

THE INTERSECTION OF ISLAMIC AND CIVIL LAW IN INDONESIAN WILL LEGISLATION

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Abstract

A will in Islamic law (wasiah) is a written or oral declaration made by a person (wasi) during their lifetime to regulate the distribution of their property after their death. The following are some important points about wills under Islamic law. A will in civil law, also known as a testament or probate, is a written instruction made by a person (testator) to arrange for the distribution of their property after their death. In practice, wills in Islamic law can provide individuals with the flexibility to organize a fraction of their estate according to personal wishes, albeit subject to the limitations set out by Sharia. In the context of civil law, will give individuals control over the distribution of their property after death and ensure that their wishes are respected. Wills can also help avoid inheritance disputes and provide legal certainty for heirs. The focus of this research is: First, how is the comparison of Islamic law with civil law in the regulation of wills in the State of Indonesia, second, how is the analysis of the perspective of the majority of people using the law in the application of wills? The model used in this research is qualitative, while the approach used is a literature study by analyzing the data obtained. The preliminary step in this research is to search for relevant literature data sources from various contexts by analyzing the findings and arguments from each source, as well as comparing and contrasting information to conclude. The results of this research show that there are similarities and differences between wills in Islamic law and civil law. The similarities can be seen in the validity of wills, the necessity to be written, and witnesses, and the differences can be seen in the limitations of inheritable property, cancellation and amendment of wills, the implementation of wills, disputes over wills, and the purpose of wills. The perspective of the majority of people in using the law related to the application of wills in Indonesia can be seen from the influence of culture and religion, legal rudeness and level of legal knowledge, legal practice in the field, trust and compliance, and involvement of legal professionals.

Keywords: Islamic Law, Civil Law, Regulation of Wills, Comparative

INTRODUCTION

Inheritance law is a branch of law that regulates how a person's property and assets will be distributed after they die or are legally recognized as no longer able to manage their assets. This arrangement includes the distribution of inherited assets to legal heirs and procedures for resolving disputes that may arise related to this distribution (Khasanah et al., 2022). Inheritance law seeks to ensure that the distribution of inherited assets is carried out fairly and in accordance with the wishes and interests of the heir as well as the principles of social justice. This often involves aspects such as identifying legal heirs, determining the portions of the inherited property to be divided, distribution following existing legal or will provisions, and resolving disputes that may arise (Alamanda & Akmal, 2021).

Inheritance law arrangements can vary between countries and are often based on the religious, cultural, and legal principles that apply in that society. In some countries, inheritance laws are based on civil law systems, while in other countries, inheritance laws may be based on religious laws such as Islamic law (Idrus, 2017). The importance of inheritance law lies in its role in providing legal certainty for individuals and families in planning and managing their inheritance, as well as in maintaining peace and harmony in family relationships by avoiding disputes that may arise related to inheritance distribution (Soleman et al., 2022). Inheritance law in Islam is regulated by sharia principles found in the Qur'an, hadith (traditions of the Prophet Muhammad), *ijma* (consensus of scholars), and *qiyas* (legal analogies). The Islamic inheritance system provides guidelines for how a person's assets will be distributed after their death. The following are several important points in inheritance law based on Islamic law: (Abdullah, 2023)

In a civil law context, will give individuals control over the distribution of their assets after death and ensure that their wishes are respected. Wills can also help avoid inheritance disputes and provide legal certainty for heirs. (Putra, 2022) Inheritance in Islamic law is regulated by sharia law which originates from the Quran, hadith, *ijma* (agreement of the ulama), and *qiyas* (legal analogy). In Islamic law, wills have certain restrictions on the distribution of inherited assets. A will must not violate the provisions for the distribution of inheritance established by Sharia. Will in Islamic law is usually limited to one-third of the inheritance. The remainder must be adjusted to the inheritance provisions stipulated by

sharia, such as the mandatory distribution for heirs which has been regulated in detail. Inheritance arrangements in Islamic law often focus more on the principles of social justice and the needs of the heirs (Sopie & Nova Orvia, 2022).

In Indonesia, inheritance arrangements based on wills are regulated by civil law which originates from statutory regulations, such as the Civil Code. In civil law, wills have greater freedom in determining the distribution of inherited assets, as long as they do not violate the provisions regulated by law. Wills in civil law can regulate the distribution of inheritance assets more flexibly according to the will giver's wishes, without a one-third limit as in Islamic law. Civil law tends to place greater emphasis on the freedom to determine the fate of personal property without significant interference from the state or religious institutions (Ikhwanudin, 2023). A comparison between the two legal systems shows that Islamic law places more emphasis on aspects of social justice and the provisions established by Sharia, while civil law gives individuals more freedom to regulate the fate of their inheritance according to personal wishes. In Indonesia, the two legal systems apply in parallel, and the final decision in resolving inheritance disputes depends on the applicable law and the decision of the relevant court (Liliana et al., 2019).

Indonesia is one of the countries in Asia with a legal system that is plural as a result of historical developments. It is called plural because until now in the Republic of Indonesia several legal systems have been in force which have their patterns and structures. What is meant is the customary law system, the system of Islamic law, and Western legal systems. Inheritance law in Indonesia is divided into 3, namely; Islamic inheritance law, western inheritance law, and customary inheritance law. What differentiates these three laws is Islamic inheritance law or what is called *fara'idh* science. In this science, everything related to inheritance has been completely regulated, including how to calculate it, while customary inheritance law is the procedure for distributing inheritance according to applicable customary law. Furthermore, western inheritance law adheres to a system of dividing inheritance based on individuals and applies to every individual who adheres to religions other than Muslims (Kuncoro, 2015). Islamic inheritance law is an important expression of Islamic family law, it is half of the knowledge possessed by humans as emphasized by the Prophet Muhammad SAW. Examining and studying Islamic inheritance law means studying

half of the knowledge possessed by humans who have lived and continue to live in Muslim society from the early days of Islam to the Middle Ages, modern and contemporary times, and in the future (Anderson, 1994). Presidential Instruction Number 1 of 1991, namely the Compilation of Islamic Law to regulate Islamic civil or family law issues in Indonesia in addition to Law Number 1 of 1974 as the national law. However, it needs to be reminded that Indonesia is not an Islamic country as stated in Article 1 paragraph (1) and Paragraph (3) of the 1945 Constitution of the Unitary State of the Republic of Indonesia, the third amendment states that Indonesia is a republic and a constitutional state (Lilis, 2022).

Inheritance conflicts have become inevitable, even the Prophet in the hadith mentioned the importance of studying inheritance law. Inheritance law conflicts cannot be avoided when greed and avarice have shackled humans wherever they are. Especially in countries that are predominantly Muslim, such as Indonesia and Malaysia, this problem is not overlooked, even though the Al-Quran, hadith, and even *ijtihad* regarding inheritance have been regulated in such detail. In general, and overall, inheritance law in the Compilation of Islamic Law appears to be following the *faraid* law contained in the Al-Quran and Hadith. However, not all of the contents of the Compilation of Islamic Law contain Islamic law as it is and it would be inaccurate to say that its contents are solely Islamic law. At least those related to the limitations of successor heirs in addition to joint assets or shared assets and especially the inheritance of adopted children. Compilation of Islamic Law Article 171 letter h explains the meaning of adopted children and the transfer of responsibility from original parents to adoptive parents based on a court decision. It is important to note that the adopted children who do not receive a will based on the Compilation of Islamic Law Article 209 are given a mandatory will, no more. from 1/3 (Fatahllah et al., 2022).

A will is a release of inheritance that is carried out after a person dies. According to legal origin, a will is an act carried out under any circumstances. Therefore, there is nothing in Islamic law that requires a will to be executed by breaking up a judge (AshShiddieqy, 2001).

Based on Article 172 of the Compilation of Islamic Law regarding the definition of heir; "The heir is deemed to be Muslim if it is known from the Identity Card or confession or practice or testimony, while for newborn babies or immature children, the religion is

according to their father or their environment." Thus, in the Compilation of Islamic Law, the definition of heirs must be Muslim, meaning that non-Muslim heirs are not seen as heirs by Muslim Heirs. However, in Indonesia, distribution to non-Muslim heirs from Muslim heirs can be given a mandatory will as regulated in Article 209. The Compilation of Islamic Law does not define general provisions regarding mandatory wills. In theory, a mandatory will be defined as an action carried out by a ruler or judge as a state official to force or give the decision to make a mandatory will for a person who has died, which is given to a certain person under certain circumstances (Nugraheni, et al, 2010).

The distribution of inheritance in Indonesia is not regulated separately or in a unified manner, therefore in Indonesia, three legal systems apply. Non-Muslims can use the provisions of customary law and Western law (Civil Code). The Civil Code is a provision made by the Dutch government, so it does not include religious elements in these provisions.

Death is inevitable for human life. When this event occurs, many parties will be involved for the people left behind, resulting in the legal consequences of this event, namely giving rise to inheritance law for those left behind. In Inheritance law, it is better known that before distribution is carried out by the heirs. Indonesia is a legal state that can see the system of inheritance law, in Islamic law it can be seen from the Compilation of Islamic Law and Civil Law, namely the Civil Law Code. These differences in legal systems can confuse the Indonesian people in regulating inheritance law, especially in wills.

By understanding this background, it is important to carry out a comparative analysis between Islamic law and civil law in regulating inheritance based on wills in Indonesia. This is necessary to find fair solutions, in line with the values of Indonesian society, and to overcome the complexities and challenges associated with a pluralistic legal system.

One of the most important aspects of human life and society in general is related to wealth. Humans and society, whatever the reason, cannot be separated from this aspect. Wealth is one of the things that humans are involved in. Because humans are equipped with desires, the Qur'an reminds us that wealth is a slander or a trial. There are so many problems that arise as a result of these assets.

According to Islamic teachings, a person's ownership of property cannot be separated from its relationship to social interests. Therefore, it is related to wealth, Islam carries a set

of Sharia laws, namely Sharia concerning inheritance, zakat, infaq, sadaqah, grants, endowments, and wills. The existence of Islamic law regarding Inheritance, Zakat, Infaq, Sadaqah, Grants, Endowments, and Wills is inseparable from faith and morals. This shows that Islam is ready with a concept to face problems in society, especially those related to problems of poverty, ignorance, and backwardness.

A will is one of the forms of handing over or releasing assets in Islamic law. Will have a very strong legal basis in Islamic law. A will also called a testament, is "a statement of a person's wishes regarding what will be done with his assets after he dies." The implementation of this will only be carried out after the testator dies. In the practice of implementing a will, certain requirements must be met so that its implementation does not conflict with the provisions of inheritance law and does not harm other heirs who do not receive gifts through a will. In this regard, the law also limits a person's power to determine his final will through a will so that he does not exclude children as heirs through a will.

Based on the description above, the issue that is very important in writing this article is analyzing the comparison of Islamic law and civil law in the regulation of wills in Indonesia so that the aspect of justice can be achieved and there is no conflict between the heirs and those who are given the will beforehand. the heir is still alive or dead (Nisardi et al., 2023).

REVIEW OF LITERATURE

Designated Heirs

Islamic law determines which heirs have certain inheritance rights. They include husbands, wives, children, parents, and siblings. Each heir has a predetermined share in the inheritance.

Principle of Distribution of Inheritance

The principle of inheritance distribution in Islam is based on the provisions of the Koran. For example, sons inherit twice as much as daughters and husbands inherit half of their wives' property if their wives have no children, while wives only inherit one-third of their husbands' assets if their husbands have children.

Mandatory Part (*Faraid*)

The obligatory share in inheritance, called *faraid*, is the share of inheritance that has been determined by sharia for each heir. This section cannot be changed through a will and must be fulfilled before any other inheritance is distributed

Limitations of Wills

Although Islam allows wills, there are restrictions on the amount and portion of assets that can be left. In general, a will cannot exceed one-third of the inherited assets and must be carried out taking into account *faraid* distribution obligations.

The Importance of Social Justice

One of the main principles in dividing inheritance in Islam is social justice. This includes ensuring that the rights of all heirs are recognized and that inheritance distribution is carried out fairly and equitably following Islamic principles.

Inheritance law in Islam has an important role in ensuring justice in the distribution of inheritance and meeting the needs of heirs. Although there are clear principles in Islamic law, the implementation and interpretation of inheritance laws can vary among Muslim communities and in different countries where Islamic law is implemented (Abdullah, 2023). Inheritance law under civil law (also known as civil law) refers to the rules and principles that govern how a person's assets will be distributed after his death based on legal provisions established by the state. In contrast to inheritance law based on religious law such as Islamic law, inheritance law based on civil law is more secular and does not depend on certain religious principles (Imron & Huda, 2023).

The following are several important things in inheritance law based on civil law (Lutfia & Waryanto, 2017):

1. Provisions of Law

Inheritance law based on civil law is usually regulated by legislation established by the government or state legislative body. These provisions are usually found in civil codes or laws regarding inheritance and succession.

2. Inheritance Distribution Arrangements

Civil law establishes rules governing the distribution of inheritance based on family relationships, such as between husband and wife, parents and children, or

siblings. Usually, inherited assets will be divided proportionally between the legal heirs in accordance with existing regulations.

3. Principles of Justice and Legal Certainty

The principles of justice and legal certainty are the basis for dividing inheritance based on civil law. The main objective is to ensure that inheritance distribution is carried out fairly and that the rights of heirs are recognized and fulfilled in accordance with applicable law.

4. Wills and Inheritance Agreements

Civil law usually recognizes wills and inheritance agreements as tools for regulating the distribution of inherited assets. However, certain restrictions may apply, such as certain formality requirements and prohibitions against wills that conflict with the law or the public interest.

5. Settlement of Inheritance Disputes

Civil law also regulates procedures for resolving disputes that may arise related to the division of inheritance. This may include court, mediation, or arbitration to resolve disputes between heirs.

The importance of inheritance law based on civil law lies in its role in providing legal certainty for individuals and families in planning and managing their inheritance. Through the civil law system, the state is responsible for regulating and enforcing the rules applicable to the distribution of inheritance, ensuring that the rights and interests of all parties are protected (Riski, 2022).

A will in Islamic law (*wasiah*) is a written or oral statement made by a person (*wasi*) during their lifetime to regulate the distribution of their assets after death. The following are several important things about wills based on Islamic law (Khalidi, 2022):

1. Limitations on the Division of Assets

Wills in Islamic law must not violate the provisions for the distribution of inheritance that have been determined by Sharia. This means that a will cannot be used to change the distribution that has been regulated in the Quran and hadith.

2. Number and Limits of Wills

Islamic law stipulates that a will cannot exceed one-third of the inheritance. In other words, a will can only cover a certain part of the inherited assets, and must not harm the rights of heirs that have been determined by sharia.

3. When making a will

A will can be made at any time while the will is still alive but must be made in a conscious state and free from coercion or pressure. A will can be stated orally or in writing, although a written will is preferred to maintain clarity and validity.

4. Execution of the Will

After the death of the will, the implementation of the will becomes the responsibility of the heirs or executors of the will. They are responsible for ensuring that the will is executed according to the instructions listed.

5. Validity of the Will

To be valid, a will must meet certain requirements set by Islamic law. This includes conditions such as the mental capacity of the will, freedom in making the will, and clarity in the content of the will.

In practice, wills in Islamic law can provide flexibility for individuals to manage a small portion of their inherited assets according to personal wishes, although they remain subject to the limitations set by Sharia (Jima et al., 2022).

A will in civil law, also known as a will or testament, is a written instruction made by a person (the testator) to regulate the distribution of their assets after death. The following are some important things about wills based on civil law (Naskur et al., 2022):

1. Freedom in Making Wills

Civil law gives individuals the freedom to make a will according to their wishes, as long as they have sufficient mental capacity at the time of making the will.

2. Fill out the Will

The contents of a will may include various instructions, such as the appointment of specific beneficiaries for certain property, the division of property between heirs, the appointment of guardians for children, and other relevant instructions related to property or personal affairs.

3. Limitations in Wills

Although civil law provides freedom in making wills, there are certain restrictions imposed. For example, some jurisdictions may have certain formality requirements that must be met to validate a will, such as witnessing or registering the will.

4. Validity of the Will

To be valid, a will must meet the requirements set by civil law in the applicable region. This includes the testator's mental skills, freedom to make a will without pressure or coercion, and fulfillment of applicable formality requirements.

5. Execution of the Will

After the death of the testator, the executor of the will is responsible for executing the will according to the instructions listed. They ensure that property is distributed according to the testator's wishes stated in the will.

The problem of comparative analysis between Islamic law and civil law in regulating inheritance based on wills in Indonesia includes several crucial aspects, namely (Katidjan, 2013):

1. Legal Plurality

Indonesia is a country with a religiously and culturally heterogeneous population. As a result, there is a duality in the legal system, where Islamic law applies to Muslims while civil law applies to non-Muslims. This plurality creates complexity in inheritance arrangements, especially when wills are used as instruments.

2. Differences in Principle and Application

The principles of Islamic inheritance law and civil law often differ, especially regarding the division of inheritance and the role of wills. For example, in Islamic law, there are strict provisions on how inheritance should be distributed, whereas in civil law, there is more freedom for the will-maker.

3. The Need for Justice and Legal Certainty

Indonesian society needs justice and legal certainty in inheritance arrangements to prevent conflict and injustice. However, the discrepancy between Islamic law and civil law in regulating inheritance based on wills often creates uncertainty and potential injustice.

4. Social and Cultural Change

Changes in Indonesian society, such as urbanization, globalization, and shifts in cultural values, can influence views and practices regarding inheritance and wills. This can create tension between traditional values and individual aspirations regarding heritage.

5. Implementation Challenges

Practical challenges may arise in applying Islamic law and civil law in inheritance arrangements based on wills in Indonesia. For example, ambiguity in regulations, varying interpretations, and unequal access to the legal system can create obstacles to achieving justice for all parties involved.

RESEARCH METHOD

The form of research in this thesis is library research, which involves studying literature or focusing on library materials such as current laws, books, magazines, articles, and journals that discuss the issue directly or indirectly. Library research is a method that uses existing written sources, such as books, journal articles, reports, and other documents, to gather relevant data and information. Forms of library research include literature study, analysis, historical study, comparative study, conceptual study, and document analysis. Researchers must critically assess the quality and relevance of sources, maintain data authenticity and accuracy, and avoid plagiarism by citing sources correctly (Irianto, 2017).

The research conducted is descriptive-comparative. Descriptive research aims to uncover facts and interpret them accurately, studying societal issues, procedures, relationships, activities, attitudes, and ongoing processes. Donal Ary describes descriptive research as designed to obtain information about symptom status at the time of the research without hypothesis testing or experimental control. Comparative research, a type of descriptive research, seeks basic answers about cause and effect by analyzing factors causing certain phenomena. In this research, the marriage laws in Sudan and Indonesia are observed and analyzed using intra-doctrinal and extra-doctrinal reform theories to understand the legal foundations and sources for drafting these laws (Lutfia & Waryanto, 2017).

RESULTS AND DISCUSSION

A comparative study between Islamic Law and Civil Law in the regulation of wills in Indonesia reveals significant differences in legal approaches and practical implementation. Here are several focal points for literature analysis on this topic:

1. Philosophical Foundation and Governing Law:

- Islamic Law: Based on Sharia law, wills are regulated according to principles found in the Quran and Hadith, interpreted by Islamic scholars and legal authorities.

- Civil Law: Based on positive legislation, such as the Civil Code (KUH Perdata) and related regulations in Indonesia.

2. Requirements for Validity of Wills:

- Islamic Law: Imposes specific conditions such as freedom of the testator, witnessing, obligatory heirs' entitlements, among others.

- Civil Law: Regulates formal requirements that must be fulfilled, including written form, witnessing, and administrative procedures.

3. Subjects Eligible to Inherit and Accept Wills:

- Islamic Law: Specifies criteria on who can inherit and accept wills, including obligatory and non-obligatory heirs.

- Civil Law: Regulates valid heirs, recipients of wills, and other criteria stipulated by law.

4. Implementation and Dispute Resolution:

- Islamic Law: Dispute resolution and execution of wills typically follow Islamic legal procedures and are overseen by religious institutions or Islamic courts.

- Civil Law: Implemented through civil courts according to applicable procedural rules in Indonesia.

5. Societal Acceptance and Everyday Practices:

- Islamic Law: Followed by devout Muslims and generally accepted within the Muslim community.

- Civil Law: Applied universally to all citizens regardless of religion or belief.

Literature analysis will highlight how the coexistence and sometimes conflicting nature of these legal systems play out in specific contexts such as inheritance, societal

acceptance, and the challenges and adaptations in practical cases within Indonesia. This study is crucial for understanding the complex dynamics between positive law and religious law in regulating wills in Indonesia.

CONCLUSION

Based on the explanations in the previous chapters, the following conclusions can be drawn: In comparing wills according to Islamic Law and Civil Law in Indonesia, we can find several significant similarities and differences. Both systems agree on the validity of wills, requiring that they be made by reasonable and mature individuals. While Islamic Law ideally suggests that wills should be written to avoid disputes, Civil Law mandates that wills must be written, either notarially or privately. Regarding witnesses, Islamic Law requires two fair witnesses, while Civil Law requires two witnesses and a notary for secret wills and two witnesses for public wills. The differences lie in the limits on assets that can be inherited, with Islamic Law capping it at one-third for non-heirs, while Civil Law does not specify a limit but ensures the rights of mandatory heirs. Both systems allow for the cancellation and change of wills at any time before the testator's death, typically in a formal manner. The execution of wills in Islamic Law must ensure that the one-third provision for non-heirs is not violated, while Civil Law ensures the rights of obligatory heirs are fulfilled. Will disputes be resolved in Sharia Courts or customary institutions under Islamic Law and in District Courts under Civil Law. The purpose of wills in Islamic Law can also be for charitable or religious purposes, whereas Civil Law is more flexible as long as it adheres to legal and public order requirements.

The perspective of the majority of people in using the law regarding the application of wills in Indonesia is greatly influenced by factors such as cultural background, religion, and the level of legal education. Local culture in various regions influences how people view and carry out wills, with some areas adhering strongly to traditional practices. Religion also plays a significant role, with the majority Muslim population often following Islamic law, while non-Muslim communities may follow the Civil Code or their religious laws. Legal awareness and the level of legal knowledge impact how wills are made and implemented, with those having good legal education more likely to follow formal legal procedures. In

practice, Muslim communities often follow Islamic law, with Religious Courts resolving related disputes, while others use notaries and District Courts under Civil Law. Trust in the formal legal system influences whether people use notaries and courts or rely on traditional mechanisms. The involvement of legal professionals, such as notaries, is crucial in ensuring that wills are legally valid and prevent future disputes. Thus, both Islamic Law and Civil Law play significant roles in the practice of implementing wills in Indonesia, with increasing awareness of the importance of complying with formal legal provisions.

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