

Legal Protection of the Rights of Non-Muslim Biological Children in the Distribution of Islamic Inheritance

Fitri Dwi Rostanti

Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia,
E-mail: fdrostanti@gmail.com

Abstract. *Indonesia, as a pluralistic nation, faces complex challenges in the implementation of inheritance law, particularly regarding the protection of the rights of non-Muslim children to inherit property from Muslim parents. This study analyzes the legal status of non-Muslim children from the perspective of Islamic inheritance law applicable in Indonesia, examines available legal protection measures, and evaluates the implications of Supreme Court jurisprudence for the unification of national inheritance law. This study uses a normative juridical method with a statutory and case-based approach. Data were collected through document studies, including primary legal materials in the form of laws and Supreme Court decisions, as well as secondary legal materials in the form of literature and scientific journals. Data analysis was conducted qualitatively using the theories of legal certainty, public interest, and legal protection. The research results show that: (1) Based on Article 171 letter c of the Compilation of Islamic Law (KHI), non-Muslim children do not have legal status as heirs of a Muslim testator because religious differences constitute a barrier to inheritance. (2) Legal protection for non-Muslim children can be achieved through lifetime gifts, ordinary will be limited to one-third of the estate, and mandatory will be based on a judge's decision. The Supreme Court, through various decisions, has made a legal breakthrough by applying the concept of mandatory wills to non-Muslim heirs. (3) The Supreme Court's jurisprudence has important implications for the unification of national inheritance law by creating uniformity in decisions and providing legal certainty. This research concludes that a mandatory will is a progressive legal solution to achieve substantive justice for non-Muslim children.*

Keywords: *Inheritance Law; Mandatory Wills; Non-Muslim Children.*

1. Introduction

Islam is a comprehensive, universal, and flexible religion in facing the various dynamics of social change in a multicultural society. Social change and interaction between religious communities in Indonesia directly influence the development of family law, particularly the existence of interfaith inheritance. In real life, kinship and blood ties often transcend religious boundaries. A legal gap (*ius operatum*) arises when Islamic substantive law textually prohibits mutual inheritance due to religious differences, while sociological facts demonstrate the urgent need to protect the civil rights of children who remain devoted to their parents. Kastury and Munsharif (2020) emphasize that contemporary legal instruments are absolutely necessary to resolve property distribution disputes for non-Muslim heirs in accordance with the principles of justice.

The issue of inheritance due to the death of a person (*muwaris*) basically transfers the ownership rights of the inherited property to the living (heirs). In classical Islamic law, religious differences are categorized *asmawani* al-irtsior an obstacle to the validity of inheritance rights based on the hadith of the Prophet Muhammad (peace be upon him). Positive regulations in Indonesia, through Article 171 letter c of the Compilation of Islamic Law (KHI), also explicitly confirm this limitation, requiring heirs to be Muslim. This normative provision has serious implications, such as the loss of civil rights for a non-Muslim biological child to receive a share of the inheritance of their Muslim parents. The absence of written protection in the KHI creates a legal vacuum that triggers uncertainty and injustice in the social order.

The development of inheritance law in Indonesia has undergone a very progressive shift through the judicial *ijtihad* process. Court judges are no longer merely mouthpieces of the law (*bouche de la loi*), but rather actively carry out legal discoveries (legal regulation) in order to explore the values of justice that exist in society. One instrument used to break through the textual rigidity of interfaith inheritance law is the expansion of the concept of mandatory wills. Mandatory wills, which were originally limited to adopted children and adoptive parents in Article 209 of the Compilation of Islamic Law, are now generally *de facto* applied by the Supreme Court to non-Muslim heirs. Purnawan and Adillah (2014) argue that every civil law policy must be based on a basis of equal justice to promote the welfare and stability of family relationships.

The application of *wajibah* wills for non-Muslims by Indonesia's highest judicial institution is based on the view that Islam is a religion that protects, is moderate, and does not discriminate against humanity. The Supreme Court holds that strong blood ties between children and parents should not be completely severed economically simply because of differences in faith. These interfaith inheritance disputes require serious attention within the national legal system, given that Indonesia does not yet have a unified inheritance law that applies uniformly to all citizens. This complexity is further exacerbated by the continued existence of three inheritance law systems operating side by side in Indonesia: Islamic Inheritance Law, Customary Inheritance Law, and Western Civil Inheritance Law (KUHPerdata).

This study aims to examine and evaluate how the mandatory will instrument is implemented for non-Muslim heirs as a form of judicial *ijtihad* and a progressive legal breakthrough. Comprehensive regulatory arrangements and a comprehensive understanding of jurisprudence are necessary to prevent sharp disparities in decisions within the judiciary. Without a clear concept and direction for legal unification, the enforcement of interfaith inheritance law will continue to be caught in a conflict between formal legal certainty and substantive legal justice. Therefore, the formulation of a standard legal formulation regarding the protection of the rights of non-Muslim children is absolutely necessary for the benefit of the community. This study aims to analyze the legal status of non-Muslim children from the perspective of Islamic inheritance law applicable in Indonesia and evaluate the implications of Supreme Court jurisprudence for the unification of national inheritance law.

2. Research Methods

This research uses a normative legal research type by examining library materials or secondary data. The approach method used is the statutory approach (*statute approach*) and case approach (*case approach*). The data collection method was carried out through document studies of primary legal materials in the form of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law and various related Supreme Court decisions, as well as secondary legal materials such as textbooks and scientific journals. The data analysis method used was qualitative analysis, where the data was systematically described, connected, and interpreted using Imam Al-Ghazali's Theory of Benefit, Legal Protection Theory, and Legal Certainty Theory to answer the legal issues studied.

3. Results and Discussion

3.1. Construction of Islamic Legal Positivism and the Principle of Islamic Personality

Based on the provisions of positive Islamic law that are applicable and binding nationally in Indonesia, particularly those contained in Book II of the Compilation of Islamic Law (KHI) concerning Inheritance Law, the position of non-Muslim children is expressly stated as not fulfilling the criteria as sharia heirs, both in their capacity as recipients of definite portions (*ashab furudh*) and the recipient of the remaining assets (*ashabah*). Article 171 letter c of the KHI defines very specifically that an heir is a person who at the time of death has a blood relationship or marital relationship with the testator, is Muslim, and is not prevented by law from becoming an heir.

With the formulation of these norms, KHI places the principle of Islamic personality as an absolute requirement (*condition sine qua non*) in determining a person's legal capacity to receive *tirkah* (inheritance). Differences in religion between the testator and the heirs (*ikhtilaf ad-din*) is positioned as an element *mawani' al-irts* (The most fundamental (barrier to inheritance)). This status automatically nullifies the right to mutual inheritance under formal legal law, without exception. This provision is not without reason, but rather deeply rooted in classical legal texts (*turats*) compiled by earlier jurists, which philosophically aimed to tightly close the gaps in asset transfers between faiths in order to maintain the purity of the circulation of property ownership and keep it within the economic corridors and authority of the Muslim community.

When examined further from a legal genealogical perspective, the construction of Article 171 letter c of the Compilation of Islamic Law (KHI) reflects the absolute adoption of the Shafi'i school of jurisprudence, the dominant school of thought adopted by Muslims in the Indonesian archipelago. This school views religious similarity as a non-negotiable demarcation line in Islamic civil law. However, the sociological implications of the rigid application of this article in Indonesia have caused significant public unrest, particularly in pluralistic families with multi-religious members.

Doctrinally and historically, the rejection of the status of heir for non-Muslims refers directly to the authentic hadith narrated by Imam Bukhari and Imam Muslim which literally states: "A Muslim has no right to inherit the property of an infidel, nor does an infidel inherit the property of a Muslim." (Narrated by Bukhari and Muslim). Conventional jurisprudence (the majority of scholars) interprets the text of this hadith in a textually rigid, black-and-white manner, thus not opening up any room for negotiation, contextualization, or humanitarian compromise in the matter of the distribution of *tirkah*.

The legal consequences of this rigidity are the emergence of substantive injustice, often felt glaringly and heartbreakingly within the biological family. As a sociological illustration, it is not uncommon for a non-Muslim biological child to have devoted his entire life to serving, paying for medical treatment, caring for, and supporting his Muslim parents through their twilight years. However, under formal Islamic inheritance law, the child suddenly loses all civil rights to the assets inherited from his parents simply because of theological differences. On the other hand, distant Muslim relatives, who may never have cared for the heir, have the right to claim the assets. This tragic situation triggers a sharp clash of values between the *maqasid ash-sharia* (the objectives of Islamic law), which uphold justice and family morality, and dogmatic adherence to written inheritance law texts.

The normative inequality in Indonesia's Islamic inheritance law system becomes even more apparent, even paradoxical, when compared with the Compilation of Islamic Law's treatment of adopted children. The Compilation of Islamic Law, through a breakthrough in Article 209, explicitly provides space for adopted children and adoptive parents who are not related by blood to still receive a share of the inheritance. This right is granted through an innovative legal instrument called *mandatory will*, with a maximum limit of one third (1/3) of the total inheritance.

This discriminatory regulatory discrepancy has sparked tremendous academic anxiety among Islamic legal thinkers. This situation ultimately led to the emergence of the courage to undertake *ijtihad* new law among the Supreme Court justices of the Republic of Indonesia. Through various jurisprudence (such as Supreme Court Decision No. 16 K/AG/2010 and subsequent decisions), the Supreme Court began to make legal breakthroughs (*rechtsvinding*) by giving a portion of inheritance to biological children or non-Muslim spouses not as heirs, but through a mechanism of granting inheritance. *mandatory will* This progressive step was taken solely to find a jurisprudential solution that is more just, humane, and brings benefits, without having to violate the textual prohibition of the hadith regarding the prohibition of inheriting legally. *lineage*.

In a macro-level analysis of the principle of Islamic personality in the KHI, it is clear that Islamic inheritance law in Indonesia still has residues or is heavily influenced by the concept of classical Islamic statecraft from the medieval era (*Dar al-Islam* And *Dar al-Harb*) This classical concept indeed designs a social structure that differentiates civil rights and legal treatment of citizens dichotomously based on religious identity.

In fact, the current geopolitical reality of the state places Indonesia as a unitary state in the form of a republic (a state based on law/*Rechtsstaat*) which is based on the philosophy of Pancasila and the constitution of the 1945 Constitution.

Within the framework of the 1945 Constitution, especially Article 28D paragraph (1), it is expressly mandated that every citizen has the right to recognition, guarantees, protection and certainty of fair law as well as equal treatment before the law (*equality before the law*), without SARA discrimination.

3.2. Legal Protection of the Rights of Non-Muslim Children Through the Obligatory Will Instrument and the Jurisprudential Implications of the Supreme Court

In order to provide balanced legal protection and realize substantive justice that is able to transcend the rigid limits of written legal formalities, the Supreme Court (MA) of the Republic of Indonesia has taken a bold step by conducting legal discovery (*rechtsvinding*) through judicial *ijtihad*. Comprehensive legal protection, both preventive (preventing economic neglect) and repressive (resolving disputes over the division of assets), is provided by shifting the paradigm of fulfilling the civil rights of non-Muslim children. Judges divert the route of acquiring assets from the pure inheritance path (*ab intestate* / *al-irts*), which is dogmatically hampered by the prohibition of interfaith, into an alternative path that is valid according to sharia, namely the law of mandatory wills.

This progressive step pioneered by the Supreme Court has made new history since the issuance of landmark decisions (permanent jurisprudence), which significantly started from Decision Number 368 K/AG/1995 and was then strengthened and affirmed by Decision Number 51 K/AG/1999. This series of cassation decisions consistently broke down the civil barrier by providing a portion of *tirkah* (inheritance) to non-Muslim heirs (both biological children, widows, and parents) through the mandatory will mechanism.

In the dynamics and developments of its practice in the courtroom, the amount of the portion of the property given to non-Muslim children is often equalized with the portion that should be received by Muslim heirs of the same rank. This policy of equalizing portions is not taken haphazardly. Supreme Court judges formulated this to prevent the emergence of segregation and internal conflict in the bereaved family, avoid social jealousy between siblings, and ensure the continuation of the economic welfare of the child with dignity. However, the Supreme Court imposes a very strict and absolute limitation: the portion of the *wajibah* will must not exceed a maximum of one-third ($1/3$) of the total net inheritance. This $1/3$ limitation is a form of judges' compliance with the standard provisions of Islamic jurisprudence referring to the Prophet's hadith (the story of Sa'd ibn Abi Waqqas), which aims to ensure that the legitimate Muslim heirs (*ashabul furudh* and *ashabah*) continue to receive the majority of their rights without unfair reduction.

Therefore, to address these weaknesses, formal legislative reform is urgently needed. The state must be present to integrate and incorporate the provisions on

interfaith wills, currently scattered throughout the Supreme Court's jurisprudence, into written positive law (codification), either through a comprehensive revision of Book II of the Compilation of Islamic Law (KHI) or the drafting of a new Law on Material Law of Religious Courts. This legal and political step must be taken so that the fulfillment of interfaith civil rights no longer depends on the interpretation of individual judges, but rather has absolute binding legal force (*erga omnes*). This is a primary prerequisite for fulfilling the principles of written legal certainty, social stability, and a sense of justice aspired to by all levels of the Indonesian legal community.

3.3. Theoretical Analysis of the Implementation of Mandatory Wills: The Perspective of the Theory of Certainty, Protection, and Legal Benefit

The implementation of mandatory wills for non-Muslim heirs in the Indonesian religious court system is not merely a practical solution to the textual impasse of the law. More than that, this legal phenomenon opens up a rich, complex, and multidimensional theoretical discourse within the realms of legal philosophy and legal sociology.

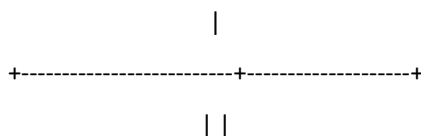
When formal legal texts are no longer able to accommodate the dynamics of justice that exist in a pluralistic society, classical and modern legal theories emerge as analytical tools to test the extent to which legal breakthroughs can be scientifically and morally justified.

Exploration of Legal Protection Theory (Philipus M. Hadjon)

When analyzed using the Legal Protection Theory developed by Philipus M. Hadjon, the Supreme Court's progressive move in granting a share of inheritance to non-Muslim children is a concrete manifestation of repressive legal protection. Hadjon divides legal protection into two main forms:

1. Preventive Legal Protection: Protection provided by the government with the aim of preventing violations before they manifest in concrete disputes (in this case, written regulations such as the KHI).
2. Repressive Legal Protection: Active protection that functions to resolve disputes that have occurred and restore the rights of injured legal subjects.

[Hadjon Legal Protection Structure]



[Preventive (Written Regulations)] [Repressive (Judge/Supreme Court Decisions)]

- Represented by Article 171 of the Indonesian Criminal Code - Through a Mandatory Will
 - Failed to accommodate cases - Restore children's civil rights non-Muslim multi-faith family after the death of the testator

In the context of interfaith inheritance, the preventive legal protections in the Compilation of Islamic Law (KHI) have proven ineffective in protecting all citizens due to the automatic disinheritance of rights due to differences in belief. This is where the state, through its highest judicial institution (the Supreme Court), comes in, providing repressive protection. Judges act as the last line of defense, restoring individuals' civil rights threatened with loss due to the rigidity and scarcity of formal norms (*rechtstvacuum*).

Philosophically, this protection provides humanitarian certainty for non-Muslim children. The state's legal system implicitly states that the sacrifice, devotion, care, and sincere biological bond of love of a child for their Muslim parents until the end of their lives cannot be simply erased by theological differences. This recognition emphasizes that the law protects not only humans as religious entities but also as socio-biological beings with fundamental rights that must be protected by state law.

Manifestation of the Theory of Benefits / *Maslahah Mursalah* (Imam Al-Ghazali)

From the perspective of pure Islamic law, particularly the Theory of Benefit (*Maslahah Mursalah*) formulated rigidly by Imam Al-Ghazali, the discovery of law through this mandatory will has very strong sharia legitimacy. Al-Ghazali, in his book *Al-Mustashfa*, asserts that the essence of sharia is maintaining the welfare of humanity, which rests on five main pillars (*Al-Kulliyat al-Khams* or *Daruriyyat al-Khams*).

The application of the mandatory will in this case is closely related to two fundamental pillars, namely maintaining descendants (*hifzh an-nasl*) and maintaining property (*hifzh al-mal*):

Every law or *ijtihad* which aims to attract benefit (*jalb al-masalih*) and reject harm (*dar' al-mafasid*) is something that must be enforced, even though there is no specific text (*nash*) that regulates it textually-literally.

a. The Construction of *Hifzh an-Nasl* (Maintaining the Lineage/Family): Al-Ghazali views this pillar as not limited to biological reproduction alone, but also encompasses the protection of the integrity, harmony, and bonds of affection within the family institution. Severing economic and civil ties between parents and biological children suddenly due to religious differences is a form of extraordinary

sociological harm. This has the potential to trigger psychological rifts between family members, give rise to intergenerational resentment, and ignite the flames of wider hostility between religious communities in Indonesia.

b. The Construction of Hifzh al-Mal (Protecting Wealth): If a dutiful non-Muslim child is completely deprived of his or her economic rights, the financial well-being that his or her parents have been supporting will collapse. This can plunge the child into poverty and social dependency. This situation clearly contradicts the goal of hifzh al-mal, which calls for a fair and protective distribution of wealth within the immediate family circle.

Thus, the shift in status from "heir" to "recipient of a mandatory will" is a truly brilliant *ijtihad*. It successfully ward off significant harm (poverty and hostility) by seeking benefit without directly violating the *hadith* prohibiting inheritance. This is a true embodiment of the nature of Islamic law, which is *rahmatan lil 'alamin*—a blessing and protector for the entire universe, transcending dogmatic barriers to uphold human justice.

Dialectics of Legal Certainty Theory (Achmad Ali)

Finally, if this jurisprudential phenomenon is examined using Achmad Ali's Theory of Legal Certainty, we will see internal tensions within the structure of our Islamic civil law. Achmad Ali distinguishes legal certainty into two dimensions that often clash in practice:

Dimensions of Legal Certainty	Primary Source	Main Characteristics	Application in Case
Legal Certainty of Law (<i>Legal Certainty</i>)	Written text of formal legislation (Codification)	Rigid, predictive, positivistic, prioritizing formal procedures.	Absolutely represented by Article 171 letter c KHI.
Legal Certainty in the Judicial System (<i>Judicial Certainty</i>)	Judge's decision / Jurisprudence	Flexible, contextual, dynamic, prioritizing substantive justice.	Represented by the MA Mandatory Will Jurisprudence.

The current situation in Indonesia demonstrates a fairly acute legal dualism. On the one hand, Article 171 of the Compilation of Islamic Law (KHI) provides clear, clear text: if a person is not Muslim, they are not heirs. On the other hand,

Supreme Court jurisprudence provides certainty of justice: even if they are not heirs, their economic rights are guaranteed through a mandatory will.

According to Achmad Ali's theory, ideal legal certainty should not sacrifice utility and justice. However, leaving the gap between written law (the Compilation of Indonesian Law) and judicial law (jurisprudence) open for too long is also very dangerous. The main drawback of this situation is the emergence of legal uncertainty at the grassroots level (low-level courts). Justice seekers will be confused because the final outcome of their cases depends heavily on "luck"—whether they find a panel of judges with a progressive vision (following the Supreme Court) or a conservative-textualist judge (adhering to the Compilation of Indonesian Law).

To achieve true, complete, and unified legal certainty, the Supreme Court's jurisprudence cannot be left to stand alone as unwritten law in the long term. The essence of substantive justice embodied in this jurisprudence must be immediately transformed and adopted into written law through a formal legislative process (codification). Only through legal political measures (*legal policy*) this is where the dualism of thought can be ended, so that law enforcement officers in the field no longer hesitate, and all citizens can enjoy legal certainty that is fair and universal.

4. Conclusion

The legal position of non-Muslim children in the Islamic inheritance law system in Indonesia based on Article 171 of the KHI is expressly stated as not being legal heirs due to the barrier of religious differences (mawani' al-irtsi). However, the Supreme Court has provided strong, fair, and progressive legal protection through the establishment of permanent jurisprudence by placing non-Muslim children as mandatory beneficiaries of wills. Legal breakthrough (legal breakthrough) this has proven successful in bridging the legal gap (legal gap) wide gap between textual legal certainty and substantive justice in order to maintain family ties, social harmony, and the economic well-being of biological children. It is recommended that lawmakers (the House of Representatives and the President) immediately take concrete steps to unify and harmonize national inheritance law through a revision of the Compilation of Islamic Law or the drafting of a comprehensive and inclusive National Inheritance Law. The new regulation must include a specific article explicitly regulating the granting of mandatory wills for heirs of different faiths, with a fair distribution of assets. This legislative step is urgently needed to create absolute, objective, and uniform legal certainty, so that judges in the Religious Courts have a solid written code of guidelines and prevent disparities in decisions in similar cases in the future.

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