>Sunaryati Hartono, *The Rule of Law Is It?* (Bandung, Alumni, 1976), p.7.

<sup>24</sup>Abdul Hakim Garuda Nusantara, *Indonesian Legal Politics*, Cetakan Pertama, (Jakarta, Yayasan LBII, 1988), p.18.

<sup>25</sup>SatjiptoRaharjo, *Some Thoughts on the Draft Inter-Discipline in National Law Developmen*, (Bandung, Sinar Baru, 1985), p.79.

2. Government Regulation
3. Presidential Decree
4. Ministerial Decree
5. Decree of the Head of the Department of Non-Government Agencies
6. Decision of the Director General of the Department of
7. State agency decision
8. Regulation of the First Level
9. Governor / Head of the Provincial
10. Level II Regional Regulation
11. Decree of the Regent and Mayor Head of Regional Level II.

By reference to TAP MPR such definite Islamic law compilation does not include the category of legislation, in the sense of writing. In one of his writings Attamimi Islamic law compilation asserts that the law is not written even in written form.

According to Attamimi, KHI is not a written law, but compiled in a book, therefore, to avoid misunderstanding, KHI should be written not with psal-section especially with the Book, Chapter and Section, but with less ample Arabic numerals, ari consecutive number 1, 2, 3, 4, and so on.<sup>26</sup>

Significance of Presidential Instruction No. 1 of 1991 on the compilation of Islamic law indicates that lead to the realization cues legal certainty. Act establishing the norms of religious instruction which still is philosophical non-statuaries be written religious norms that shape.

Legal certainty is characterized by the presence of the law in writing, the judge's ruling, realistic fact that a peremptory of society norm, either voluntary or imposed by state agencies. Formation law in legal tradition Continental European (Civil Law) conducted by agencies and law makers by legal experts. While the legal tradition (Common Law) establishment of law made by the judge's verdict in ending the judicial process. These principles to create a justice, order and society peace. This is not unlike the position and presence of Islamic law compilation in Indonesia legal system

Presidential Instruction No. 1 of 1991 About Compilation of Islamic law as a source of law Indonesia legal system. At the academic level, this study aims to deepen and develop the science of legislation. Whereas at the level of political practice as legal, research is expected to provide input to the agency authorized form of legislation in arrange the applicable state law, with the nomenclature reconstruct prevailing in Indonesia legal system.

Religious norms should be present in the composition hierarchy of the arrangement of state law as the national legal system of Indonesia based on Pancasila philosophical. Structuring (reconstruction and repositioning) applicable state law in Indonesia should be based on Pancasila (as Grundnorm) and the Constitution of the Republic of Indonesia Year 1945. Reconstruction and repositioning help communities make it easier to understand the state law, legislation and regulatory policies or quasi-regulation. Reconstruction and repositioning of state law is needed to create justice, order, prosperity and the rule of law. Reconstruction and repositioning of state law made by the legislature and the executive. So far, the basic law of hierarchy of laws in Indonesia has changed 4 (four) times and still contains flaws, therefore, needs to be reconstructed again on a hierarchy of laws and legislation which is based on the teaching of legal pluralism, because the character of the people of Indonesia are multi-cultural, multi-ethnic, multi-racial, multi-class and multi-religious, which has implications for the constitutional system and the enactment of the legal system.

Each of these types of laws in the legal system has its own function. From the various types of laws and regulations the charge material that needs to know is the law, because the law can reach fundamental rights or human rights in general. While other legislation or regulation is delegasian attribution rules or regulations of the law.

Legislation system is now based on Article 7 of TAP MPR No. III/MPR/2000 indeed been declared void. However, the position Compilation of Islamic Law, according to the author, still got the legitimacy of TAP MPR No. III/MPR/2000. Therefore, Article 1 Paragraph (2) of the MPR reads: "Sources of law consists of a source of written and unwritten law".

In accordance with the position, the law is a form of legislation that created and implemented to carry out the Constitution and MPR. Another characteristic of the law according to Kansil that is, legislation that is specific override laws of a general nature, applicable law later overturned previous legislation (which regulates certain).

One more thing to note, that the process of making this law in constitutional law in Indonesia should be subject to parliamentary approval, as the holder of legislative power jointly President. Therefore, any discussion of legislation

<sup>26</sup>A. Hamid S. Attamimi, *Dimensions of Islamic Law in the National Legal Systems*, First Edition, (Jakarta, Gema Insani, 1996), p.154.

involving the Parliament, must always be political nuances. This is reasonable when we remember, that the DPR is actually a representation of each political party that is the main.

Policies President issued Presidential Instruction No. 1 Year 1991 About Compilation of Islamic Law as a source of law in the legal system in Indonesia, the authority issued a Presidential Instruction essentially rests on taking power in wisdom, especially the wisdom of legal fields. The President issued instructions wisdom rooted in the Constitution of 1945 that Article 4 paragraph (1). The Indonesian government sovereignty in the Constitution the Constitution of the Republic of Indonesia Year 1945, the President has the power seat is very dominant as prerogative. Principle held by the founder of the State of Indonesia is Republic, leaving the kingdom ideas. System of sovereignty that still taken into account is theory of the sovereignty of God, the rule of law and the sovereignty of the people. The principle of the rule of law embodied in the notion of "rechtsstaat" or "the rule of law" and the principle of the rule of law. The principle of popular sovereignty is based on the Godhead, contained in the Preamble to the Constitution of the Republic of Indonesia on the fourth Alenia. Attribution authority is the authority inherent in a position, delegation of authority is the removal of an existing authority. Wisdom of the President issued Presidential Instruction No. 1 of 1991 to meet the requirements of Islamic law, because it still happens of legal vacuum applied to the Religious Courts as the demands of Article 23 paragraph (1) of Law No. 14 of 1970 as amended by Law No. 35 of 1999 on the Amendment of Law No. 14 of 1970 concerning provisions principal Judicial Power. Then converted into the Law No. 4 of 2004 converted into Law No. 48 of 2009 on Judicial Power. Article 50 paragraph (1) which requires each judge's decision to put the basic considerations are sufficient (motivating plight) to any case decided by a judge. Thus it can be found that is the background of Presidential Instruction No. 1 of 1991 is because of the existence of "emptiness" of Islamic law as the law of the material in the Religious Courts.

Muslim jurists when called Islamic legal term is the emergence of a difference in providing a sense of the term Shari'ah, Fiqh and Islamic law.

RifyalKa'bah<sup>27</sup> suggested that the third term is initially equally mean the road that comes from Allah. Therefore not surprising that the term is equated understanding with each other. But according to him, the development of Islamic history experienced three differentiations. Differentiation intended meaning is as follows:

1. *Shari'ah* terminology means God's provisions outlined in the provisions for the regulation of religious life of his servant. As God's provisions actually the *shari'ah* provisions include terms in religious belief and practice. However, by Muslim jurists that term is collapsible so it only includes provisions relating to acts of God (human deeds).
2. *Fiqh* is the result of understanding the texts in the absence of understanding of the texts. According *RifyalKaaba*, the number of schools in *fiqh* is the result of the involvement of the intellect and an analysis of the values derived from the revelation that allow different from each other.
3. Understanding of *shari'ah* Islamic law is formulated in the form of legal texts in the form of the constitution, laws and regulations that bind citizens.

The opinion of the *KaabaRifyal* almost the same as the opinion *BusthanulArifin*,<sup>28</sup> which among other things stated that the *shari'ah* is the word *lafdziazali* that only Allah knows the intention and purpose. *LafdziKalam* is the Qur'an and has been run purely by the Prophet. Thus, what has been practiced by the Prophet according to *ArifinBusthanul* is pure *Shari'ah* as intended by God. According to him, the *Shari'ah* is *qath'i*. While *fiqh* is the real implementation of the *Shari'ah* by the human mind that has been mixed with and *rasio*.<sup>29</sup> It's just that he does not explicitly provide an understanding of Islamic law although criticized at length bias term for Islamic law to identified it with the term *shari'ah* and *fiqh*.<sup>30</sup>

What was raised by two experts on the one hand at least represent the opinion which tended to separate clearly the meaning of the *Shari'ah*, *Fiqh* and Islamic law. On the other hand, as cited by *Amin Summa*<sup>31</sup> there are also opinions that want to separate clearly the meaning of these three terms. Meanwhile *Joseph Musa*, he uses the term *shari'ah* that can grow and flourish.<sup>32</sup>

<sup>27</sup> RifyalKa'bah, *FiqhYurisprodensi the Religious and the Fuqaha, (papers in 10 years the Religious Law)*, (Jakarta, Casindo, 1999), p.49.

<sup>28</sup> *BusthanulArifin, Institutionalization of Islamic Law in Indonesia*, (Jakarta, Gemalnsani Press, 1996), p.37.

<sup>29</sup> *Ibid*, p. 55.

<sup>30</sup> *Ibid*, p. 54.

<sup>31</sup> *Muhammad Amin Summa, Overview of Islamic FiqhYurisprodensi Against the Religious of the Implementation Act Peradilan Religion*, (Jakarta, Casindo, 1999), p.61

<sup>32</sup> *Muhammad Yusuf Musa, Islam a comprehensively study (over language oleh A.MalikMadanydanChamimIlyas)*, (Jakarta,

According to the author, in a third party is necessary to distinguish these terms in order to avoid confusion, but on the other hand the differences in substance may not need extreme line drawn. Therefore, the difference in the extreme meaning of these three terms only complicates the development of Islamic law in the implementation stage. The author agrees with BustanulArifin, that Islamic law only God knows its purpose. But the mention of *Shari'ah-qath'ias* something to be sterile in terms of changes according to the author, has been caught up in the extreme distinction that it will cause difficulties in understanding *Shari'ah* in the implementation stage of this. An example is whether the provisions of 2 (two) to 1 (one) (part of the heritage provisions of the male and female) *Shari'ah* or *Fiqh*, whether all the laws and regulations in Indonesia, in this case relating to the material laws of Islam, *Shari'ah* or *Fiqh*. Perhaps more precisely is what is expressed by Amin Summa on the distinction of these three terms. As a term, we need to distinguish according to the *shari'ah* jurisprudence as a norm that is commonly known. For example, if we read the essays Hanafi, Maliki, Shafi'i and Hanbali, HanafiFiqh it is called, Maliki Fiqh, FiqhShafi'i and HanbaliFiqh, not *shari'ah*Hanafi, and so on. But if we call something from the Qur'an and hadith al, then called the *Shari'ah* of Allah or the Prophet.

In connection with the problem of Islamic inheritance, under Islamic law there are good arguments from the Qur'an and the Hadith about the position of the heir to the heir to inherit, until now there is still the issue debated by jurists. Ijtihad in Islamic constitution, the problem of the position of heir to the heir, and a number of disagreements aplenty to interpretation. When finding the differences of opinion, then the implementation / tathbiq jurists concerned incorporate other factors to strengthen his opinion, factors such as a sense of justice, there is also a take manhaj analogical (qiyas).

The Qur'an has been silent on the matter of inheritance, that is, in surah Al-Baqarah verse 233, letter of Ali-Imran verse 85, Surat an-Nisa verses 7,8,11,12,13,14,33 and 176.<sup>33</sup> In the hadith also many set about inheritance law like Bukhari and Muslim hadith, hadith Buhari, who set about hijab-Mahjub, then in the books of *fiqh* (yellow book). In Indonesia, the Islamic inheritance law is set in the Compilation of Islamic Law which is the law of the Religious Courts material, the problem of inheritance only be arranged in chapters, so it still happens Islamic legal vacuum. As an example of the problem dawilArham, *Musharaka* problem, problem hijab-Mahjub, groups grandchildren heirs, heirs of brother groups, *asobahnasabiyah*.

In Islam there are four classes of the virtue of section heirs. Four groups according to the primacy of Islamic law are as follows:

1. Descendants, parents and spouses;
2. Brothers, descendants of siblings, parents and spouses;
3. Parents and spouses;
4. Husband or wife, parents of the parents or successors, first to the bottom line (the second line), then to the top of the line, then the line to the third side and thus seterusnya.<sup>34</sup>

Unification of inheritance law continued effort formation, but still difficult to resolve inheritance law pluralism in Indonesia, as well as for Muslims themselves who have issued Compilation of Islamic law. One of these circumstances is the result of a series of extremely complicated inheritance case arising from inter-personal relationships between the people who come from backgrounds that legal traditions differ.<sup>35</sup>

Religious Courts in desperate need of legal material such as compilation of Islamic law, because it relates the absolute jurisdiction to deal with matters of inheritance for the parties who are Muslims, as stipulated in Article 49 of Law No. 7 of 1989 as amended by Law No. 3 of 2006 and Law No. 50 Year 2009 on Religious Courts have jurisdiction, namely:

1. Religious Court duty and authority to examine decide and resolve matters first level between people who are Muslims in the field:
  - a. marriage
  - b. Inheritance, Probate and Grant were carried out by Islamic Law
  - c. Endowments and *Sadaqah*
2. Field of marriage referred to in paragraph (1) letter a is set out in or under the laws of the applicable law marriage.
3. Field of inheritance referred to in paragraph (1) letter b is the determination of who are the heirs, the inheritance determination, the determination of each section heir, and executing the division legacy.<sup>36</sup>

Rajawali,1988),p

<sup>33</sup>Departemen Agama R I, *AlhidayahTafsir Al Quran Tajweed Code Words Per Figures*, (TangerangSelatan : PT Kalim,2010), p.79,80,106.

<sup>34</sup>Hazairin, *National Kinship Legal*,(Jakarta, Tintamas, 1968), p. 16-17.

<sup>35</sup>RatnoLukito, Op. Cit. p.347.

<sup>36</sup>*Legislation set of Environmental Justice In Religious*, (Jakarta, Yayasan Al-Hikmah), p.254.

Since the release of Presidential Instruction No. 1 of 1990 on the compilation of Islamic law and followed up with the Minister of Religious Affairs No. 154 of 1991, the provisions concerning the definition of Islamic Inheritance Law previously scattered in various book of *fiqh*, to refer to the compilation of Islamic law, as specified in section 171 (a):

Inheritance Law is the law that governs inheritance rights of ownership (*tirkah*) heir, determine who is becoming heirs, and how their share.<sup>37</sup>

KHI that is currently used as a law applied by the religious court judges only consists of three books. Book I of the marriage which comprises 16 Chapters and 170 Articles; Book II of Inheritance comprising Chapters 6 and 44 of Article (Article 171-214) and Book III of the donation which consisted of 5 Chapters and 113 Articles (from section 215-228). The provisions in the article largely been regulated in the legislation in force as the marriage has been regulated by Act No. 1 of 1974 and the donation as stipulated in Government Regulation No. 28 of 1977. Both of these provisions are still valid today. While the law of inheritance still have to compete with existing laws, namely the West inheritance law as stipulated in the Civil Code and customary inheritance law.

From the scope of legal materials contained by KHI as exists today, obviously not possible to say that KHI is a representation of the overall Islamic law there, which of course broader than just the issue of marriage, inheritance, and *waqf*. In case everyone knows Islamic law also includes criminal law (*jinayat*), civil law in the broad sense (*Muamalat*), such as buying and selling (trading), agreement. And, to be noted are the three aspects of the law that is set in KHI and even then seems to still not cover all the rules of Islamic marriage laws, inheritance, and *waqf* in Islam. For example, in KHI has not set completely on *nushuz*, *fasakh*. In the example of inheritance has not been set on the positions *dzawilArham*, yet they are firmly in the Qur'an and of course, yet also set the contemporary issues related to inheritance law.

Thus the existing KHI is associated with aspects of Islamic law there is only a small part of the Islamic legal aspects.

#### 4. Conclusion

Based on the results of the study as described in the previous chapters, a conclusion can be stated as follows:

1. Compilation of Islamic law as the law of the material in the Religious Court did not set a problem *dawilArham*, *Musharaka* problem, problem *hijab-Mahjub*, groups grandchildren heirs, heirs of brother groups, *asobahnasabiyah*, and other inheritance issues in detail. The substance of Islamic Law Compilation of Islamic inheritance law is very limited, so it cannot provide certainty, fairness and expediency it is because of the legal vacuum in the Compilation of Islamic Law, results in disparity verdict.
2. The existence of a new Islamic Law Compilation status of Presidential Instruction No. 1 of 1991, as the law courts for the material substance regulating inheritance problem, not included in the legal system in Indonesia, so it does not have a strong position, and have no sanctions for religious court judges that does not apply.

#### 5. Conclusion

Of the conclusions presented the following recommendations:

1. Due Inheritance Law in Islamic Law Compilation incomplete and to avoid any legal vacuum as well as to obtain legal certainty, justice and expediency, and to avoid disparities decision in a case similar to the different religious court judges, Compilation of Islamic Law should be completed chapters governing inheritance.
2. Appealed to the Government of the Republic of Indonesia and House of Representatives, that a new compilation of Islamic law status of Presidential Instruction No. 1 of 1991, which has become the guidelines on religious court judges across Indonesia in examining and deciding cases relating to inheritance, especially inheritance brother heir, then the Executive (President) with the Legislature (Parliament) should soon to strive for making the Instruction into law.

<sup>37</sup>Religious Affairs Directorate General of Islamic Institutional Development, Presidential Instruction No. 1 of 1991 Compilation of Islamic Law, (Jakarta, 1997/1998), p.77.

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