
Juridical Disparity in Interfaith Inheritance Law: A Comparative Study Between Islamic Law and Positive Law in Indonesia

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ARTICLE INFORMATION

History of Article:

Received: April 17, 2025

Accepted: May 5, 2025

Available Online: June 25, 2025

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ABSTRACT

The plurality of religions in Indonesia presents significant challenges to the multidimensional implementation of the existing inheritance law. A particularly complex issue arises when heirs hold differing religious beliefs, which may occur due to interfaith marriages among their parents or individual conversions by the heirs themselves. This divergence in faith introduces a dualism of norms, as it contrasts the exclusive normative provisions of Islamic law with the inclusive approach espoused by Indonesian positive law, which seeks to promote substantive justice. This current research aims to investigate juridical disparities within interfaith inheritance law through a normative and comparative juridical approach. The findings suggest that the absence of an integrated legal framework leads to legal uncertainty, creating interpretative gaps that adversely affect individual civil rights. Consequently, this research advocates for the reformulation of national inheritance law arrangements and policies, emphasizing a foundation of sustainable and equitable legal pluralism.

Keywords: Interfaith Inheritance Law; Islamic Law; Positive Law; Pluralism of Law

A. INTRODUCTION

Indonesia's multireligious society presents numerous complex legal issues and dynamics, particularly in the realm of inheritance law. The discussion of inheritance law will be a sensitive topic because it touches on faith, civil rights, and the values adopted within a family. Discussion of a similar context regarding religious plurality is not only a sociological reality but also an epistemological challenge in the formation and implementation of national law.

A significant problem raised is the issue of interfaith inheritance. Inheritance law is often closely tied to religion or existing civil rights. However, in the discussion of research, this opportunity will mention carefully the issue of inheritance distribution or interfaith inheritance law. This will be problematic in itself, as it will lead to legal consequences that are not uniform and have the potential to undermine the principles of justice and legal certainty. However, Sajipto Rahardjo asserts that there is a law for society, not society for the law.¹

Islamic law is one of the legal systems that coexist with Indonesian positive law, as well as with the national legal framework, through the Compilation of Islamic Law (KHI). This compilation explicitly states that religious differences are one of the obstacles to establishing a legal relationship of inheritance.² The issue at hand has a solid foundation, as it is directly derived from the Qur'an and Hadith. This perspective highlights the exclusivity of inheritance rights among fellow Muslims. On the other hand, Indonesian law, which is rooted in continental European legal principles, does not explicitly prohibit inheritance relationships between individuals of different faiths. Additionally, the Supreme Court has issued rulings that reflect a more inclusive approach.

This disparity results in a disconnect between the normative goals of religious law and the practical needs of a pluralistic society. Islamic law distinctly emphasizes a separation between Muslims and non-Muslims in matters of inheritance.³ This is clearly stated in Surah Al-Kafirun (109:6) which states:

لَكُمْ دِينُكُمْ وَلِيَ دِينِ

Means: "For you, your religion, for me, my religion."

Islamic law aims to maintain a strict separation between Muslims and non-Muslims in matters of inheritance, while positive law seeks to bridge that divide. In

¹ Sajipto Rahardjo, *Ilmu Hukum*, ed. Awaludin Marwan, Cetakan Ke (Bandung: Citra Aditya Bakti, 2021).

² Fitriyaningsih Marfuah, Nurul Afifah, and Ziadatus Salamah, "Penggunaan Wasiat Wajibah Bagi Ahli Waris Beda Agama Perspektif Hukum Islam," *NALAR FIQH: Jurnal Hukum Islam* 14, no. 1 (June 30, 2023): 21–29, <https://doi.org/10.30631/nf.v14i1.1305>.

³ Safira Rahmi Khouw and Sabri Fataruba, "Kajian Hukum Islam Tentang Wasiat Wajibah Kepada Ahli Waris Beda Agama," *TATOH: Jurnal Ilmu Hukum* 1, no. 11 (2022): 1120–29.

Indonesia, positive law is grounded in principles of equality, non-discrimination, and the protection of human rights. These contrasting approaches highlight differences in legal methodology and underscore fundamental distinctions in how law, religion, and social justice are understood.

Inheritance law in Indonesia operates as a tripartite system, comprising Islamic, customary, and civil laws of inheritance.⁴ All three concepts have strong historical, cultural, and philosophical roots. In this context, the application of inheritance law largely depends on the identity of the legal subject and the legal approach chosen by the parties involved. Legal uncertainty becomes unavoidable, especially in families with members from differing religious backgrounds.

The practical implementation of interfaith inheritance law, often lacking explicit and uniform regulations, results in numerous interpretations that can be contradictory among judicial institutions. This situation can result in substantive injustices for individuals who do not fit into the categories recognized by specific legal systems. Furthermore, religious norms tend to be rigid and binding for their adherents.

To address this dilemma, a compromise can be sought through concepts such as mandatory wills. In this case, normative reconciliation aims to provide a solution. However, this approach remains fragmented and has not adequately addressed all existing social dynamics. Therefore, there is a pressing need for legal reform in the form of national codification that harmonizes the pursuit of justice, respect for religious beliefs, and citizenship rights.

B. RESEARCH METHODS

This research employs a normative legal approach using secondary data collection techniques complemented by primary data.⁵ Primary data is obtained through the necessary search/observation of inheritance property distribution to those heirs of different religions. Additionally, searches and observations are conducted on the internet, and secondary data is collected as supporting evidence in legal materials. This research aims to determine the reality in the community regarding the distribution of inheritance property in religious differences. This is adjusted to provide benefits for parties who experience similar issues, and how positive law in Indonesia seeks to address such problems. A specific descriptive analytical technique involves the disclosure of rules and regulations related to the legal theory being researched. This is the approach taken in the community implementation of the study's object.

⁴ Herlina Nur Afida, "Pemberian Wasiat Wajibah Pada Ahli Waris Non-Muslim Perspektif Hukum Progresif," *ISLAMIKA* 5, no. 1 (2023): 359–74.

⁵ Zainuddin Ali, "Metode Penelitian Hukum, Jakarta," *Sinar Grafika (Ed. 1, Cet). Sinar Grafika*, 2016.

C. RESULTS AND DISCUSSION

1. Juridical and Theological Complexities in Interfaith Inheritance

Interfaith inheritance in Indonesia is not just a problem of normative law; it also involves the sociological, theological, and psychological aspects of individuals and communities. At the practical level, the family relationships among adherents of different religions reflect the undeniable sociological reality of Indonesia's religious pluralism.

Juridically, these relationships face stagnation due to the rigidity of legal norms, particularly from the perspective of Islamic law, which does not accommodate the distribution of inheritance to non-Muslim heirs. According to a Hadith from the Prophet Muhammad, "*la yarith al-muslim al-kafir wa la al-kafir al-muslim*" (HR. Bukhari and Muslim), Islamic law establishes that religious differences serve as a barrier to inheritance. Strong theological and political justifications historically back this doctrine.⁶

However, a normative-theological approach encounters several epistemological challenges in contemporary society. This approach emphasizes substantive justice and the principles of human rights. The *maqashid al-shariah* framework can serve as a potential hermeneutical link for the reinterpretation of religious texts that were initially exclusive, allowing them to become more inclusive.⁷ It is permissible as long as it does not contradict the main objectives of Shariah, which include the preservation of life (*high al-naifs*), the protection of wealth (*high al-maal*), and the safeguarding of honour (*high al-bird*). This perspective argues that granting inheritance to non-Muslim children or relatives can be seen as a realization of family justice and the maintenance of property rights. However, it is often viewed as a theological violation. This approach supports the idea of mandatory wills as an alternative solution within Islamic jurisprudence (*fiqh*).⁸

The Supreme Court has paved the way for the recognition of compulsory probate through Decision No. 368/K/AG/1995. This landmark ruling brought significant changes to the national legal perspective on religious pluralism within families. As a result of this decision, there has been an increase in inheritance

⁶ Faiz Muhammad Zkwan and Tajul Arifin, "PERBANDINGAN WASIAT WAJIBAH DALAM WARIS BEDA AGAMA MENURUT PASAL 832 KUHPERDATA DAN HADIS RIWAYAT BUKHARI" 4, no. 10 (2024).

⁷ Mukhammad Khapni, "IMPLEMENTASI WASIAT WAJIBAH UNTUK AHLI WARIS NON MUSLIM DITINJAU DARI HAK ASASI MANUSIA (Studi Analisis Putusan Nomor 990/Pdt. P/2022/PA. Cms)" (S1-Hukum Keluarga, 2023).

⁸ Mohammad Ibrahim Sidik Soulisa, Rory Jeff Akyuwen, and Barzah Latupono, "Wasiat Wajibah Bagi Ahli Waris Yang Bukan Beragama Islam," *TATOHI: Jurnal Ilmu Hukum* 4, no. 10 (2024): 834–42.

applications based on wills for children of different religions in various religious courts. However, this judgment has not yet become a binding national policy.⁹

This situation is distinct from the regulations governing civil inheritance law. The Civil Code does not impose a formal ban on interfaith inheritance. Instead, it focuses on biological and legal relationships within families, rather than on religious affiliations, as the basis for determining the validity of inheritance. This approach leads to inconsistencies in how the law is interpreted and applied between religious courts and general courts.¹⁰

The lack of a national regulation that integrates inheritance laws in a multireligious context has led to legal fragmentation and inconsistencies in court decisions. In several cases, judges in religious courts have rejected inheritance claims from non-Muslim heirs. In contrast, general courts have accepted these claims based on the principles outlined in the Civil Code. This situation not only highlights a legal vacuum but also creates legal uncertainty, as theorized by H.L.A. Hart in "The Concept of Law," where legal norms fail to meet the actual needs of society.¹¹

The sociological aspect indicates that Indonesia's multicultural society seeks a legal system that enforces norms beyond a purely formalistic approach. It should also promote social justice rooted in local values and humanity. Legal pluralism emphasizes the importance of recognizing the diversity of legal systems and alternative dispute-resolution mechanisms, striving for a balance between religious values and state values. Consequently, religious differences should not act as a complete barrier in family law matters. Instead, these differences present an ethnic and constitutional challenge that needs to be addressed through a reconstruction of national law.

The concept of justice, as articulated by Rawls, emphasizes the principles of fair equality of opportunity and the difference principle. These can serve as a moral framework for formulating interfaith policies. According to Rawls, a policy is fair if it treats disadvantaged individuals equitably. In this context, non-Muslim heirs often find themselves in a vulnerable position and face systemic exclusion. Thus, it

⁹ Eliana Eliana, "TINJAUAN FIQH MAWARITS TERHADAP PUTUSAN MAHKAMAH AGUNG NOMOR 16 K/AG/2010 TENTANG HAK WARIS ISTERI YANG BERLAINAN AGAMA DENGAN SUAMI," *Jurnal Hukum Keluarga Islam*, 2021.

¹⁰ Budi Hariyanto, "Tinjauan Yuridis Terhadap Pembagian Harta Waris Beda Agama Menurut Kitab Undang Undang Hukum Perdata (Kuh Perdata) Dan Kompilasi Hukum Islam (KHI)," *IUS* 8, no. 2 (January 17, 2021): 28–42, <https://doi.org/10.51747/ius.v8i2.688>.

¹¹ Yuda Widisia Asmoroaji and Destri Budi Nugraheni, "Dasar Pertimbangan Hakim Pengadilan Agama Tidak Memberikan Wasiat Wajibah Kepada Kerabat Beda Agama Berdasarkan Asas Egaliter (Studi Putusan Nomor 361/Pdt.G/2019/PA.Sidrap Dan Putusan Nomor 832/Pdt.G/2023/PA.Bms)" (Universitas Gadjah Mada, 2024).

is essential to reinterpret Islamic law and recodify national inheritance law in a way that harmonizes both to create a responsive and compassionate legal system.

The normative framework for strategic recommendations includes revising the Compilation of Islamic Law, which currently adopts a rigid interpretation of religious exclusivity in inheritance matters. Additionally, there is a need for the issuance of a Supreme Court Regulation (PERMA) or a National Inheritance Law that is inclusive and pluralistic. Continuous education for judges and legal practitioners on legal pluralism and contemporary fiqh hermeneutics is also necessary. Lastly, enhancing public awareness about legal rights within interfaith families can help prevent conflict and marginalization.

These efforts will strengthen the interdisciplinary perspective among fiqh, positive law, and justice theory. This approach will not only reorganize the inheritance system to make it more contextually relevant but will also contribute meaningfully to the realization of the Pancasila legal state framework.

2. Indonesian Positive Law and Normative Inclusivity

Positive law, often referred to as current law, is a product of the integration of various legal systems in Indonesia, which include customary law, Western law, and Islamic legal principles. Customary law has a longstanding and significant history in Indonesia, having been integrated into the nation's legal framework by the early 20th century.¹² This legal tradition reflects the customs, practices, and beliefs of local communities and has contributed to the establishment of social order over the centuries. Additionally, Islamic law has played a crucial role in shaping the Indonesian legal landscape since the early kingdoms, underscoring its significance in the lives of many Indonesians who adhere to Islamic principles.

The introduction of Western law marks a crucial chapter in Indonesian history, beginning in 1602 with the establishment of trading operations by the Dutch East India Company (VOC). Initially, these Western legal principles applied exclusively to Dutch and European nationals, thereby entrenching a colonial legal system that delineated rights between colonizers and the indigenous population. However, over time, these legal frameworks began to extend their influence to the local populace. A growing number of regulations and legal practices began to encompass Indonesians, particularly those involved in economic activities, where adherence to Western law became vital for participating in trade and commerce.

The coexistence and interaction of these legal systems have given rise to a complex legal environment. The relationship among customary law, Islamic law, and Western law has contributed to the development of a distinct legal identity in Indonesia, reflecting the country's rich cultural diversity and historical

¹² W. A. Mustofa, *Hukum Islam Kontemporer* (Sinar Grafika, 2009).

transformation. This evolution continues to influence contemporary judicial practices and legal scholarship within Indonesian society.

Since its initial introduction to Indonesia, Islamic law has undergone significant evolution, transforming into a vibrant and dynamic doctrine that resonates both symbolically and practically within Indonesian society. This development is not solely the result of the country's majority Muslim population. Rather, in various regions, Islamic law has been warmly embraced as a cherished tradition, often regarded with deep respect and reverence.

As a consequence of this cultural integration, Islamic law has become intricately woven into the fabric of daily life for many Indonesians. Its enduring presence can be attributed to its inherent flexibility and adaptability, allowing it to meet the diverse needs and circumstances of local communities. This adaptability is crucial, as it underscores the capacity of Islamic law to evolve in response to shifting social dynamics and address contemporary issues confronting society.¹³

While the ultimate authority is anchored in the decrees of Allah, the legal frameworks established by Islamic law have proven capable of transformative adjustments, reflecting the values and realities of modern life. This ongoing evolution emphasizes the importance of reinterpretation and adaptive practices in ensuring the law remains relevant and respected among the people.¹⁴

However, the law faces challenges in accommodating religious diversity, particularly in the sphere of inheritance. One significant issue is the difference in religion between the testator and the heir. In Islamic law, this religious discrepancy has been deemed a barrier to inheritance (*mani al-birth*). It is clearly articulated in a Hadith of the Prophet Muhammad (SAW), which states: "A Muslim does not inherit from a disbeliever, and a disbeliever does not inherit from a Muslim" (HR. Bukhari and Muslim). The principles regarding inheritance are reflected in the Compilation of Islamic Law (KHI), specifically outlined in Article 171 letter c, which asserts that only Muslim heirs who are not legally barred may inherit.¹⁵

However, the practice of positive law in Indonesia differs significantly in this regard. There are ongoing efforts to accommodate a more inclusive social reality. One of the mechanisms employed is the concept of mandatory wills. This approach allows for the possibility of bequeathing property to non-Muslim relatives through a mandatory will. This was established in Supreme Court Decision Number 368/K/AG/1995, which states that the court grants a share of the inheritance to a

¹³ Ainun Najib, "Legislasi Hukum Islam Dalam Sistem Hukum Nasional," *Istidlal: Jurnal Ekonomi Dan Hukum Islam* 4, no. 2 (2020): 116–26, <https://doi.org/10.35316/istidlal.v4i2.267>.

¹⁴ Sirajuddin, *Legislasi Hukum Islam Di Indonesia* (Pustaka Pelajar, 2008).

¹⁵ Sindi Luchia Saldi and Devianty Fitri, "Pembagian Hak Waris Antara Pewaris Berbeda Agama Dengan Ahli Waris," *Recital Review* 5, no. 2 (2023): 324–43.

non-Muslim child of a Muslim testator via a mandatory will.¹⁶ This decision highlights the importance of achieving substantive justice and preventing discrimination based on religion in the division of inheritance. It further underscores the need to revise laws and regulations to promote fairness and social harmony within religiously diverse families.

The next point to discuss is the principle of human rights, which emphasizes the guarantee of equality before the law and the elimination of all forms of discrimination. One way the Indonesian government can address the existing legal gap is by allowing the distribution of inheritance from Muslim heirs to non-Muslim heirs through a mandatory testament method. The various issues stemming from diversity support the legal system in Indonesia, which demonstrates a high degree of normative flexibility.

Applying the distribution of inheritance with this mandatory will is a step used to grant rights to parties not included in the list of legally determined heirs, while still respecting the existing shares. However, it should be noted that applying this mandatory will still cause problems or challenges from a legal and social perspective. Discussing the legal side itself, several judges in religious courts ultimately refuse to be able to apply the mandatory will to non-Muslim heirs. This is not without a definite reason or argument. However, some judges in religious courts believe it contradicts the provisions of Islamic Sharia and KHI.

This issue has intensified as the Supreme Court has set a precedent for inconsistent implementation at the level of religious courts. Therefore, there must be an effort to increase understanding and legal awareness among law enforcement officials regarding the importance of normative inclusiveness in inheritance law. In the same context, the hermeneutic approach to Islamic law, based on *maqasid al-shari'ah*, becomes highly relevant. This approach emphasizes that the purpose of Sharia is to help realize the benefits and justice that exist in society. The granting of this mandate is viewed as an effort to achieve this goal while upholding the fundamental principles of Sharia.¹⁷ The mandatory will, in the context of interfaith inheritance, reflects an expansion of Islamic law's principles to adapt to social realities.

3. Challenges of Implementation and Legal Uncertainty, Along with Comparative Analysis and Opportunities for Harmonization

The implementation of positive law in Indonesia involves Islamic law as it exists within the community, along with the application of the Compilation of

¹⁶ Ahmad Baihaki, "Penerapan Wasiat Wajibah Dalam Putusan Penyelesaian Sengketa Waris Beda Agama Ditinjau Dari Perspektif Hukum Islam," *Kritha Bhayangkara* 15, no. 1 (2021): 117–42.

¹⁷ Baihaki.

Islamic Law. This section addresses the Compilation of Islamic Law, which stipulates that heirs must be Muslims. As a result, differences in religion between the heirs and the testator can obstruct the distribution of inheritance. However, as previously noted, the Supreme Court has developed jurisprudence regarding inheritance division in cases of religious differences through the use of mandatory testament methods. Supreme Court Decision No. 368/K/AG/1995 should be regarded as a significant milestone in the judicial resolution of inheritance division issues.¹⁸

The decision issued by the Supreme Court is justified and aims to provide a fair opportunity for non-Muslim heirs, promoting substantive justice. However, despite the provision for distributing inheritance to non-Muslim heirs, there is still legal uncertainty. Some courts in Indonesia have not consistently applied this decision.¹⁹ The current legal situation regarding inheritance for non-Muslim heirs has created a significant legal vacuum and uncertainty. To address this issue, it is essential to support efforts aimed at increasing understanding and legal awareness among law enforcement officials and the wider community about the importance of inclusivity in inheritance law. Additionally, it is crucial to harmonize the rulings of the Supreme Court with the Compilation of Islamic Law to ensure legal certainty.

Changes in societal values regarding justice have prompted the Supreme Court to adopt a more inclusive approach to its jurisprudence. However, challenges persist, particularly at the level of religious courts.

Therefore, the implementation issues and legal uncertainties related to interfaith inheritance in Indonesia require urgent attention from various stakeholders. Legal reforms that take into account the diverse social realities and ensure substantive justice for all Indonesian citizens, regardless of their religious beliefs, are essential in establishing a fair legal system.

D. CONCLUSION

The complexities surrounding inheritance law, including the distribution of inherited property, become particularly contentious when there are no regulations governing these matters. The presence of diverse perspectives and religious beliefs in Indonesia further complicates the resolution. According to the Compilation of Islamic

¹⁸ Alip Pamungkas Raharjo and Elok Fauzia Dwi Putri, "Analisis Pemberian Wasiat Wajibah Terhadap Ahli Waris Beda Agama Pasca Putusan Mahkamah Agung Nomor 331 K/Ag/2018," *Jurnal Suara Hukum* 1, no. 2 (September 30, 2019): 172, <https://doi.org/10.26740/jsh.v1n2.p172-185>.

¹⁹ Hopiah Ramdani Subagja Rasyid Nida'ul, "PEMBERIAN HARTA KEPADA AHLI WARIS BEDA AGAMA MELALUI WASIAT WAJIBAH PERSPEKTIF TM HASBI ASH SHIDDIEQY" (Studi Kasus Putusan Hakim Pengadilan Agama Surabaya Nomor 3531/Pdt. P/2022/PA. Sby)" (Universitas KH Abdul Chalim, 2024).

Law and supported by authentic hadiths, differing religious views are significant obstacles in inheritance and marriage relationships.

This uncertainty was eventually addressed by a Supreme Court ruling that permitted inheritance across different religions. This decision was made after careful consideration of human rights and the pursuit of substantive justice. However, the implementation of this ruling has not been consistent across courts in Indonesia, leading to a confusing dual legal system for the community.

To address this issue, there is a pressing need for legal reform, which should include revisions to the KHI (Compilation of Islamic Law) and the harmonization of Supreme Court jurisprudence. Such reforms would help establish legal certainty and ensure just outcomes, serving as a strategic step to resolve the normative conflicts between Islamic and national law.

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