



Toward Interfaith Equality in Islamic Inheritance Law: Discourse and Renewal of Judicial Practice in Indonesia

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Abstract: The Supreme Court of Indonesia has granted portions of inheritance to non-Muslim relatives through the legal mechanism of *wasiat wājibah* (obligatory will), based on considerations of propriety and limited to no more than one-third of the estate. This article examines how the Supreme Court establishes the legal basis, rationale, and relevance of applying *wasiat wājibah* to non-Muslim relatives, and how this practice contributes to the reform of Islamic inheritance law in Indonesia. The study employs a normative legal research method with a case based approach. The findings reveal that the Supreme Court's decisions to award *wasiat wājibah* to non-Muslim relatives represent a form of judicial innovation aimed at achieving *maslahah* (public benefit) among heirs. However, the application of *wasiat wājibah* remains case-specific, determined by the perceived benefit within the personal relationship between a Muslim testator and their non-Muslim relatives. These rulings hold significant relevance for the reform of Islamic inheritance law in Indonesia. First, conceptually, Islamic inheritance law falls under the domain of *mu'āmalah* (civil transactions), which allows for reinterpretation and contextualization based on local realities. Second, the implementation of *wasiat wājibah* reflects a constructive response to the evolving social and legal dynamics of Indonesia's pluralistic society.

Keywords: *Wasiat Wājibah*, *Maslahah*, Legal Reform, Islamic Inheritance Law, Non-Muslims.

Abstrak: Mahkamah Agung memberikan bagian harta kepada kerabat non-Muslim melalui sarana hukum *wasiat wājibah* berdasarkan kepatutan dan tidak lebih dari sepertiga harta peninggalan. Artikel ini mengkaji bagaimana Mahkamah Agung menentukan dasar hukum, alasan, dan relevansi penerapan *wasiat wājibah* untuk kerabat non-Muslim bagi pembaruan hukum kewarisan Islam di Indonesia. Kajian ini termasuk penelitian normatif dengan pendekatan kasus. Hasil penelitian menunjukkan, putusan Mahkamah Agung yang memberikan *wasiat wājibah* kepada kerabat non-Muslim merupakan bentuk penemuan hukum bebas untuk menciptakan kemaslahatan antar ahli waris. Namun, penerapan *wasiat wājibah* bersifat kasuistik dengan mempertimbangkan kemaslahatan dalam hubungan personal antara pewaris Muslim dengan kerabat non-Muslim. Putusan-putusan tersebut relevan dengan pembaruan hukum kewarisan Islam Indonesia. Pertama, secara konseptual, hukum kewarisan Islam termasuk bidang hukum *mu'āmalah* yang memungkinkan dilakukannya kajian

baru dengan mempertimbangkan dimensi lokalitas. Kedua, penerapan *wasiat wājibah* merupakan respon positif terhadap dinamika sosial dan hukum di tengah masyarakat Indonesia yang majemuk.

Keywords: *Wasiat Wājibah*, Kemaslahatan, Pembaruan, Hukum Kewarisan, Non-Muslim.

Introduction

Islamic inheritance law prohibits Muslims from giving inheritance to non-Muslims, as is the opinion of classical scholars.¹ The Compilation of Islamic Law (KHI) Article 171 (c) which is the basis of Indonesian Islamic civil law also prohibits Muslims from giving inheritance to non-Muslims, because religious difference falls into the category of obstacles to inheritance. However, in the current era, Muslims and non-Muslims live together in a pluralistic society.² Therefore, a scheme for the distribution of inheritance is needed based on human rights justice by not providing religious barriers that are not in line with modern justice.³ In addition, the living conditions when the primary texts of Islam (Quran and Sunnah) were revealed different from the modern era⁴ are a strong reason for changing the scheme of inheritance distribution under the principles of contextualization of Islamic law.

The implementation of Islamic inheritance law that adopts plurality by giving a share of inheritance to non-Muslims is found in Supreme Court decisions No. 368K/AG/1995, No. 51K/AG/1999, 59K/AG/2001, 16K/AG/2001, and 721K/AG/2015. Interestingly, the division of the inheritance given is not explicitly included in the scheme of inheritance law but in the *wasiat wājibah* system. *Wasiat wājibah* is a testamentary obligation addressed to a party who is not part of the heirs. KHI Article 209, paragraphs (1) and (2) provide provisions for *wasiat wājibah* to adoptive parents and adopted children. However, it does not mention the provision of *wasiat wājibah* to non-Muslim heirs,⁵ as decided in the five decisions above. Another interesting point is the number of non-Muslim relative's share in the *wasiat wājibah* distribution. Although it is said that the maximum *wasiat* is one-third of the estate, judges vary in their application. In these decisions, it is not clearly stated how the *wasiat wājibah* can be applied in this case so that non-Muslim relatives who are essentially prevented from receiving inheritance (*mamnū'*) have the same rights as Muslim heirs.

¹ Aden Rosadi and Siti Ropiah, "Reconstruction of Different Religion Inheritance through Wajibah Testament," *Jurnal Ilmiah Peuradeun* 8, no. 2 (May 30, 2020): 327–50, <https://doi.org/10.26811/PEURADEUN.V8I2.466>.

² Zakiul Fuady Muhammad Daud and Raihanah Azahari, "The Wajibah Will: Alternative Wealth Transition for Individuals Who Are Prevented from Attaining Their Inheritance," *International Journal of Ethics and Systems* 38, no. 1 (January 12, 2022): 1–19, <https://doi.org/10.1108/IJOES-09-2018-0133/FULL/PDF>.

³ Reni Nur Aniroh, Khoiruddin Nasution, and Ali Sodikin, "The Bilateral Inheritance System in Islamic Family Law: Fairness, Equality, and Mutual Exchange Perspectives," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (May 22, 2024): 891–911, <https://doi.org/10.22373/SJHK.V8I2.17630>.

⁴ Nasr Abu Zayd, "The 'Others' in the Qur'an: A Hermeneutical Approach," *Philosophy and Politics - Critical Explorations* 2 (2016): 97–109, https://doi.org/10.1007/978-3-319-41821-6_10.

⁵ Muhammad Lutfi Hakim and Khoiruddin Nasution, "Accommodating Non-Muslim Rights: Legal Arguments and Legal Principles in the Islamic Jurisprudence of the Indonesian Supreme Court in the Post-New Order Era," *Oxford Journal of Law and Religion* 11, no. 2–3 (July 25, 2023): 288–313, <https://doi.org/10.1093/OJLR/RWAD004>. particularly under Islamic inheritance law. This article attempts to re-evaluate this general assessment by presenting cases of Islamic inheritance involving non-Muslims in post-New Order Indonesia. Using five decisions of the Indonesian Supreme Court, we argue that whilst the judges' legal arguments are relatively progressive and inclusive by accommodating non-Muslim rights, their analogical interpretation of the wasiat wājibah (mandatory will

The Supreme Court's decisions are interesting to review because in addition to deviating from the KHI requirements⁶ half of the ulama still question the status of *wasiat wājibah* that was recognized after the enactment of the Acts of Egyptian Probate No. 71 in 1946.⁷ The Supreme Court's decision is also considered contradictory to the opinions of some 'Ulama in several Muslim countries that have previously applied the *wasiat wājibah* to deal with the problem of grandchildren whose parents have died before their grandparents.⁸ It needs to be quoted that the grandchildren do not receive an inheritance from their grandfather or grandmother because they are closed (*maḥjūb*) by their father's brother.⁹

The research related to *wasiat wājibah* was written by Zubair, et al. The conclusion was that there was a violation of the maximum limit for the *wasiat wājibah* giving of non-Muslim relatives in several Supreme Court Decisions. The *wasiat wājibah* are indeed good for reforming Islamic law, but they must still pay attention to the limits of statutory regulations.¹⁰ Unlike Zubair, Suwarti, et al found a *wasiat wājibah* decision on non-Muslims following the law, namely by giving up to a third of all inheritance. The humanistic side considered by the judge is the coexistence of a non-Muslim with the deceased in a marriage bond for 18 years.¹¹ By investigating five Supreme Court Decisions, Halim stated that issuing a *wasiat wājibah* in such cases provides legal construction with a contextual-humanistic approach.¹² The researchers have not yet presented the typology of the legal finding made by the judge in deciding on matters relating to a *wasiat wājibah*. This research is different from previous studies. The difference lies in the theory of legal finding used as the basic theory, as well as the basis for the renewal of Islamic inheritance law and judicial practice in Indonesia.

As a product of *ijtihad*, the Supreme Court attempted to find a legal way to answer contemporary questions in the pluralistic Indonesian society, which also marks an important period in the reform of Islamic inheritance law in Indonesia.¹³ This article aims to answer two questions: 1) How is the

⁶ The Supreme Court's decision is essentially a development of the idea of *wasiat wājibah* as enshrined in Article 209 of the Compilation of Islamic Law. The reasons are: 1) The essence of the *wasiat wājibah* in the Compilation of Islamic Law is not to leave adopted children and adoptive parents in a state of lack of assets. The idea is applied to non-Muslim relatives because of their closeness to the heir, and 2) Indonesian society is plural so that the lives of Muslims and non-Muslims can coexist. An interview with Drs. H. Taufiq, SH. MH, the case presiding judge No: 368K/AG/1995, 51K/AG/1999, 59K/AG/2001 on 16 September 2013 in Bekasi.

⁷ The Acts of Egyptian Probate in its development was adopted with few changes by several Muslim countries and those are Syria, Maroco, and Tunisia. Sri Hidayati, "Various Provisions of the Wājibah Testament in Contemporary Muslim Countries,," *Ahkam: Jurnal Ilmu Syariah* 12, no. 1 (2012): 81–90, <https://doi.org/10.15408/AJIS.V12I1.982>. Morocco, Syria, Tunisia, Pakistan, etc.

⁸ Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi: Academy of Law and Religion, 1987), 127–63. Also See Suhaili Alma'amun et al., "Legislative Provisions for Waṣiyyah Wājibah in Malaysia and Indonesia: To What Extent Do They Differ in Practice?," *ISRA International Journal of Islamic Finance* 14, no. 2 (September 5, 2022): 157–74, <https://doi.org/10.1108/IJIF-01-2021-0013>. employing a thematic analysis approach. Six Muslim Wills (State

⁹ Sugiri Permana, "Implications of Hazairin and Munawir Sjadzali Thoughts In Establishment of Islamic Inheritance In Indonesia,," *Ahkam: Jurnal Ilmu Syariah* 18, no. 2 (2018): 375–94, <https://doi.org/10.15408/AJIS.V18I2.9866>. two years after the death of prophet, has renewed inheritance law. Indonesias (*Indonesia

¹⁰ Asni Zubair et al., "The Construction of Inheritance Law Reform in Indonesia: Questioning the Transfer of Properties through Wasiat Wājibah to Non-Muslim Heirs,," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (June 27, 2022): 176–97, <https://doi.org/10.22373/SJHK.V6I1.12628>.

¹¹ Suwarti, Decha Khunmay, and Stepan Abannokovya, "Conflicts Occurring Due to the Application of Different Legal Inheritance Systems in Indonesia,," *Legality: Jurnal Ilmiah Hukum* 30, no. 2 (September 18, 2022): 214–27, <https://doi.org/10.22219/LJIH.V30I2.21020>.

¹² Abdul Halim, "Disparities of the Supreme Court Judge's Decisions on the Non-Muslim Inheritance: Indonesian Case,," *J. Legal Ethical & Regul. Isses* 24 (2021): 1.

¹³ Anugrah Reskiani et al., "Reform Methods of Islamic Inheritance Law in Indonesia in Jurisprudence,," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (June 9, 2022): 39–51, <http://ejournal.uinmybatusangkar.ac.id/ojs/index.php/Juris/article/view/5564>.

legal finding by judges in giving shares to non-Muslim relatives through *wasiat wājibah*? 2) How do the legal findings by judges in these decisions relate to Islamic inheritance law renewal in Indonesia?

This article argues that juridically and normatively the rules of inheritance relations between Muslims and non-Muslims have been considered finalized and agreed on the standard rule of “No mutual inheritance between Muslims and non-Muslims.” Legal practice in Indonesia has departed from this rule and developed new legal thinking on this sensitive issue by opening up space for non-Muslims to obtain the same rights as Muslim relatives.

This study is a normative legal research with a case approach. The intended case approach is the decisions of the Supreme Court that provide a share of inheritance to non-Muslims, not by way of inheritance, but by legal means of *wasiat wājibah*. The legal finding theory is used to answer the above questions.¹⁴ The legal finding theory is considered relevant to be applied in this study because it starts from the legal finding, which then gives birth to a judge’s decision. In positive law, Sudikno Mertokusumo divides the legal finding theory into three parts, namely the interpretation method, argumentation method, and free legal finding method. Of these three methods, according to their importance in answering the problems that have been determined, the discussion focuses more on the free legal finding. The free legal finding theory is used to solve problems without legal rules by forming legal notions.

Religious Difference as a Barrier to Inheritance (*Māni’ al-Irsi*) and the Debate among Islamic Scholars

Religious difference constitutes a barrier to inheritance. The prohibition to inherit between Muslims and non-Muslims is based on the hadith of Prophet SAW narrated by Usāmah ibn Zaid who stated, “A Muslim does not inherit from a non-Muslim and the non-Muslim does not inherit from the Muslim.”¹⁵

Based on the text of hadith, the majority of the ‘Ulama thought that there was no relation for inheriting between Muslims and non-Muslims. They considered the Prophetic hadith from Usāmah ibn Zaid as a *ṣaḥīḥ* hadith,¹⁶ with clear legal guidance (*qaṭ’i dalālah*) and it would not be possible to conduct the *ijtihād* within this. Among the ‘Ulama that had such an opinion were all the founders of four Islamic legal schools.¹⁷

Despite that consensus, the opinion did not become *ijma’*, because there was a Prophet’s companions who disagreed, namely Mu’āz Ibn Jabal. According to him, the prohibition of inheriting due to religious differences did not include the prohibition of Muslims receiving a share of an inheritance from a non-Muslim.¹⁸

Many reacted and opposed such an argument and way of thinking. James Norman Dalrymple Anderson, for example, argued against it and stated that such a practice of inheritance not awarding

¹⁴ By definition, legal finding is the process of law formation by judges or other legal officers who are given the task of applying the law to concrete legal events. In other words, a legal finding is the process of concretizing or individualizing general legal regulations by remembering certain concrete events. Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Yogyakarta: Liberty, 1998), 26.

¹⁵ Bukhārī, *Ṣaḥīḥ Al-Bukhārī* (Beirut: Dār al-Fikr, n.d.), VII: 11. Muslim, *Ṣaḥīḥ Al-Muslim* (al-Qanā’ah, n.d.), II: 2. Abū Dāwūd, *Sunan Abī Dāwūd* (Beirut: Dār al-Fikr, n.d.), III: 124.

¹⁶ Rosadi and Ropiah, “Reconstruction of Different Religion Inheritance through Wajibah Testament.”

¹⁷ Muhammad Jawad Mughniyah, *Fikih Lima Madzhab* (Jakarta: Lentera Basritama, 1999), 541–42.

¹⁸ ‘Alī ibn Ḥajar, *Fath Al-Bārī*, Vol. VI (Kairo: Dār at-Turāṣ, n.d.), 50.

a portion to the non-Muslim relatives from a Muslim inheritor and of awarding their share of the inheritance to the Muslim relatives was not fair and very discriminative.¹⁹ Abdullah Ahmed An-Na'im also expressed his disagreement about it. According to him, one of the discriminations of shari'ah law is religious differences, so Muslims and non-Muslims cannot inherit from each other.²⁰

The debate also arose within Indonesian circles, touching upon the issue of local tradition or customary law.²¹ Habiburrahman as quoted by Ilyas et al. addressed that the customary law applicable almost in Indonesia does not acknowledge religious differences as a barrier to inheritance (*māni' al-irsi*).²² This is similar to the Civil Code, which does not consider religious differences as one of the barriers or impediments to inheritance.²³

Indeed, the rule of customary law and civil code differ from the Islamic law system of inheritance in Indonesia. Islamic law of inheritance adopted by Indonesia's legal system firmly prohibits the inheriting practice between Muslims and non-Muslims. Therefore, the principle of the Islamic personality constitutes a base and foundation for the inheritor and heirs to inherit from and to each other, as explained in the Compilation of Islamic Law Article 171 Alphabet (b) and (c).

The alternative to giving wealth to non-Muslims is through *wasiat wājibah*. However, scholars differ on this *wasiat wājibah*. Here are some of their views:

Table 1
Differences of Opinion among Scholars on Wasiat Wājibah²⁴

No.	Scholars who have an Opinion	Opinion Result on Wasiat Wājibah	Description
1.	Ibn Hazm	Supporting Wasiat Wājibah	All relatives who are not entitled to inheritance, either because of different religions or closed opportunities to become heirs because of other heirs, or other reasons, are entitled to <i>wasiat wājibah</i> . ²⁴

¹⁹ James Norman Dalrymple Anderson, *Hukum Islam di Dunia Modern*, trans. Machnun Husein (Yogyakarta: Tiara Wacana, 1994), 85.

²⁰ Abdullahi An-Na'im and Mashood A. Baderin, "Islam and Human Rights: Selected Essays of Abdullahi An-Na'im," *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im*, January 1, 2017, 1–372, <https://doi.org/10.4324/9781315251790/Islam-Human-Rights-Abdullahi-Na-Im-Edited-Mashood-Baderin>.

²¹ Mark R. Woodward, "Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning. By John R. Bowen. Cambridge University Press, 2003. 289 Pages. \$25.00," *Journal of the American Academy of Religion* 73, no. 4 (December 1, 2005): 1192–94, <https://doi.org/10.1093/JAAREL/LFI122>.

²² Ilyas Ilyas et al., "The Accommodation of Customary Law to Islamic Law: Distribution of Inheritance in Aceh from a Pluralism Perspectives," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 2 (May 28, 2023): 897–919, <https://doi.org/10.22373/sjhk.v7i2.15650>.

²³ See, Article 838 of the Civil Code. Religious differences as a reason for the inhibition of inheritance rights for non-Muslims are also challenged by human rights. See Muhammad Faisal Hamdani, "Islamic Family Law in the Perspective of Universal Declaration Human Rights (UDHR) and the Universal Islamic Declaration Human Rights (UIDHR).," *Ahkam: Jurnal Ilmu Syariah* 16, no. 1 (2016): 21–30, <https://doi.org/10.15408/AJIS.V16I1.2892>.

²⁴ Ibn Ḥazm, *Al-Muḥallā*, IX (Beirut: Dār al-Fikr, n.d.), 312.

No.	Scholars who have an Opinion	Opinion Result on Wasiat Wājibah	Description
2.	Fatchur Rachman	Supporting Wasiat Wājibah	The only parties entitled to wasiat wājibah are male or female grandchildren, whether from male or female offspring. ²⁵
3.	Imam Shafi'i	Rejecting Wasiat Wājibah	A wasiat is not obligatory, according to the hadith narrated by Ibn 'Umar. ²⁶ A wasiat is important, but not obligatory because if it is not bequeathed, the property will still be distributed to the heirs based on the agreed Islamic law of inheritance (<i>ijma'</i> of the scholars). ²⁷
4.	Habiburrahman (Judge at the Supreme Court of the Republic of Indonesia 2003-2011)	Rejecting Wasiat Wājibah	Granting wasiat wājibah to non-Muslim relatives not only contradicts the principles of Islamic inheritance law, but also contradicts the objectives of Shari'ah, namely preserving religion, soul and offspring. ²⁸

Non-Muslim Relatives' Right to Inheritance in the Supreme Court Decision

To date, the Supreme Court has issued several rulings concerning the inheritance rights of non-Muslim relatives in cases involving Muslim heirs. Some of the decisions are No. 368K/AG/1995, No. 51K/AG/1999, No. 59K/AG/2001, No. 16K/AG/2010, and No. 721K/AG/2015.

First, Supreme Court decision No. 368K/AG/1995. In this case, the inheritor had six children: three sons and three daughters. Five children were Muslims and one daughter was Christian. In the jurisprudence, the Supreme Court decided that the non-Muslim daughter had the right to receive a portion of the wealth based on the wasiat wājibah following the portion for a daughter who was Muslim and, therefore, an heir. Each Muslim heir was awarded a share of a 2:1 ratio between the males and the females.

Second, Supreme Court decision No. 51/K/AG/1999. This decision involved a Muslim inheritor who died and had no children. The inheritor left a Muslim wife, two Muslim sisters, and one non-Muslim sister, as well as eleven nephews/nieces from his four brothers/sisters who had died before. Some heirs and nephews/nieces were either Muslims or non-Muslims. In this case, the Supreme Court decided that of all the relatives left, whether Muslims or non-Muslims including wife, sisters, and nephews/nieces, had the right to receive the inheritance with the details as follows: the wife received a quarter portion and the other heirs received portions of the remaining three-quarters, including the non-Muslim relatives who, through the wasiat wājibah, received as much as the Muslim heirs of the same degree/status.

²⁵ Fatchur Rahman, *Ilmu Waris* (Bandung: Al-Maarif, 1981).

²⁶ See, Muslim, *Ṣaḥīḥ Al-Muslim*, 1249. امرئ مسلم يبيت ليلتين ألا ووصيته مكتوبة عنده ما حق This Hadith can be interpreted to mean that if a Muslim does not leave a wasiat, then there is no obligation to bequeath his property.

²⁷ Ash-Shan'ani, *Subulussalam*, trans. Abu Bakar Muhammad (Surabaya: al-Ikhlās, 1995), 372.

²⁸ Habiburrahman. *Rekonstruksi Hukum Kewarisan Islam di Indonesia* (Jakarta: Kencana Prenada Media Group, 2011), 242.

Third, Supreme Court decision No. 59K/AG/2001. This decision began with a Muslim couple and when the husband died, they had no children. The husband, as an inheritor, left wealth to his non-Muslim father and his non-Muslim brothers/sisters, as well as his Muslim wife. The Supreme Court decided that the wife, the only heir, should receive half of the joint wealth and a quarter of the other half. The non-Muslim father got one-third of the legacy wealth through the *wasiat wājibah* because of justice and courtesy.

Fourth, Supreme Court decision No. 16 K/AG/2010. This decision is related to the inheritance case of a Muslim man who married a non-Muslim woman. During their marriage, they had no children. When the husband died, he left a non-Muslim wife and heirs, including his mother and his four Muslim brothers and sisters. In this case, the Supreme Court decided that the non-Muslim wife had the right to get half the portion of the joint wealth, and the inheritance wealth through the *wasiat wājibah* amounted to a quarter portion. The mother got one-sixth portion and the four brothers and sisters got the rest with the formulation of sharing for males and females 2:1.

Fifth, Supreme Court decision No. 721K/AG/2015. This decision began with a husband and wife who were both Muslims and had two children who were non-Muslims. When the husband died, he left a wife and two sons. The Supreme Court decided that as the only heir, the wife got half a portion of the joint wealth and 7/24 portion of the inheritance. His two non-Muslim sons got the *wasiat wājibah* amounting to 17/24 portions of the wealth.

Table 2
Differences among Supreme Court Decisions in the Distribution of Wasiat Wājibah

Decision Number	Case Position	Status of non-Muslim Relatives	Part of the Wasiat Wājibah for non-Muslim Relatives
Decisions No. 368K/AG/1995	The inheritor has six children. Five children are Muslim and one is Christian.	Natural child	Non-Muslim daughters receive a share of the estate through <i>wasiat wājibah</i> equal to the share of other Muslim daughters' heirs.
Decision No. 51/K/AG/1999	The inheritor did not leave any children but did leave a wife, several sisters, and several nieces and nephews. One of the sisters is a non-Muslim.	Sister	A non-Muslim sister gets a share of the estate through <i>wasiat wājibah</i> equal to the share of an equal Muslim heir (Muslim sister).
Decision No. 59K/AG/2001	The inheritor left behind a Muslim wife, a non-Muslim father, and several non-Muslim siblings. The wife gets half of the joint property, as well as a quarter of the remaining estate.	Father and several siblings	The non-Muslim father gets one-third of the estate through <i>wasiat wājibah</i> . Three non-Muslim brothers get the remainder of the estate that has been divided between the father and wife. Each sibling gets the same amount through <i>wasiat wājibah</i> .

Decision Number	Case Position	Status of non-Muslim Relatives	Part of the <i>Wasiat Wājibah</i> for non-Muslim Relatives
Decision No. 16 K/AG/2010	The inheritor left behind a non-Muslim wife, a Muslim mother, and several Muslim siblings. The wife gets half of the joint property.	Wife	Non-Muslim wife gets a quarter of the remaining estate through <i>wasiat wājibah</i> (The remaining property after the joint property division)
Decision No. 721K/AG/2015	The inheritor left behind a Muslim wife and two non-Muslim sons. The wife gets half of the joint property and 7/24 of the remaining property (inherited property).	Sons	Two non-Muslim sons get 17/24 of the remaining estate through <i>wasiat wājibah</i> (The remaining property after the joint property division)

These situations gave rise to the problem of which wealth to use to implement the *wasiat wājibah*. In those decisions, the *wasiat wājibah* was sometimes taken from the legacy wealth (*tirkah*), such as the decisions No. 368K/AG/1995, 59K/AG/2001, 16K/AG/2010, and 721K/AG/2015, but in decision No. 51K/AG/1999 the *wasiat wājibah* is taken from the inheritance wealth (*maurūs*). In the opinion of *farāḍiyūn* ulama, there should be a differentiation between legacy wealth and inheritance wealth. The inheritor leaves legacy wealth before the implementation of rights related to it (*ḥuqūq at-tirkah*) such as the care of the remains, paying the debts of the inheritor, and the *wasiat*, which means that while wealth is still dirty, the inheritance wealth has been cleaned after the three above have been taken from it.²⁹ Therefore, the *wasiat* implementation, including the *wasiat wājibah*, must be taken from the legacy wealth, not from the inheritance wealth, because the last one is the heirs' right.³⁰

***Wasiat Wājibah* as a Legal Means for Equal Justice**

1. The Harmonious Relation for Religious Harmony

According to the Supreme Court, the reason to give the *wasiat wājibah* to non-Muslim relatives is the blood relationship. Besides that, although they have different religions, the Muslim inheritor and non-Muslim relatives have a very harmonious relationship and the inheritor has never been disadvantaged by them. Accordingly, it would be very unfair if the non-Muslim relatives were excluded from the circle of heirs and robbed of their rightful portion of the legacy wealth. As for the portion, the Supreme Court's view is that the non-Muslim relatives could be awarded as much as

²⁹ Tarmizi, "Inheritance System of Bugis Community in District Tellu Siattinge Bone, South Sulawesi (Perspective of Islamic Law)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 4, no. 1 (June 30, 2020): 179–208, <https://doi.org/10.22373/SJHK.V4I1.6784>.

³⁰ Prioritizing the *wasiat* implementation before sharing the inheritance is based on An-Nisā' (4): 11 and KHI Article 175 (1) stated, "The obligations of the heirs to inheritor are as follows: a. Caring and finishing until the burial has finished; b. Finishing the debts in the form of medical treatment and caring, including the obligations of the inheritor or collect receivable; c. Finishing the probate of the inheritor; d. Sharing the inheritance wealth among the entitled heirs."

the portion received by the Muslim heir or one-third at the maximum.³¹ This decision is intended to realize goodness in humanity.³²

Giving *wasiat wājibah* to relatives of different religions is a form of *mu'amalah* based on humanitarian justice. The humanitarian side of giving property does not look at religious barriers. In Q.S. Al-Mumtaḥanah (60): 8, it is explained that doing good and being fair to non-Muslims is not prohibited by Allah, unless they fight and expel Muslims from their lands. This verse in Quraish Shihab's view relates to the permissibility of distributing wealth to non-Muslims.³³ In addition to doing good, the Qur'an also commands Muslims to be fair to everyone indiscriminately. The hint of justice that Allah wants is contained in al-Māidah (5): 8. Such justice also applies to non-Muslims.

Being kind and fair to non-Muslims is also explained by Wahbah Zuhaili. According to him, *wasiat* to a non-Muslim who is not the enemy (*ahl az-zimma*) is allowed and vice versa. Moreover, it is said that the non-Muslim people among *dār al-Islām* have the same rights as the Muslims have and they are obliged to anything that is obliged to the Muslims.³⁴

While in positive law, casuistic *wasiat wājibah* implementation can also be understood as the judge's obligation to interpret the legal text while exploring, following, and understanding the legal values and the justice of living and improvement among society as mandated by the Law.³⁵ That condition is following the rule (*qā'idah*) "A leader's action to his people refers to goodness."³⁶ This rule teaches that a leader's wisdom including that of a judge is related to and concerns the people's rights based on people's goodness, and should intend to bring goodness, as well as.

Thus, the casuistic *wasiat wājibah* implementation is based more on the goodness in the personal relationship between the inheritor and the heir (*al-maṣlaḥat bain al-muwarriṣ wa al-wāriṣ*). If the non-Muslim relatives have behaved well to the inheritor during his life, the *wasiat wājibah* can be given to them.

2. The Islamic Legal Reasoning: The Significant Thought of Ibn Ḥazm

Throughout the process, religious difference is viewed as one prohibiting factor for the non-Muslim relatives to get inheritance rights from the Muslim inheritor. Such is the utilization of the legal tools of the *wasiat wājibah* for non-Muslim relatives. Besides not being directly shown in the legal text, it is also not practiced in any Muslim country. Even in Indonesia, the legal tool can only be used for giving a portion to the adopted children or parents who receive no *wasiat*. Therefore, to

³¹ An interview with Drs. H. Taufiq, SH. MH, the case presiding judge No: 368K/AG/1995, 51K/AG/1999, 59K/AG/2001 on 16 September 2013 in Bekasi.

³² The goodness that is built into these decisions is related to the fulfillment of the value of justice towards the provision of inheritance to non-Muslim relatives. Juridically-normatively, non-Muslim relatives are prevented from inheriting from Muslim heirs, but biologically non-Muslim relatives remain as people who have blood relations and therefore as relatives. However, the application of *wasiat wājibah* in Indonesia also includes people who are not blood relatives, namely adopted children. See Reni Nur Aniroh et al., "Compulsory Testament: Efforts to Protect and Fulfil the Welfare Rights of Adopted Children in Indonesia's Islamic Inheritance System," *Journal of Legal Dynamics* 8, no. 2 (2024): 891-911. This shows that the application of *wasiat wājibah* is more flexible and depends on the justice considered by the judge.

³³ M. Quraish Shihab, *Tafsir Al-Misbah*, vol. XIV (Jakarta: Lentera Hati, 2002), 169.

³⁴ لا يشترط اتحاد الدين بين الموصي والموصى له لصحة الوصية، فتجوز وصية المسلم لغير المسلم، وتجوز وصية غير المسلم لأهل ملته، ولغير أهل ملته، كاليهودي للمسيحي وبالعكس، والمسلم لليهودي أو المسيحي وبالعكس، لأن غير المسلمين في دار الإسلام هم ما للمسلمين وعليهم ما على المسلمين

See, Wahbah Az-Zuhālī, *Al-Fiqh Al-Islāmī Wa Adillatuhu*, Vol. VIII (Dār al-Fikr, 1985), 39-40.

³⁵ The Acts No. 48 in 2009 on Judicial Power Article 5 Section (1) and The Compilation of Islamic Law Article 229.

³⁶ As-Suyūṭī, *Al-Asybah Wa an-Nazāir* (Dār al-Fikr, n.d.), 83.

overcome legal emptiness and solve a case, the Supreme Court conducted a legal finding by adopting Ibn Ḥazm's opinion.³⁷

The provision of *wasiat wājibah* constructed by Ibn Ḥazm is relatively flexible and can be applied in a broader context.³⁸ Ibn Ḥazm's *wasiat wājibah* can accommodate heirs and certain people who due to Shara's obstacles do not get inheritance. One of the Sharia-based obstacles in the case is the difference in religion. The plurality of Indonesian society consisting of various beliefs makes the lives of Muslims and non-Muslims remain harmonious,³⁹ especially among relatives, so that such closeness must be accommodated in the interests of the distribution of inheritance. Therefore, Ibn Ḥazm's construction of *wasiat wājibah* is considered to be the most appropriate to be implemented.

According to Ibn Ḥazm, the obligation of a *wasiat* is based on the provisions of Q.S. An-Nisā' (4): 11-12. According to him, the legal texts should be directly understood from the *ẓahir* meaning.⁴⁰ Moreover, Ibn Ḥazm explains, in Q.S. An-Nisā' (4): 11-12, that Allah imposes on the Muslims to give inheritance wealth to the heir, by prioritizing the implementation of *wasiat* and the repayment of debt than giving the inheritance wealth.⁴¹

As for the people entitled to receive the *wasiat wājibah*, Ibn Ḥazm explains in his book that they are relatives who do not receive inheritance based on Q.S. al-Baqarah (2): 180.⁴² From this verse, it is known that the law of *wasiat* is obligatory. Then the obligation to make *wasiat* to parents and relatives who receive an inheritance is issued by the prophet's hadith which states, "Indeed Allah has provided rights to every single rights holder, then there was no *wasiat* for the heir."⁴³ Therefore, the *wasiat* is given to parents and relatives who do not receive inheritance due to being a slave, having a different religion, being blocked by other relatives (*mahjūb*), or being *ẓawī al-arḥām*.⁴⁴

Concerning the amount of wealth that must be inherited, Ibn Ḥazm does not give a standard, but it is submitted to sincerity and in consideration of the situation and surrounding conditions as long as it is still within the maximum limit of a *wasiat*. Thus, the determination of the *wasiat* amount is submitted to the heir or a person appointed to implement the *wasiat* within reasonable limits and not more than one-third of the wealth.⁴⁵

³⁷ Interview with Drs. H. Taufiq, SH, MH, the Supreme Court judge, in 16 September 2013 in Bekasi.

³⁸ This concept is different from Fatchur Rahman's idea, which only gives mandatory wills to grandchildren. See, Rahman, *Ilmu Waris*.

³⁹ Farkhani et al., "Converging Islamic and Religious Norms in Indonesia's State Life Plurality," *Indonesian Journal of Islam and Muslim Societies* 12, no. 2 (December 17, 2022): 421–46, <https://doi.org/10.18326/IJIMS.V12I2.421-446>.

⁴⁰ Ibn Ḥazm, *Al-Iḥkām fī Uṣūl Al-Aḥkām*, Vol. III (Kairo: Matba'ah al-Asimah, n.d.), 292.

⁴¹ This interpretation suggests that *wasiat* -including *wasiat wājibah*- are taken from the legacy wealth, not from the inheritance wealth.

⁴² Ḥazm, *Al-Muḥallā*, 313.

⁴³ Dāwud, *Sunan Abī Dāwud*, III: 13. Hadith of Abū Dāwud from Abū Umāmah. The understanding is different from the ulama *jumhur* stating that a verse on the *wasiat* obligation has been deleted by a verse on the inheritance that has determined the portion of inheritance for both parents and relatives as explained in An-Nisā' (4): 11-12, which is strengthened by hadith *lā waṣīyyata li wārīshin*. According to the ulama *jumhur*, if the *wasiat* is obliged, Prophet Muhammad SAW would certainly explain it. The Prophet never explained it and before his death he did not make *wasiat* at all on his legacy wealth. Besides, most of the Prophet's *sahabat* also did not implement the *wasiat*. Nobody denied that most of the Prophet's friends made no *wasiat*. Al Yasa Abu Bakar, *Ahli Waris Sepertalian Darah Kajian Perbandingan Terhadap Penalaran Hazairin Dan Penalaran Fikih Mazhab* (Jakarta: INIS, 1998), 191.

⁴⁴ Nadjma Yassari, "Compulsory Heirship and Freedom of Testation in Islamic Law," *Comparative Succession Law: Volume III: Mandatory Family Protection* 3 (January 1, 2020): 629–47, <https://doi.org/10.1093/OSO/9780198850397.003.0021>.with the deceased having the right to dispose only of one-third of his or her estate. With the position of legal heirs being so strong, a priori there is no need for instruments to override the deceased's testamentary freedom. Modern legislatures have, however, altered the system with the introduction of the 'obligatory bequest' for orphaned grandchildren (*al-waṣīyya al-wājiba*

⁴⁵ Bakar, *Ahli Waris Sepertalian Darah Kajian Perbandingan Terhadap Penalaran Hazairin Dan Penalaran Fikih Mazhab*, 191.

The description above shows that the Supreme Court decisions have agreed with Ibn Ḥazm in the case of the obligation of a *wasiat*, but the Supreme Court has different views on which wealth is used to implement the *wasiat*. In decision No. 51K/AG/1999, the *wasiat wājibah* is taken from the inheritance wealth (*maurūs*), while in other decisions (No. 368K/AG/1995, 59K/AG/2001, 16K/AG/2010 and 721K/AG/2015), the Supreme Court has agreed with Ibn Ḥazm that the *wasiat wājibah* is taken from the legacy wealth (*tirkah*).

Concerning the rightful recipients of a *wasiat wājibah*, the Supreme Court has agreed with Ibnu Ḥazm in its decisions, in which people who are prohibited by the legal barrier cannot receive the inheritance. It is similar to the amount of wealth given as a *wasiat*, Ibn Ḥazm does not give the standard amount as long as it is still within the maximum limit of one-third by considering justice and propriety. In decision numbers 368K/AG/1995, 51K/AG/1999, 16K/AG/2010, and 721K/AG/2015, the Supreme Court gives the *wasiat wājibah* in equal portion as the Muslim heir with the same degree, but in decision No. 59K/AG/2001, the Supreme Court gives the non-Muslim real father a portion as much as one-third of the legacy wealth. This similarity indicates the adoption of the judgments from Ibnu Ḥazm's opinion.

Adopting Ibn Ḥazm's, the Supreme Court has made a free legal finding. According to Sudikno Mertokusumo, the free legal finding is intended for incidents with no legal texts to form legal notions. Here, the judge does not function as an officer who applies or explains or interprets the legal texts, but as the creator of law, creating the right solution for such concrete incidents so that the subsequent incidents can be solved according to the method created by the judge.⁴⁶ The free legal finding does not mean that the regulations or legal texts do not bind a court. The regulations or legal texts are the tools for obtaining the solutions that suit the living law and do not have to be similar to the settlement following the regulations or legal texts.⁴⁷

3. Relevance of the Application of Wasiat Wājibah to Non-Muslim Relatives for the Reform of Islamic Inheritance Law in Indonesia

Conceptually, Islamic inheritance law is included in the *mu'āmalah* jurisdiction, which allows carrying out a new study by considering the dimensions of cultural locality.⁴⁸ According to Munawir Sjadzali, Islamic inheritance law is included in the *ta'aqquli* category.⁴⁹ These legal provisions are relative following the changes in situations and conditions. Therefore, the laws of *'illat* and *maqāsid al-syarī'ah* are of great concern and a kind of common sense plays an important role. Occasionally, however, the Islamic inheritance law are positioned and understood as the *ta'abbudi*, so it can make

⁴⁶ Mertokusumo, *Bab-Bab Tentang Penemuan Hukum*, 28–31.

⁴⁷ This principle is also used by Sadipto Rahardjo in projecting the discovery of progressive legal theory. See Mustafa Lutfi, "Critical Analysis of the Progressive Law Theory on the Constitutional Court Judges' Decisions in Indonesia Regarding Marriageable Age Limit," *Pertanika Journal of Social Sciences & Humanities* 28, no. 1 (2020).

⁴⁸ Arskal Salim, "Contemporary Islamic Law in Indonesia : Sharia and Legal Pluralism," n.d., 214. practice and institutions in post-tsunami Aceh. Indonesia has probably the fastest changing legal system in the Muslim world. This ethnographic account of legal pluralism in the post-conflict and disaster situation in Aceh addresses changes in both the national legal system and the regional legal structure in the province. Focusing on the encounter between diverse patterns of legal reasoning advocated by multiple actors and by different institutions (local, national and international; official and unofficial; judicial, political and social cultural

⁴⁹ Etymologically, *ta'aqquli* is an *isim maṣdar* of *fi'il* "*ta'aqqala-yata'aqqalu-ta'aqqulan*" that means 'make sense' or 'rational'. *Ta'aqquli* is the provision of Islamic law that is accepted and obeyed by a follower because there are goodness for humanity based on rationales. See, Ibn Manẓūr, *Lisān Al-'Arab*, Vol. IV (Mesir: Dār al-Ma'rifah, n.d.), 262.

the law stagnant.⁵⁰ However, Islamic inheritance law should be able to accommodate the social context to be in line with the essence of humanity.

The relationship between Muslims and non-Muslims in the early period of Islam was recognized as inharmonious even when it was overwhelmed with an atmosphere of hostility and war. The non-Muslim groups that came from a nation or tribe that the Islamic army had conquered received *zimmi* status.⁵¹ They should choose to convert to Islam or remain with their religion, but would have no political rights and would have to pay some kind of tax.⁵² The theological perspective that strictly separates Muslims and non-Muslims has influenced many legal products of *fiqh*, including inheritance law.

The situations above differ greatly from those in modern day Indonesia. Religious differences in certain parts of society are sometimes not a matter of principle concern; there is even a very harmonious relationship among them. They help each other and there is no tension and hostility. In a family, children occasionally adhere to a religion that is different from their parents, respect and honor each other despite their different religions, and live in a harmonious and peaceful atmosphere.⁵³ The parents work hard to provide for their families and even accumulate wealth for them, all without asking about different religions and beliefs. In such situations, Al-Qur'an does not prohibit Muslims from doing a good deed and being fair to them, making friends with them, protecting each other, and helping them. Al-Qur'an only prohibits Muslims from doing good deeds and being fair to non-Muslims who are hostile, fighting, and expelling Muslims from their homeland, insulting and abusing Islam.⁵⁴

The difference in reality above is one of the reasons for giving *wasiat wājibah* to non-Muslims. These decisions not only reflect humanity but also demonstrate the adaptability of Islamic law to local contexts. The provision of the *wasiat wājibah* is a positive response to the social dynamics and laws within the Indonesian pluralistic society carried out through exploring, following, and understanding the legal values. The reasoning pattern of the relationship between Muslims and non-Muslims in inheritance towards responsive inheritance law is described as follows:

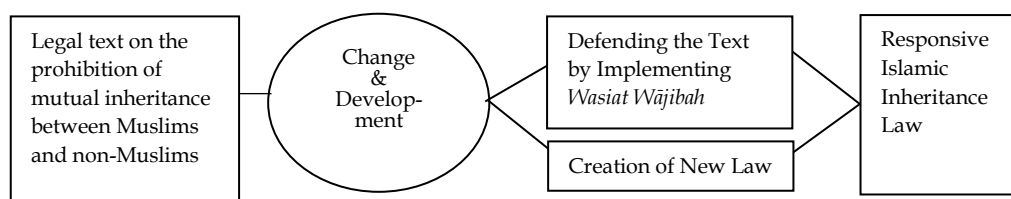


Figure 1
Scheme of Relevance of Wasiat Wājibah to the Reform of Islamic inheritance law

⁵⁰ Etymologically, *ta'abbudi* is an *isim maṣdar* of *fi'il* "*ta'abbada-yata'abbadu-ta'abbudan*" that means self-servitude, obedience and adherence. *Ta'abbudi* is the provision that must be accepted and implemented because it is a form of self-servitude and obedience to only Allah, despite not rationally knowing the reason and the purpose. See, Manẓūr, *Lisān Al-'Arab*, 3046. Also see, Moath Alnaief and Kotb Rissouni, "A Critical Analysis of the Claim That Absolute Juristic Interpretation (Ijtihād) Has Ended," *Journal of Islamic Thought and Civilization* 12, no. 2 (October 11, 2022): 28–40, <https://doi.org/10.32350/JITC.122.03>

⁵¹ That status allows Non-Muslim to be protected but without full political rights such as the right to vote or to be voted for, with the implication of being treated as second-class citizens

⁵² Rumadi Ahmad, "Speaking the Unspeakable: The Status of 'Non-Muslims' in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (December 31, 2022): 734–56, <https://doi.org/10.22373/SJHK.V6I2.13576> in which citizenship was no longer based on religion. In the literature of *fiqh al-siyasah*, the status of non-Muslims is divided into four categories: 1

⁵³ Ahmad.in which citizenship was no longer based on religion. In the literature of *fiqh al-siyasah*, the status of non-Muslims is divided into four categories: 1

⁵⁴ Al-Mumtaḥanah (60): 8.

The diagram shows the process of change and development of Islamic inheritance law that is responsive to the social context and needs of modern society. In traditional Islamic legal texts, there is a prohibition on inheritance between Muslims and non-Muslims. However, through the concept of *wasiat wājibah*, non-Muslims can receive a share of the estate from Muslims, even though they are not textually entitled to it. This process includes two approaches: defending the original legal text with implementation adjustments and the creation of new law. Both approaches lead to the establishment of a more responsive Islamic inheritance law, relevant to the principles of *muāmalah* that is flexible and adaptive to changing times, thus fulfilling the principles of justice and broader welfare in society.

The renewal of the Islamic inheritance law in Indonesia can be conducted in two ways. *First*, the principle rule of order of inheritance must be maintained because it cannot be united based on certain religious customs, so there will be no legal emptiness. This step requires attention as, according to Mochtar Kusumaatmadja, inheritance law is a “non-neutral” sector of law as is company law, traffic law, contract law, and many others. The inheritance law is related to religion, culture, and customs, so it would be very risky if it were uniform.⁵⁵ *Second*, creating a new rule that has never existed to respond and accommodate the present improvements, the living law, and the spirit of change that requires equity, justice, and upholding human rights.

Conclusion

Under classical Islamic law and state Islamic law in Indonesia, non-Muslim relatives are prohibited from receiving an inheritance from the Muslim inheritor. However, not giving a portion, as in the original law, seems unfair and does not follow the legal values of living and growing within an Indonesian pluralist society. In such a condition, a judge is required to be brave enough to conduct the rule-breaking by reading the existing legal text with more extensive meaning, or even in the condition of not having a legal text, conducting a free legal finding to create a new law relevant to the spirit of change upholding the values of equality, justice, and humanity, as exemplified by the Supreme Court in its decisions.

The application of *wasiat wājibah* to non-Muslim relatives has relevance to the spirit of renewal of Islamic inheritance law in Indonesia, as well as being an asset for legal theorists and legal practitioners to create inheritance law that is responsive to the times. The pluralistic condition of the Indonesian nation demands the enactment of a rule of law that is friendly to differences, upholds the spirit of brotherhood, equality, justice and human rights as the main mission of Islamic teachings, which are also recognized and upheld by other national and international legal orders.

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⁵⁵ Mochtar Kusumaatmadja, *Pembinaan Masyarakat Dan Pembinaan Hukum Nasional* (Bandung: Binacipta, 1976), 14.

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