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Legal Protection and Competence: Protection of the Rights of Non-Muslim Biological Children to the Inheritance of Muslim Parents through Compulsory Wills

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Abstract

This study examines the legal protection of the economic rights of biological children who convert from Islam to a non-Muslim faith with respect to the inheritance of their Muslim parents and analyzes the judicial authority competent to resolve such inheritance disputes in Indonesia. This research employs a normative legal method using statute, conceptual, and case approaches. The study identifies a normative tension between the legal certainty embodied in Article 171 letter c of the Compilation of Islamic Law (Kompilasi Hukum Islam/KHI), which requires heirs to be Muslim, and the principles of substantive justice and constitutional guarantees of religious freedom. To address this legal tension, the Supreme Court has developed a progressive legal interpretation through the application of wasiat wajibah (obligatory bequest) for non-Muslim biological children. Through this mechanism, non-Muslim children may obtain economic protection in the form of a mandatory bequest of up to one-third of the deceased's estate without being recognized as heirs under Islamic inheritance law. Furthermore, the study finds that disputes concerning inheritance from a Muslim deceased remain under the absolute jurisdiction of the Religious Court based on the principle of Islamic personal status attached to the deceased at the time of death. This development reflects an effort to harmonize legal certainty, substantive justice, and constitutional protection within Indonesia's pluralistic legal system.

INTRODUCTION

Inheritance is one of the most fundamental legal events in human life, considering that it is directly related to the transfer of rights and obligations over property from a deceased person to those who are still alive. Philosophically, inheritance is not just a physical transfer, but also a reflection of the moral responsibility and sustainability of family relationships recognized by law.[1] In the context of national legal development, the regulation of inheritance has a strategic position because it touches on economic aspects as well as sociological aspects of society which are very diverse.

Indonesia as a pluralistic legal country adheres to a system of inheritance distribution based on legal pluralism. Until now, there are at least three inheritance law systems that apply and are recognized side by side, namely Customary Inheritance Law, Islamic Inheritance Law, and Western Civil Inheritance Law (*Burgerlijk Wetboek*).[2] This diversity was born from the long history of the establishment of national laws that respect the heterogeneity of the social identity, culture, and religious beliefs of its inhabitants. As a result, the determination of which legal system should be applied in an inheritance event depends largely on the personal status or religious identity of the heir at the time of death.

For residents who embrace Islam, the provisions of Islamic inheritance law apply which have been formally codified into the Compilation of Islamic Law (KHI) through Presidential Instruction Number 1 of 1991. KHI is the main material guideline for judges within the Religious Court in deciding inheritance, marriage, and waqf cases.[3] This arrangement aims to provide standardization and legal certainty for Muslims in Indonesia so that the process of distributing heritage assets is in line with Islamic law which has been adjusted to the needs of national law. The position of KHI emphasizes the existence of Islamic law as an integral part of Indonesia's national legal system.

However, in its implementation, the application of inheritance law based on religious identity often intersects with the principle of religious freedom guaranteed by the constitution. Article 29 paragraph (2) of the 1945 Constitution of the Republic of Indonesia emphasizes that the state guarantees the freedom of each population to embrace their own religion. On the other hand, a person's religious status in Indonesian private law often determines his civil rights and obligations, including in terms of the right to inherit. This condition triggers juridical tension when there is a change in

[1] Sudikno Mertokusumo, *Knowing the Law: An Introduction* (Yogyakarta: Liberty, 2007), 87.
[2] Riduan Syahrani, *Sumkuman Intisari Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2011), 104.
[3] Ahmad Rofiq, *Islamic Civil Law in Indonesia* (Jakarta: RajaGrafindo Persada, 2013), 42.

religious status within a biological family bond, where certain religious laws stipulate strict faith requirements for the heirs.[4]

The tension between the pluralism of inheritance law and social dynamics ultimately gives rise to a legal *gap* that is quite serious. On the one hand, legal certainty requires the application of the normative text of inheritance law in a rigid manner in accordance with the religious identity of the heir. On the other hand, a sense of substantive justice demands recognition of the blood relationship between parents and biological children regardless of differences in beliefs.[5] Therefore, understanding the position of inheritance in the framework of Indonesian legal pluralism is a crucial starting point to analyze how justice can be realized for children who change their religion without having to injure the applicable principles of material law.

In the doctrine of classical Islamic law (*Fiqh*), differences in beliefs or *ikhtilaf al-din* are one of the main factors that absolutely break the inheritance relationship between heirs and heirs. This principle is rooted in the hadith of the Prophet Muhammad PBUH which affirms that a Muslim does not inherit from a non-Muslim, and conversely, a non-Muslim does not inherit from a Muslim. Theologically, inheritance in Islam is seen as a right born from the similarity of faith and religious loyalty, so that when one of the parties changes beliefs, then automatically the material rights derived from the blood relationship are declared null and void according to the provisions of the sharia.[6]

These normative principles were then adopted and legalized in the Indonesian positive legal system through the Compilation of Islamic Law (KHI). Article 171 letter c of the KHI explicitly provides a limitation that an heir is a person who at the time of death has a blood relationship or marital relationship with the heir, is Muslim, and is not prevented by law from becoming an heir.[7] This affirmation indicates that the condition of "Muslim" is an absolute condition (*conditio sine qua non*) that must be fulfilled by a biological child in order to be categorized as a legal heir. Without religious similarities, the biological relationship between parents and children is considered to have no legal consequences in the distribution of inheritance in Islam.

Furthermore, in Islamic legal literature, the concept of *Mawani' al-Irth* or inheritance barriers is known , where religious conversion (*riddah*) puts a person in a position to be prevented from receiving inheritance. A biological child who chooses to convert from

[4] Abdul Ghofur Anshori, "The Existence of Islamic Hereditary Law in the National Legal System and Its Contribution to the Enforcement of Substantive Justice," *Ius Quia Iustum* Legal Journal 18, no. 2 (2011): 218.
[5] Satjipto Rahardjo, *Law* (Bandung: Citra Aditya Bakti, 2014), 112.
[6] Mohammad Daud Ali, *Islamic Law: An Introduction to Islamic Law and Governance in Indonesia* (Jakarta: RajaGrafindo Persada, 2012), 201.
[7] Article 171 letter c *of the Compilation of Islamic Law (KHI).*

Islam to a non-Muslim (apostate) is juridically considered to have experienced "civil death" within the scope of his Muslim family.[8] This is because he no longer has the legal capacity to receive the *faraid share*, even though he is still the biological child of the heir. This provision reflects the nature of Islamic inheritance law which is ijtihadi but still adheres to the principle of exclusivity of faith as the basis for the distribution of property.

The impact of the application of *the principle of ikhtilaf al-din* is very significant on the fate of the parents' inheritance for children who change their faith. Textually, Article 172 of the KHI states that heirs who are not Muslims are not entitled to inheritance, which indirectly closes access for the child to obtain a share of his parents' property through the pure inheritance route.[9] This condition often causes polemics in the midst of Indonesian society that upholds family values, where a biological child who remains devoted to his parents must lose his material rights just because of differences in beliefs, a situation that is seen as very rigid when viewed from the perspective of humanity.

The rigidity of the norms in the KHI ultimately triggered a debate about the limits of the sovereignty of religious law in a pluralistic legal state. The provision of inheritance barriers due to religious differences is seen as a non-negotiable rule (*fixed*) in the perspective of material law within the Religious Court. However, the absence of a gap in the text of this law often clashes with the sociological reality where parents (heirs) actually still want to give a share of the property to their children as a form of affection and economic protection.[10] This is the starting point for the emergence of legal discovery efforts through other instruments to bridge the gap between normative texts and justice for non-Muslim biological children.

The normative impasse that arises due to the rigidity of the text in the Compilation of Islamic Law (KHI) encourages judicial institutions, especially the Supreme Court, to make legal discoveries (*rechtsvinding*). Judges as the front line in law enforcement have a moral and juridical obligation not to reject cases on the grounds that the law does not exist or is unclear.[11] In interfaith inheritance cases, the Supreme Court began to shift from a textualist-legalistic approach to a more progressive approach to finding solutions for non-Muslim heirs who biologically remain biological children of the heirs. This legal discovery is an important instrument to fill the regulatory gap that has not been able to answer the social dynamics of Indonesian society.

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[8] Ahmad Mujahidin, *Contemporary Islamic Inheritance Law* (Jakarta: RajaGrafindo Persada, 2014), 65.
[9] Article 172 of *the Compilation of Islamic Law (KHI).*
[10] Abd. Haris, "Obligatory Wills for Heirs of Different Religions: A Study on the Shift in Legal Paradigm in the Supreme Court," *Al-Risalah: Journal of Justice and Islamic Law* 15, no. 1 (2017): 48.
[11] Sudikno Mertokusumo, *Indonesian Civil Procedure Law* (Yogyakarta: Liberty, 2006), 143.

One of the most phenomenal legal breakthroughs in religious justice practice in Indonesia is the use of mandatory wills instruments for non-Muslim heirs. Traditionally, a mandatory will is reserved for adopted children or adoptive parents who do not get a share of the inheritance, but the Supreme Court has expanded the scope of its application through legal analogy. This step was taken as a middle way to still respect the principle of *ikhtilaf al-din* (religious differences) as a barrier to inheritance, but at the same time still provide economic rights to biological children who change religions. With this instrument, non-Muslim children do not have the status of heirs, but rather as recipients of a will granted automatically by law.[12]

This paradigm shift can be clearly seen through various permanent jurisprudence of the Supreme Court, starting from the Supreme Court Decision Number 368 K/AG/1995. In the ruling, the judge gave a share of the inheritance to the non-Muslim heirs through a mandatory will with a portion equivalent to the share of the daughter's heirs.[13] Since then, the granting of a mandatory will to non-Muslim family members has become a common practice and is followed by judges at first instance and on appeal as a standard of justice in deciding similar cases. This jurisprudence has become a source of formal law that provides a basis for legal certainty in the absence of explicit rules in the KHI.

The legal considerations or *ratio decidendi* that underlie the granting of a mandatory will prioritize aspects of substantive justice and the benefit of the family. The judge is of the view that differences in beliefs should not obliterate the respect for blood relations and services that a child has given to his or her parents during life.[14] The principle of humanity and efforts to maintain harmony between religious communities in one family are a strong philosophical foundation for judges in exceeding the limits of the text of Article 171 of the Criminal Code. Through this approach, the law is no longer seen as a set of dead rules, but rather as a tool to realize social peace in a pluralistic society.

The urgency of this research is based on the need for synchronization between the value of legal *certainty* and substantive justice in resolving cases of interreligious inheritance. Legal certainty requires the consistent application of written rules to ensure legal predictability for society, which in this case is represented by the normative text of the Compilation of Islamic Law (KHI). However, on the other hand, substantive justice requires judges to look beyond the letters of the law in order to find the material truth

[12] Supriyadi, "Legal Discovery by Judges in the Case of Interfaith Inheritance in the Religious Justice Environment," *Journal of the Law Pulpit* 24, no. 3 (2012): 415.
[13] Supreme Court of the Republic *of Indonesia, Supreme Court Decision Number 368 K/AG/1995 dated July 16, 1998*.
[14] Abd. Haris, "Obligatory Wills for Heirs of Different Religions...," 52.

and sense of justice that lives in society.[15] The tension between these two basic legal values often puts biological children who convert in a position of juridical and economic vulnerability.

Although previous studies have discussed interfaith inheritance and the granting of compulsory wills for non-Muslim heirs, most of the research has focused on the legal legitimacy aspects of compulsory wills and their conformity with Islamic legal principles. Studies that link the legal protection of non-Muslim biological children with the aspect of the absolute competence of judicial institutions in resolving interfaith inheritance disputes are still relatively limited. Therefore, this study not only examines the form of legal protection provided through the instrument of mandatory will, but also analyzes the basis of the authority of the Religious Court in resolving inheritance disputes involving non-Muslim biological children.

Based on this reality, the formulation of the problem in this study is focused on two main things: *First*, how is the construction of legal protection for the economic rights of non-Muslim biological children over the inheritance of Muslim parents through the mechanism of compulsory wills? *Second*, what is the absolute competence of the Religious Court in resolving interfaith inheritance disputes involving non-Muslim biological children?

METHODS

This research uses a type of normative legal research (*normative juridical*), which is legal research that lays down law as a system of norms that includes principles, norms, laws and regulations, court decisions, and legal doctrines.[16] The approach used in this study is a statute *approach* to examine written regulations related to the inheritance of different religions such as the 1945 Constitution and the Compilation of Islamic Law (KHI), as well as *a case approach*. In addition, this study also uses a conceptual approach to examine the concepts of legal protection, substantive justice, religious freedom, and legal discovery (rechtsvinding) that develops in legal doctrine and court decisions. through an analysis of the jurisprudence of the Supreme Court's rulings on the granting of compulsory wills for non-Muslim heirs.[17]

The legal materials used include primary legal materials consisting of laws and regulations and court decisions, as well as secondary legal materials obtained from legal textbooks, accredited scientific journals, and scientific articles relevant to the research

[15] Satjipto Rahardjo, *Law...*, 115.
[16] Peter Mahmud Marzuki, *Legal Research: Revised Edition* (Jakarta: Kencana, 2017), 35.
[17] Peter Mahmud Marzuki, *Legal Research: Revised Edition. 35.*

object. The collection of legal materials is carried out through library *research* with the technique of recording and classifying legal materials based on the relevance of the problem formulation. Data analysis is carried out qualitative-descriptive using deductive reasoning to draw specific conclusions from general legal premises, so as to formulate clarity regarding legal certainty and civil rights protection for biological children who have undergone religious conversion.[18]

RESULTS AND DISCUSSION

1. Legal Protection of the Rights of Children of Different Religions: A Dialectic of Legal Certainty and Substantive Justice

Normatively-textually in the positive regulation of Islamic law in Indonesia, biological children who convert from Muslims to non-Muslims (apostates) face absolute obstacles to being categorized as heirs who are entitled to receive *the faraid* share. Article 171 letter c of the Compilation of Islamic Law (KHI) outlines in a limited way that the main criterion to be called a legal heir is a Muslim at the time of the heir's death. This provision is in line with the general opinion of the jurists who place *ikhtilaf al-din* (religious differences) as one of the factors *of mawani' al-irth* (inheritance barrier) which is absolute based on the hadith narrated by Bukhari and Muslim.[19] Thus, if it is only based on the principle of rigid and positivistic legal certainty, the position of the rights of a biological child who converts is declared null and void since he renounces his Islamic faith. This condition shows the dominance of the formal legal certainty approach as proposed by Gustav Radbruch, where the applicability of norms is determined by their conformity with written rules. But in practice, rigid application of norms can result in injustice when biological relationships and family responsibilities are ignored simply because of differences in beliefs.

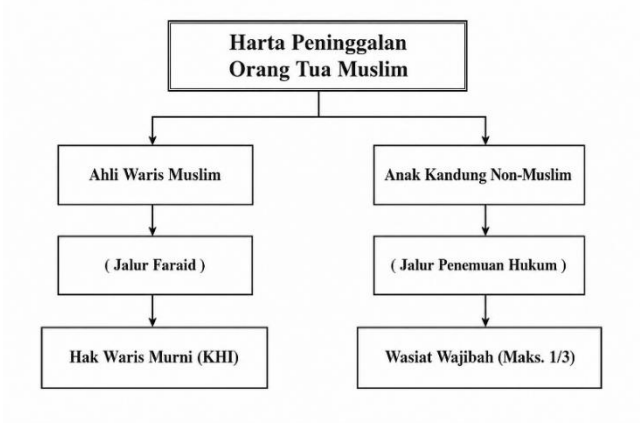
However, in its development, the sociological dynamics of Indonesian society show that the termination of civil relations absolutely solely due to differences in beliefs often injures the sense of justice and triggers disintegration within the family. Faced with the clash between the rigid legal text and the humanitarian reality, the highest judicial institution in Indonesia, namely the Supreme Court, took a progressive step through the method of legal discovery (*rechtsvinding*).[20] The Supreme Court is of the view that although the right of inheritance under *the faraid route* has been closed to non-Muslim children, the economic rights to the inheritance of their biological parents must still be

[18] Peter Mahmud Marzuki, *Legal Research: Revised Edition*, 35.
[19] Mohammad Daud Ali, *Islamic Law...*, 205.
[20] Supriyadi, "The Discovery of the Law by the Judge...," 419.

protected by substantive law for the sake of the principles of humanity (*al-insaniyyah*) and justice.

This form of substantive legal protection is realized by shifting the settlement paradigm from the pure inheritance route to the instrument of Obligatory Will. A mandatory will is essentially a will that has never been pronounced by the heir during his lifetime, but its existence is forced or determined automatically by the law (judge) for the sake of certain benefits.[21] This juridical breakthrough was first formally confirmed through the Supreme Court Decision Number 368 K/AG/1995. In the monumental ruling, the Supreme Court ruled that a biological child who is a non-Muslim can inherit a share of the inheritance of his Muslim parents through a compulsory will, where the portion is equal to the share of the daughter of a Muslim heir.[22]

Figure 1. Scheme for the Protection of the Rights of Non-Muslim Biological Children through Compulsory Wills



The institutionalization of mandatory wills for children of different religions reflects the success of the judiciary in harmonizing two often conflicting legal values, namely legal certainty on the one hand and substantive justice on the other. Through this legal construction:

a. Sharia Principles Are Maintained: The prohibition of the transfer of property through the pure inheritance route (*faraid*) between people of different religions is still respected and not violated, because the non-Muslim child is juridically not entitled to the status of "heirs" but rather as "beneficiaries of the will".[23]
b. Protected Children's Civil Rights: The biological blood relationship (*nasab*) between the child and the biological parents is still economically respected, so that

[21] Ahmad Rofiq, *Islamic Civil Law*..., 189.
[22] Supreme Court of the Republic of Indonesia, *Decision No. 368 K/AG/1995*.
[23] Ahmad Mujahidin, *Contemporary Islamic Heirloom Law*..., 78.

the child's right to get welfare guarantees from his parents' property is not simply lost due to religious conversion.[24]

This progressive step of the Supreme Court is also strengthened by a solid constitutional foundation. Article 28E paragraph (1) and Article 29 paragraph (2) of the 1945 Constitution expressly provide a guarantee that every citizen is free to embrace their own religion and worship according to their religion. If a child has to lose all economic access to his parents' inheritance just because he chooses a different belief, then it can be indirectly interpreted as a form of indirect civil sanction for a person's choice of belief, which has the potential to harm human rights guaranteed by the constitution. Therefore, the use of a mandatory will is a solution that maintains the sanctity of Islamic law while upholding the constitutional rights of citizens.

The practice of giving a mandatory will was then followed consistently (*stare decisis*) in various subsequent Supreme Court decisions, such as Supreme Court Decision No. 16 K/AG/2010 and Supreme Court Decision No. 51 K/AG/2012, which extended this gift not only to non-Muslim children but also to non-Muslim wives or husbands abandoned by their Muslim spouses.[25] From the perspective of legal protection, the granting of a mandatory will to non-Muslim biological children is a form of repressive legal protection as stated by Philipus M. Hadjon. The protection is provided through a court decision to ensure the fulfillment of a person's civil rights that have the potential to be neglected due to the vacancy or limitation of applicable legal norms. The maximum limitation on the acquisition of assets through this mandatory will is still subject to the provisions of Islamic law, which must not exceed 1/3 (one-third) of the heir's total net assets, as stipulated in Article 195 paragraph (2) of the KHI.[26] Thus, this instrument has proven to be effective in providing fair legal protection without undermining the standard order of Islamic inheritance law.

2. Judicial Competence in Settlement of Interreligious Inheritance Cases: Affirmation of the Principle of Islamic Personality

The issue of which judicial institution has absolute authority (competentia forum) to examine, adjudicate, and decide inheritance dispute cases involving family members of different religions is a very crucial procedural legal issue. The determination of absolute competence is very important to avoid the occurrence of formal defects in the decision (absolute authoritarianism) and to ensure one-stop legal certainty for justice seekers. In the judicial system in Indonesia, the determination of this competency is based on the

[24] Abdul Ghofur Anshori, "The Existence of Islamic Hereditary Law...," 222.
[25] Supreme Court of the Republic of Indonesia, *Decision No. 16 K/AG/2010* and *Decision No. 51 K/AG/2012*.
[26] Article 195 paragraph (2) *of the Compilation of Islamic Law (KHI).*

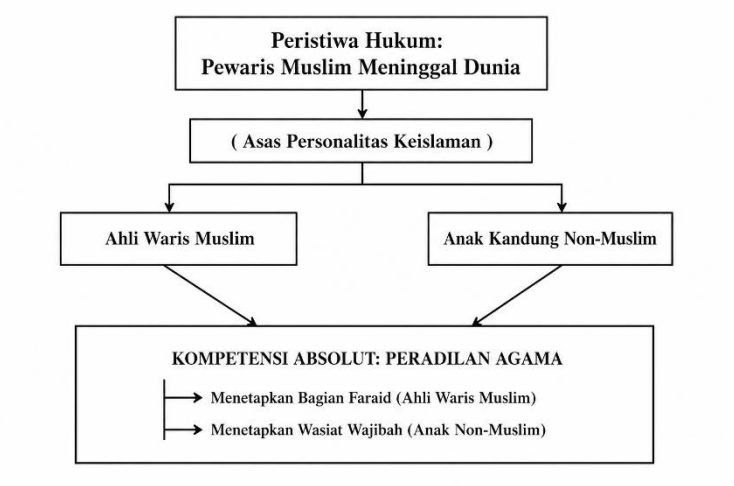
Islamic Personality Principle.[27] The principle of Islamic personality is a principle that determines that Islamic law applies to every person who is a Muslim in certain areas that are under the authority of the Religious Court. Therefore, the religious status of the heir is the main factor in determining the absolute competence of the judiciary that is authorized to resolve inheritance disputes.

The principle of Islamic personality determines that a person's attachment to Islamic material law is automatically attached to him based on the religious status he embraces. Based on Article 49 of Law Number 7 of 1989 concerning Religious Courts which has been amended last by Law Number 50 of 2009, the Religious Court has the duty and authority to examine, decide, and resolve cases at the first level between Muslims in the fields of marriage, inheritance, wills, grants, waqf, zakat, infaq, shadaqah, and sharia economics.[28] The logical consequence of this principle is that if the heir at the time of death has the status of a believer in Islam, then legally all matters related to the management and distribution of his inheritance are subject to Islamic law.

The provision emphasizes that the focal point of determining the absolute competence of the judiciary does not lie in the religion of the heirs as the legal subjects who receive the property, but lies in the religion embraced by the heir at the time of his death.[29] Therefore, even if in the facts of the trial it is found that all or part of the biological children of the heirs have converted to non-Muslims, the judicial forum with absolute authority to settle the division of the property remains under the jurisdiction of the Religious Court (the Religious Court at the first level and the High Court of Religion at the appellate level), not within the General Court (District Court).

[27] Roihan A. Rashid, *Procedural Law of Religious Justice* (Jakarta: RajaGrafindo Persada, 2013), 29.
[28] Article 49 *of Law No. 50 of 2009 concerning the Second Amendment to Law No. 7 of 1989 concerning Religious* Courts.
[29] Roihan A. Rashid, *Procedural Law of Religious Court...*, 32.

Figure 2. Absolute Competence of the Religious Courts in Interfaith Inheritance Disputes



If the case is submitted to the District Court under the pretext of having a non-Muslim heir, then the District Court is obliged to declare itself to have absolute authority through an interlocutory or final judgment, because the object of the dispute left behind comes from a Muslim heir who in domestic law is the exclusive competence of the Religious Court.[30] This is where the strategic role of judges in the Religious Court lies to apply the Supreme Court's jurisprudence on mandatory wills comprehensively.

In the practice of trial in the Religious Court, the judge has full authority to perform the dual functions in a single verdict:

a. Judging Faraid: The judge determines the heirs who are Muslims and the proportions of their respective shares based on the standard provisions in the KHI.[31]
b. Adjudicating by Execution (Obligatory Will): The judge designates a non-Muslim biological child as the beneficiary of a mandatory will and immediately calculates the portion he is entitled to receive from the total net property before the property is distributed faraid to the Muslim heirs.[32]

The affirmation of a single competence within the Religious Court has a very high urgency value from the point of view of procedural law. By centralizing the settlement of interfaith inheritance disputes in the Religious Court, it is possible to avoid the occurrence of a conflict of jurisdiction which has the potential to give birth to disparities or conflicts of decisions between the Religious Court and the District Court. In addition,

[30] Sudikno Mertokusumo, *Indonesian Civil Procedure Law*..., 156.
[31] Ahmad Rofiq, *Islamic Civil Law*..., 210.
[32] Supriyadi, "The Discovery of the Law by the Judge...," 423.

it provides procedural efficiency (light, fast, and simple costs) and ensures the realization of legal unity in resolving internal family disputes.

CONCLUSION

Legal protection for the acquisition of economic rights for biological children who convert (from Muslim to non-Muslim) over the inheritance of their biological parents is realized through the institutionalization of mandatory wills instruments based on the Supreme Court's permanent jurisprudence (such as Supreme Court Decision No. 368 K/AG/1995). Although formally-textually in Article 171 and Article 172 of the KHI children of different religions are prevented (*mawani' al-irth*) from receiving inheritance purely (*faraid*), the substantive justice approach applied by judges has succeeded in bridging the regulatory vacuum. With this construction, civil rights and biological relationships of children are still respected in the form of granting economic rights that are limited to a maximum of one-third of the heir's net assets, without harming the basic doctrine of sharia law.

The judicial institution that has the absolute competence to examine, adjudicate, and resolve interfaith inheritance disputes is absolutely within the **Religious Court**, as long as the heirs are Muslim at the time of death. This competence is expressly based on the Islamic Personality Principle of the heir as stipulated in Article 49 of the Religious Courts Law. The presence of non-Muslims (biological children) in the case does not shift absolute authority to the General Court, and the judge of the Religious Court has full authority to determine the distribution of *faraid* as well as to determine the verdict in the form of giving a mandatory will in order to ensure complete and fair legal certainty for all family members. The findings of this study show that the development of Supreme Court jurisprudence has resulted in a transformation of Indonesian Islamic inheritance law that is more responsive to the protection of civil rights of members of different religious families. The transformation shows efforts to harmonize legal certainty, substantive justice, and the protection of human rights in the national legal system.

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