THE INHERITANCE RIGHT OF NON-MUSLIM HEIRS

IN INDONESIA AND MALAYSIA

(Comparative Study between Indonesian and Malaysian Law)

Thesis

By:

Akhmad Fariz

Student ID Number 11210031



AL-AHWAL AL-SYAKHSHIYYAH DEPARTMENT

SYARI'AH FACULTY

MAULANA MALIK IBRAHIM

STATE ISLAMIC UNIVERSITY MALANG

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2015

STATEMENT OF THE AUNTENTICITY

In the name of Allah (swt),

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

THE INHERITANCE RIGHT OF NON-MUSLIM HEIRS IN INDONESIA AND MALAYSIA (Comparative Study between Indonesian and Malaysian Law)

is truly the author's original work. It does not incorporate any material previously written or published by another person. If it is proven to be another person's work, duplication, plagiarism, this thesis and my degree as the result of this action will be deemed legally invalid.

Malang, 8th June 2015

Akhmad Fariz NIM 11210031

APPROVAL SHEET

After examining and verifying the thesis of Akhmad Fariz, NIM 11210031, Al-Ahwal Al-Syakhshiyyah, Department of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim of Malang, entitled:

THE INHERITANCE RIGHT OF NON-MUSLIM HEIRS IN INDONESIA AND MALAYSIA (Comparative Study between Indonesian and Malaysian Law)

the supervisor states that this thesis has met the scientific requirements to be proposed and to be tested by the Thesis Board of Examiners.

Malang, 8th June 2015

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DEDICATION SHEET

This thesis is dedicated to the State Islamic University Maulana Malik Ibrahim Malang for the best educations. This thesis is dedicated to my beloved mother and father who teaches me every time and always gives motivations for me.



ΜΟΤΤΟ

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللهُ عَنْهُ أَنَّهُ قَالَ أَنَّ رَسُولُ اللهِ صَلَىَّ اللهُ عَلَيْهِ وَسَلَّمَ قَالَ تَعَلَّمُوا الْفَرَائِضَ فَإِنَّهَا مِنْ دِيْنِكُمْ وَإِنَّهَا نِصْفُ الْعِلْمِ وَإِنَّهَ أَوَّلُ عِلْمٍ يُنَزِّعُ مِنْ أُمَّتِي (أخرجه الحاكم وابن ماجه)

From Abu Hurayrah, the Prophet SAW said : "Learn Faraid knowledge and teach it to people, because it is part of the knowledge and will be forgotten. It is also the first knowledge that would be pulled from my people."

(Narrated by Ibn Maajah and Al-daaraqutni).



TRANSLITERATION GUIDANCE

A. Consonant

Arab	Latin	Arab Latin		
1	a	ط	Th	
Ļ	В	ظ	Zh	
ت	Т	3	٢	
ث	ts	ż	Gh	
5	J	ف	F	
5	H	ق ا	Q	
ż	kh	ای	K	
	D	J	L	
i	dz	P	М	
	R	<u>ن</u>	N	
j j	Z	و	W	
س	S	Z 0 0	Н	
ش	Sy	۶	>	
ص	Sh	ي	Y	
ض	Dl			

B. Vocal, long-pronounce and diphthong

Vocal fath	ah			a	
Vocal kasi	rah		=	i	
Vocal dlor	nmah		=	U	
Long-vocal (a) = Long-vocal (i) = Long-vocal (u)=	Â Î Û	e.g. e.g. e.g.	قال قيل دون	become become become	Qâla Qîla Dûna
Diphthong (aw) = Diphthong (ay) =	ـو بـ	e.g. e.g.	قول خير	become Become	qawlun khayrun

C. Ta' marbûthah (ة)

Ta' marbûthah transliterated as "<u>t</u>" in the middle of word, but if Ta' marbûthah in the end of word, it transliterated as "h" e.g. الرسالة للمدرسة become *al-risala<u>t</u> li al-mudarrisah*, or in the standing among two word that in the form of *mudlaf* and *mudlaf* ilayh, it transliterated as t and connected to the next word, e.g. فى رحمة الله become fi rahmatillâh.

D. Auxiliary Verb dan Lafdh al-Jalâlah

Auxiliary verb "al" (U) written with lowercase form, except if it located it the first position, and "al" in lafadh jalâlah which located in the middle of two word or being or become *idhafah*, it remove from writing.

- a. Al-Imâm al-Bukhâriy said ...
- b. Al-Bukhâriy in muqaddimah of his book said ...
- c. Masyâ' Allâh kâna wa mâ lam yasya' lam yakun.

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All Praises due to Allah, the Cherisher and Sustainer of all the worlds. There is neither might nor power but with Allah the Great, the Exalted. With only His Grace and Guidance, this thesis entitled "The Inheritance Right of Non-Muslim Heirs in Indonesia and Malaysia (Comparative Study between Indonesian and Malaysia Law)" could be completed, and also with His benevolence and love, peace and tranquility of the soul. Peace be upon the Prophet Muhammad (saw) who had brought us from darkness into the light, in this life. May we be together with those who believe and receive intercession from Him in the day of Judgment.

With all of the support and help, discussions, guidance and directions from all parties involved during the process of completing this thesis, the writer wishes to express his utmost gratitude to the following:

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- 2. Dr. H. Roibin, M.H.I., as Dean of Sharia Faculty of State Islamic University of Maulana Malik Ibrahim Malang, an also as lecturer guardian for guiding the writer in any academic processes while studying in Sharia Faculty. Many thanks are expressed for everything he has provided to the writer in guidance, advice, and motivation.
- 3. Dr. Sudirman, M.A., as The Head of Al-Ahwal Al-Syakhshiyyah Department of Sharia Faculty in State Islamic University of Maulana Malik Ibrahim Malang. As well as a father of unit ICP unit, for giving us many advices while studying as ICP student.
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- 6. Staff, and Employee of Sharia Faculty of State Islamic University of Maulana Malik Ibrahim Malang, participating in the completion of this thesis.
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Hopefully, by imparting what has been learned during the course of study in the Faculty of Sharia of State Islamic University, Maulana Malik Ibrahim Malang, it will benefit all readers and the author himself. Realizing the fact that error and weakness is impartial to being human, and that this thesis is still far from perfection, the author appreciates constructive critics and suggestions for the improvement and betterment of this thesis.

Malang, 8th June 2015 Writer,

Akhmad Fariz Reg. No. 11210031

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ABSTRAK

Akhmad Fariz, 11210031, Hak Kewarisan bagi Ahli Waris non-Muslim di Indonesia dan Malaysia (Studi Komparatif antara Hukum Indonesia dan Hukum Malaysia). Skripsi, Jurusan Al-Ahwal Al-Syakhshiyyah, Fakultas Syariah, Universitas Islam Negeri (UIN) Maulana Malik Ibrahim Malang, Pembimbing: Dr. Zaenul Mahmudi, M.A.

Kata Kunci: Waris non-Muslim, Hak Pewaris, Hukum waris Indonesia dan Malaysia

Indonesia dan Malaysia merupakan Negara dengan mayoritas agamanya adalah islam, akan tetapi kedua Negara tersebut bukanlah Negara islam. Selain itu kedua Negara tersebut memiliki banyak kebudayaan, suku, agama dan ras. Keberagaman ini lah yang dapat menimbulkan suatu fenomena yang beragam di masyarakat Indonesia dan Malaysia, salah satunya terkait kewarisan kepada anggota keluarga yang berbeda agama. Karena tidak dipungkiri, telah banyak pernikahan antar-agama yang terjadi baik di Indonesia maupun Malaysia. Selain itu, perpindahan agama dari agama satu ke yang lain merupakan sesuatu hal yang sering terjadi di kedua Negara ini.

Dalam penelitian ini, rumusan masalah yang ditentukan adalah: 1) Bagaimana hak kewarisan bagi ahli waris non-muslim di Indonesia dan Malaysia? 2) Bagaimana lembaga peradilan di Indonesia dan Malaysia menentukan lembaga mana yang berwenang menangani kewarisan bagi ahli waris non-muslim?, dan 3) Bagaimana perbandingan hak kewarisan bagi ahli waris non-muslim dan kewenangan pengadilan di Indonesia dan Malaysia?

Penelitian ini termasuk jenis penelitian normatif. Karena menggunakan data kepustakaan ataupun bentuk *library Research*. Penelitian ini menggunakan pendekatan yang digunakan adalah pendekatan yuridis normatif yang menggunakan kombinasi pendekatan peraturan perundang-undangan, pendekatan konsep, dan pendekatan perbandingan.

Hasil penelitian 1) kedua Negara tidak memberikan hak kewarisan pada ahli waris non-muslim, namun memberikan jalan lain berupa hibah dan wasiat wajibah. 2) Pengadilan di Indonesia yang berwenang untuk menangani kasus kewarisan ini adalah Pengadilan Agama. Di Malaysia, terjadi dual kekuasaan dalam masalah kewarisan. Dalam perkara kewarisan bagi ahli waris non-muslim, kewenangan Mahkamah Syariah hanya sebatas pada penentuan hak kewarisan yang dituliskan dalam Sijil Faraid. Sedangkan prosedur administrasi dan pendistribusian harta merupakan wewenang dari Mahkamah Sivil. Mahkamah syariah di Malaysia tidak memiliki wewenang untuk memerintahkan pemberian wasiah wajibah, karena mahkamah syariah tidak memiliki kewenangan terhadap ahli waris non-muslim. 3) Pengadilan dikedua Negara memutuskan untuk tidak memberikan harta waris kepada ahli waris non-muslim, karena madzhab Maliki, Syafi'i, dan Ahmad menganggap kemurtadan adalah penghalang untuk mendapatkan kewarisan. Pengadilan Agama di Indonesia memiliki kewenangan penuh dalam menangani perkara kewarisan, sedangkan Malaysia terjadi dua kekuasaan pengadilan yang memakan waktu dan biaya lebih banyak.

ABSTRACT

Akhmad Fariz, 11210031, The Inheritance Right of non-Muslim Heirs in Indonesia and Malaysia (Comparative Study between Indonesian and Malaysian Law), Thesis, Department of Al-Ahwal Al-Syakhshiyyah, Sharia Faculty, The State Islamic University (UIN) Maulana Malik Ibrahim Malang, Supervisor: Dr. Zaenul Mahmudi M. A.

Keywords: Inheritance right for non-Muslim, Indonesian and Malaysian Law of Inheritance

Indonesia and Malaysia are countries with a majority religion are Islam, but these two countries are not Islamic Countries. In addition, these two countries have a lot of culture, ethnic, religion and race. This diversity can lead to a variety of phenomena in the people of Indonesia and Malaysia. One of phenomena is related to inheritance for non-Muslim heirs, because there are a lot of inter-religious marriage that occur in both of Indonesia and Malaysia. In addition, the conversion from one religion to another religion is something that often happens in these two countries.

In this study, the statement of the research which determined are: 1) What is the right of non-Muslim heirs under Indonesian and Malaysian law?, 2) What court that has the authority to held case of inheritance for non-Muslim heirs according to Indonesian and Malaysian court authorities?, and 3) What is the comparison of inheritance right of non-Muslim heirs and court authority in Indonesia and Malaysia?

This research is a normative and library research, because it uses literature data. This study uses the approach of juridical normative that uses a combination of the legislation, concept, and comparative approach.

Results of the research, 1) Indonesia and Malaysia do not give the inheritance to non-Muslim heirs. However, the law of inheritance in both countries gives other ways for non-Muslim heirs to get property in the form of *wasiah wajibah* and *hibah* or grants. 2) In Indonesia the authority to solve the inheritance case between muslim and non-muslim is in religious court, even there are any non-Muslim heirs. Malaysia practices a dual system courts in handling inheritance case. Syariah courts have jurisdiction to issue *Faraid* Certificate only. While, the court that has jurisdiction to deal with the procedural aspects of the administration of Inheritance is Civil Court. 3) The judgments in both countries prohibited non-Muslim heirs to get inheritance, because Maliki Scholars, Al-Shaafi'i and Ahmad said that the apostasy became an absolute restriction to get inheritance. Indonesia Religious court has total authority to handle inheritance case between Muslim and non-Muslim but Malaysia practices a dual system of courts, so it requires more time and cost.

الملخص البحث

فاريس احمد. 2015 الحق في الميراث للورثة غير المسلمين في إندونيسيا وماليزيا دراسات مقارنة بين قانون إندونيسيا والقانون ساراواك. بحث لقسم الأحوال الشخصية جامعة مولانا

مالك إبراهيم مالانج، المشرف الدكتر زينول مهمود, الماجستير.

الكلمات الرئيسية: ورثة غير المسلمين, حق في الميراث, قانون إندونيسيا والقانون ساراواك

إندونيسيا وماليزيا هي بلد مع دين أغلبية هو الإسلام، ولكن البلدين ليست "دولة إسلامية". وبالإضافة إلى ذلك أن البلدين لديهما العديد من الثقافات، والقبائل والأديان والأعراق. التنوع هو الذي يمكن أن تؤدي ظاهرة متنوعة في مجتمع إندونيسيا وماليزيا، من تلك التي تتصل بميراث أفراد الأسرة من مختلف الديانات. لأنه لم ينكر بالعديد من حالات الزواج بين الأديان التي حدثت سواء في إندونيسيا أو ماليزيا. وبالإضافة إلى ذلك، تشريد أحد إلى دين آخر هو أمر كثيرا ما يحدث في كلا البلدين.

ويشمل هذا البحث هذا نوع البحث المعيارية. لأنه يستخدم بيانات مكتبة أو مكتبة النماذج البحثية. يستخدم البحث هذا النهج المستخدم هو النهج المعياري القانوني النهج الذي يستخدم مزيجاً من النهج للتشريع، إلى مفهوم ونهج والمقارنة.

من نتائج البحث كما هو معروف أن البلدين لا توفر حق الإرث في الورثة غير المسلمين، ولكن تفسح المجال للآخرين للحصول على الكتر، أي عن طريق المنح والوصايا واجيبة والأوقاف . بينما المحكمة السلطات الإندونيسية التعامل مع هذه قضية الميراث للورثة من غير-"المسلمين الدينية" في المحكمة. إلى جانب المحاكم الدينية هي المخولة بإعطاء الأوامر لوريث المسلمين لإعطاء واجيبة واسية للورثة غير المسلمين .وفي ماليزيا، يحدث الإرث المزدوج الطاقة المرتبطة كما. في حالة الميراث للورثة غير المسلمين، في سيل سيل الفرائض صلب محكمة الشريعة الإسلامية فقط كسلطة في تحديد الحق في الميراث. أثناء عملية إدارة وتوزيع الثروة هي السلطة للمحكمة الشريعة الإسلامية لا تملك المحلمة في ماليزيا لا تملك سلطة الأمر .ممنح واجيبة واسية، لأن محكمة الشريعة الإسلامية الإسلامية لا تملك سلطة ضد الورثة غير المسلمين.

CHAPTER I INTRODUCTION

A. Background of the research

In this world, human has the feeling of love for another person. Humans are getting married have children as a result from marriage. Their children will become their successor in the future. However, in the reality, child becomes temptation for the human¹. The feeling of love for the children makes human becomes blind and selfish. They will do anything for their children, even if they have to sacrifices themselves. Therefore, God has said:

إِنَّمَا أَمُو لُكُمْ وَأُولَدُكُرْ فِتْنَةٌ وَٱللَّهُ عِندَهُ ٓ أَجْرُ عَظِيمٌ ٢

Your wealth and Your Children are Only a trial, whereas Allâh with Him is a great reward (Paradise). (QS. At Taghabun[64]:15)

¹Salman Otje, *Hukum Waris Islam*, (Bandung: Refika Aditama, 2002), p. 1.

That verse explicitly explains that child is only trial for human to get great reward (paradise). However, human always acts unfair and has tendency in treating their child. Moreover, this verse mentions the problems faced by human in life which are wealth and child. The peak of the problem will happen when human dies. The arrival of death also raises many new problems; one of them is dealing with inheritance. Inheritance is one of the important issues in people's life. Through the inheritance, people shall devolve rights and duties to another person's property from a generation to another generation too². For some people the property treated as fortune in his life and it will open the opportunities of the disputes when owning the property.

The branch of Islamic discipline that associated with the distribution of inheritance property is called *faraidh*. As a Moslem, one of disciplines that have to learn is Islamic law of inheritance. As ordered by the Prophet that: From Abu Hurayrah, the Prophet SAW said³: "*Learn Faraid knowledge and teach it to people, because it is part of the knowledge and will be forgotten. It is also the first knowledge that would be pulled from my people.*" (Narrated by Ibn Maajah and Al-daaraqutni).

In addition, the purposes of studying the science of faraidh are to prevent disputes due to inheritance and to prevent the family relationships to be broken. As ordered by the Prophet narrated by Ahmad, Al-nasaa'i and Al-

²Syakroni, Konflk Harta Warisan, (Yogyakarta: Pustaka Pelajar, 2007), p. 1

³http://www.ikim.gov.my/index.php/en/the-star/8471-achieving-sustainability-through-knowledge-ofal-faraid-inheritance, last accessed 14th of December 2014

daaraqutni, that the meaning is: Learn the Qur'an and teach it to mankind, and learn and teach knowledge of al-Faraid (knowledge of inheritance) to mankind. Indeed, I am man who will leave this world, and indeed the knowledge that will be taken away, and later there will be persecution, until two people disagree about the distribution of the estate, and no one was able to resolve between the two.

It is natural that every human being is very concerned about property and wealth. Because of wealth, men are willing to quarrel among themselves, even with their close relatives. This will not only destroy the family relationship, but it will also affect the sustainable development of the *Ummah* in entirety⁴. Hence, the foregoing Hadith clearly warns the Muslims of the importance of learning the Knowledge of *al-Faraid* to avoid property disputes among Moslems and to keep the harmony of the family.

Wealth and property that given by God to human are not only to fill the needs for owners in an attempt to serve the Almighty giver, but also to keep brotherhood relationship. But as a result of death, it will make dispute among the heirs on the wealth and property. This case occurs when the parties are not consistent with the rule that have been set.

Inheritance law in Islam gets a great attention, because the distribution of inheritance often gives unfavorable consequences for the grieving families.

⁴http://www.ikim.gov.my/index.php/en/the-star/8471-achieving-sustainability-through-knowledge-ofal-faraid-inheritance, last accessed 14th of December 2014

The matters of inheritance are about devolving the various rights and obligations of person who dies to their heirs.

From time to time, problems that related to inheritance are developing due to the changes happened in society. As a pluralist society, the religion and the tribes in the Indonesian and Malaysian are very heterogeneous. Indonesian courts divide the case between Muslim and non-Muslim, and so do in Malaysia. Also, religious court in Indonesia is not handling non-Muslim case, neither is Malaysia. But, it will raise problem when there are any family member whom in different religion. It will cause so many society problem, especially in inheritance, because in Islam the different religions are an obstacles⁵ (*mannu*') to obtain an inheritance.

It is in line with hadith that says: *the infidels do not inherit property of the Muslims and vice versa (al-Jama'ah* unless *Muslims* and *Nasa'i*). The Hadith above describes the problems of the different religions to inherit. When the decedent is muslim and the heirs are not muslim, in this case there should be a restriction of their religions. Based on the explanation above, the writer want to observe more about the problem above and put into a thesis entitled, "The Inheritance right of Non-Muslim heirs in Indonesia and Malaysia (Comparative Study between Indonesian and Malaysian Law)".

⁵Lubis, K. Suhrawardi, *HukumWaris Islam*, (Jakarta: SinarGrafika, 2007), h. 59

B. Statement of problem

Based on the background above the statement of problems are:

- 1. What is the right of non-muslim heirs under Indonesian and Malaysian law?
- 2. What court that has the authority to held case of inheritance for non-muslim heirs according to Indonesian and Malaysia court authorities?
- 3. What is the comparison of inheritance right for non-muslim heirs and court authority in Indonesia and Malaysia?
- C. Objective of research

From the problems that have been formulated above, the research objectives are:

- a. To describe the inheritance status position of the non-Muslims heirs in the laws of Indonesia and Malaysia.
- b. To understand which court in Indonesia and Malaysia that held the case of inheritance for non-muslims heirs.
- c. To understand the similarities and the differences of inheritance right for non-muslim and court authority between Indonesia and Malaysia.
- **D.** Significance of research
 - 1. Theoretical Significance

This research is expected to provide additional concept regarding inheritance matters and the right of inheritance for non-muslim heirs in Indonesia and Malaysia. In the other hand, it will also be beneficial for the development of legal science, by donating legal thoughts in Islamic family law and inheritance law specifically.

2. Practical Significance

This research is expected to make a contribution and suggestion for policy makers in implementing inheritance laws against non-muslim family members. In addition, it can be suggested to the Government as a additional consideration for making regulation of inheritance on different religious family members in the equitable development law efforts. The result of this research can be used as reference material for the community in the Division of inheritance.

E. Operational Definition

Inheritance

Inheritance is problematic subject. In order to get appropriately result, the main focus in this research is the inheritance case between deceased muslim and non-muslim heirs.

Non-muslim

Non-muslim in this research means someone who convert or changing his/her belief and religion from Islam.

Malaysia

However, Malaysia is a federation country and to gain a deeper study, the writer limited the problem in Sarawak state only.

F. Research Method

1. Type of research

According to theme of inheritance that chosen, the sources are from regulations and court decisions as well as other Islamic books, then this research included in normative research. In this type of legal research, conception that happens frequently are what is written in the Systematics of legislation or as a rule which is the benchmark of human behavior in the life of society and in regards to the expansion of the Islamic law⁶, it also examines researching secondary material.

2. Approach

The approach in this research is the scientific way of investigating to understand the data. Research methods used in this research are based on qualitative data analysis and the characteristic is descriptive. This study describes an overview on the issue of inheritance that happens in the community. This research also describes the laws of inheritance that can be accepted by common sense⁷.

3. Data Source

a. The primary legal material is legal materials that bind and become the main substance in research problems. The primary legal materials in this research is consisted of Indonesia and Malaysia Regulation and

⁶Cik Hasan Bisri, *Pilar-Pilar Penelitian Hukum Islam dan Pranata Sosial*, (Jakarta: Rajawali pers, 2004),h 118

⁷Amiruddin & Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali pers, 2006), p.
6.

related books or journals such as: Islamic Family Law Ordinance, Sarawak 2001, Pawancheek Marican: Islamic Inheritance laws In Malaysia, Verdict of the Supreme court No. 368 K/AG/1995.

- b. Secondary legal material is legal material that gives a description of the primary legal materials, or references that refer to or cite the primary legal materials.
- c. Tertiary Legal Materials is the law that gives hints and explanations of the material law of primary and secondary legal materials. Encyclopedias and scientific dictionary.

4. Data collection Techniques

The type of this research is library research, the steps that must be accomplished in data collection techniques are searching and finding data related to the subject matter, reading and examining the collected data to obtain complete assured data, and recording the data systematically and consistently. In this case, the literature used by the researcher are in the form of books, scientific papers, and other related sources as reference material relating to the issue of inheritance, specifically in terms of different religious inheritance.

5. Data Analysis Techniques

Data analysis technique that is used in this research is descriptive analytic method, in which the issues is be presented in details and then analyzed from critical and content aspects against the various aspects that

can provide an explanation or an answer to the problems that written in the statement problem. In relation to the title in which the writer is interested in, then in this analysis the writer gave an idea of what is meant by inheritance, which was later explained in chapters to be more understandable, and then drew the conclusion which answering the statement of problem.

G. Previous Research

The title that chooses by writer in this research is, The Inheritance Right of non-muslim heirs in Indonesia and Malaysia actually contains an interest variable about previous research that has been researched or not.

From the search results, the writer found topics that have not much difference with topics who the researchers were interested in inheritance. These are some research results that correlated with the title above:

Choirul Anam (2010) entitled *Kewarisan anak hasil inseminasi buatan dan akibat hukum terhadap Kewarisan anaknya, kajian antara hukum islam dan hukum positif* (Inheritance Children Results of Artificial Insemination Artificial, Insemination And Due To The Inheritance Law son, Study Between Islamic Law and Positive Law⁸). This research is about the inheritance case according to Islamic law, when the children was born from artificial insemination process through the womb of another woman, and the child who was born of artificial insemination techniques with the mother's womb through the toll that childbirth

⁸Choirul Anam, *Kewarisan anak hasil inseminasi buatan dan akibat hukum terhadap Kewarisan anaknya, kajian antara hukum islam dan hukum positif,* Skripsi (Malang: UIN Malang, 2010)

cannot inherit each other, because it is considered as suckle and transferred to couples who have embryos. Moreover, the inheritance is according to positive law, then the artificial insemination through a toll womb as the legal consequences of his inheritance legally as a child of the couple who had the egg and sperm cells, and both can inherit each other in accordance with the provisions of applicable law.

Inayatur Rahmah (2007) entitled *Hukum Waris Anak dari Perkawinan Beda Agama Menurut fiqh dan Kompilasi Hukum Islam (KHI)* (Inheritance Law of Children from Different Religious Marriage according to Fiqh and Compilation of Islamic law (KHI)⁹). The research indicates that according to the fiqh, the status of children from different religious marriage is considered a legitimate child if the child born of the marriage with a woman who were given the scripture, because the marriage with those women is permitted by Allah SWT. While according to the KHI is invalid, because KHI prohibit the practice of different religious marriage. As for the law regarding his heir, according to the fiqh of marriage different religions can get legacy through wasiatwajibah which should not be more than 1/3 of the decedent's property. While according to KHI, the child could not inherit from his father and can only be inherited from the mother and the family of his mother.

Ali Musthofa (2010) entitled Status Hak Waris Anak Dari Pernikahan Sedarah Perspektif Fiqh Kontemporer (Inheritance Rights of the Child from

⁹Inayatur Rahmah *hukum waris anak dari perkawinan beda agama Menurut fiqh dan kompilasi hukum islam (khi)*, Skripsi (Malang: UIN Malang, 2007)

incest Marriage in the Perspective of Fiqh Contemporary)¹⁰. There are several things that makes the marriage invalid under the law, such as whether the legitimate of marriage is fulfilled or not, and incest is one of the reasons for the marriage cancellation. The problem arises is what if the marriage has been canceled by law (*fasakh*) which caused by both husband and wife are known have an incestuous relationship while they have children. From the research that has been done, the conclusion stated that incestuous marriage is prohibited due to various negative consequences in medical, psychological, and sociological aspects of the children and their families. Related with children's *nasab*, child is born from a legal marriage and it is considered legitimate under the law, even it is incestuous marriage, because the child was born from a valid marriage under the law so the rights is equal under the law and the child still get inheritance rights, protection, guardianship, *nasab*, etc.

H. Structure of Discussion

This research writing organized in four chapters. The chapters have focused discussion of each as described as follows:

Chapter I is the introduction. This chapter contains some of the basic elements of this research, such as the background that give basic information and the importance of this research, a problem that became the focus of the research, the research objectives are coupled with the significance of research about inheritance. By observing this chapter, an overview of basic research will be understood clearly

¹⁰Ali Musthof, *Status Hak Waris Anak Dari Pernikahan Sedarah Perspektif Fiqh Kontemporer*, Skripsi (Malang: UIN Malang, 2010)

by the readers. This chapter also included the research method, which explains the research steps that must be considered by the author because that is the core of the thesis.

Chapter II, to obtain satisfactory results, the writer placed a theory as one of the comparisons for this research. The theories in this chapter are expected to give an overview or formulate a problem that found in the research objects that will use in the analysis process. The first section in this chapter reviews the issue of inheritance. This discussion leads to the understanding of inheritance and so on. Further discussion is discussed about the Inheritance law in Indonesia and Malaysia. In addition, this chapter also reviews Indonesia and Malaysia court system.

After the theories are explained, **Chapter III**, will describe about The Inheritance Right of Non-Muslim Heirs according to Indonesian and Malaysian law. In this chapter, the data is processed by entering the data and information acquired in the previous chapters. Then, the next processes are editing, classifying, verifying and analyzing the data to answering the statement of problem to obtain accurate and valid result.

The last one is **Chapter IV**. This chapter contains two basis things namely conclusions and recommendations. The conclusion is a summary about the answers of problems presented in the Statement of problem. The recommendation includes a number of suggestions for both academic institutions and future researchers.

CHAPTER II

COURT SYSTEM IN INDONESIA AND MALAYSIA

A. Islamic Inheritance Law

1. The Definition of Inheritance

In some literature of Islamic law, there are some names in Islamic Law of Inheritance, such as *fiqh mawaris*, *ilmu faraidh*, and the inheritance law¹. This differences happen because the point of view in inheritance discussion.

There are two words which commonly used in Islamic inheritance, namely *mawarits* and *faraa'idh*. *Mawarits* is the plural form from the word *mirats*, which means "legitimacy or the properties as result of the death of someone else"². In the terminology of Syara', *mawaris* is knowledge of figh that related with

¹Muhibbin, Abdul Wahid, *Hukum Kewarisan Islam sebagai Pembaruan Hukum Positif di Indonesia*, (Jakarta: Sinar Grafika), p. 5.

²Naskur, *Hukum Kewarisan Dalam Kompilasi Hukum Islam (KHI)*, p. 54.

distribution of inheritance³. *Miratsun* is verbal noun (maşdar) of verb form *al-irts*, *wirtsan*, *turatsan*, and *wirtsan* which is basic form from *intiqalun*, that means transfer of property⁴. Meanwhile, *faraa'idh* is the plural form from the word *farīdah* that means "*fardlu*/obligation","one of parts in zakah and inheritance". *Farīdah* is derived from *faradha* which means "duty or order"⁵. *Faraaidh* explains about the portion of inheritance and distributing wealth and property from dead people by using *mawaris* is *wajib 'ain* for Islamic community⁶.

Muhammad al-Syarbiny gave definition of *ilmu faraidh*':

الفِقْهُ الْمُتَعَلَّقُ بِالإِرْثِ وَمَعْرِفَةِ الْحِسَابِ الُوَصَّلُ إلى مَعْرِفَةِ ذَالِكَ وَمَعْرِفَةِ قَدْرِ الْوَجِبِ مِنَالتَّرْكَةِ لِكُلِّ ذِيْ حَقِّ

(Ilmu faraidh is) Fiqh that related to inheritance and calculation knowledge to know the share of property that should be transferred to each heir.

Therefore, inheritance or succession can also be understood as a process of transferring property which owned by died person. Portion of the heirs will distribute by testament that specified about it, if there is no testament then the distribution of inheritance and the mechanism of distribution using the portion

³Ismuha, *Penggantian Tempat dalam Hukum Waris munurut KUHPerdata, Hukum Adat dan Hukum Islam*, (Jakarta: Bulan Bintang, 1978) p. 29.

⁴Djamila Usup, *Perkawinan Beda Agama Implikasi Kewarisan dan Perwalian: Perspektif Hukum Islam*, (Malang: UM Press), p. 51.

⁵Naskur, *Hukum Kewarisan...*, p. 56.

⁶Anshori, Abdul Ghafur, Filsafat Hukum Kearisan Islam, (Yogyakarta: UII Press, 2005), p. 1.

⁷Muhibbin, Abdul Wahid, *Hukum Kewarisan Islam...*, p. 8.

that mention in law of inheritance. The main priority in this issue lies in the will. Sometimes, dead people have determined a testament before they died and hand over their wealth to their family after he died. It is also accordance with the word of God, which imposes a legal heir, occurred after executed corpse will and paid off his debts.

2. Sources of Islamic Law of Inheritance

The sharia is revealed through the Holy Qur'an and the Traditions (*Sunnah*) of Prophet Muhammad. Thus the first primary source of the sharia is the Holy Qur'an while the second primary source is the hadith. The growth and development of the law are achieved through human intellect working on the Qur'an-*Sunnah* by analogy (*Qiyas*) and as individual jurist exercise their intellect upon the Qur'an-*Sunnah*, there has developed a consensus (*Ijma*)⁸. Thus the body of rules governing inheritance just likes any other rules of the sharia. Islamic inheritance can only be understood if examined in the context of these sources of law the *Quran*, *al-Sunnah*, and *Ijma*⁹.

3. The Requirements for Inheritance

Inheritance in Islam will not take unless the requirements of inheritance coincide, which include *al-muwarrith*, *al-warith*, and *al-mauruth*¹⁰. *Al-Muwarrith* is when a benefactor dies, whether *taqdiri* or *hukmi*. *Al-Warith* is a beneficiary

⁸Pawancheek Marican, *Islamic Inheritance laws In Malaysia*, (Malaysia: LexisNexis), p. 1 ⁹Ahmad Azhar, *Hukum Waris Islam*, (Yogyakarta: UII Press), p. 4

¹⁰Muhammad Muhyiddin Abdul Hamidi, *Ahkam Al-Mawarits fi Asy-Syari'ah Al-Islamiyah 'ala Madzahib Al-Arba'ah*, terj. Wahyudi Abdurrahim, (Jakarta: Pustaka Al Kautsar), p. 46

who will receive an inheritance and is required to be alive during the demise of the benefactor, whether *hukmi* or *taqdiri*. While *al-Mauruth* refers to the wealth owned by the benefactor, be it liquid or solid wealth and all rights associated with the wealth.

4. Impediments to Inheritance

Impediment means barring an heir from getting his/her share of the deceased's estate due to certain circumstances. In inheriting the property, there are some restrictions or prohibitions from receiving the inheritance.

There are two kinds of restrictions, namely the impediment that has been agreed by scholars and the restriction that still debated by scholars. Meanwhile, there is also impediment that still in a debated by scholars. Some scholars make it as a restriction for person to get a property, and some other scholars do not regard it as a restriction.

a) Agreed Impediment by scholars

If there is one restriction found, despite all of the terms and causes to get property has been fulfilled, the property remains invalid¹¹. According to the majority of scholars, the three most essential impediments to inheritance are: Al-Qatl (homicide), difference religion, and slavery.

1) Al-Qatl.

A person causing the death of another person cannot inherit, though some authorities admit an exception to this rule in the case of homicide for

¹¹Muhammad Muhyiddin Abdul Hamidi, Ahkam Al-Mawarits, p. 45.

which the perpetrator was not in any way to blame. Those who argue that a murderer or a killer shall not inherit rely on the prophetic tradition.

2) Slavery

A slave and everything he owns belongs to his master. As far as he remains a slave, he will not inherit from his relatives and they will not inherit from him. The logic is that if he inherits, whatever he gets belongs to his master and if his relatives are to inherit from him, they will actually be inheriting part of the master's estate.

3) Difference of religion.

A Muslim does not inherit from a non-Muslim relative no-matter how close they are, and vice-versa. For instance, a Muslim father who has a non-Muslim son will not inherit from him and the other way round.

b) The Debated Impediment by Scholars

There is also impediment that still in a debated by scholars. Some scholars make it as a impediment for person to get a property, and some other scholars do not regard it as a impediment¹². Two impediments that still debated by scholars are:

1) Apostasy

The first impediment that still debated by scholars is apostate (arriddah). Etymologically Al-riddah is al-irtidad, which means back and turn away from something. According to sharia scholars, it is a phrase that is

¹²Muhammad Muhyiddin Abdul Hamidi, *Ahkam Al-Mawarits*..., p. 73.

intended as "a muslim commits an act or utters a word or a particular belief which is in no way condoned by Islam".

2) Difference states

The second impediment is difference states. State in this term means the state where someone died and the state where heirs living. Scholars who make it as an impediment are said this specifically used for inter-religion except muslim.

5. Maslahah

Maslahah, literally means benefit or interest. When it is narrowed to Maslahah mursalah, the term indicates unregulated public interest in the sense of not having been regulated by the Lawgiver, as no textual authority can be found on its validity or otherwise. Al Ghazali defined Maslahah as the consideration which secures a benefit or prevents harm but is, in the meantime, harmonious with the aim and objective of the sharia¹³.

In applying a law or on the basis of *maslaha<u>h</u>* certainly shouldn't be perfunctory, must comply with the specified requirements. Related to the requirements of *al- maslaha<u>h</u> al-mursalah*, Al-Syathibi which was later reaffirmed by the Abd. Wahab Kholaf and Abu Zahrah, as inferred by a. Djazuli, mentioned in the following¹⁴:

 ¹³Elvan Syaputra, Faridl Noor Hilal, "Maslahah as an Islamic Source and its Application in Financial Transactions" Journal of Research in Humanities and Social Science 2 (2014), p.66
 ¹⁴A. Djazuli, Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis, (Jakarta, Kencana, 2010), p. 11
- Maslaha<u>h</u> al-mursalah must not be contrary to the maqasid Syari'ah, a common legal basis, the spirit of the teachings of Islam and the detailed legal basis for sure the cause and instructions.
- 2. *Maslaha<u>h</u> al-mursalah* must be assured in the sense that there should be a discussion and a rational and in-depth research so that it is believed that this provides benefits or deny the dangers
- Maslaha<u>h</u> al-mursalah is generally does not give rise to difficulties which are not reasonable.

From requirements above, scholars use *maslaha<u>h</u> al-mursalah* in *ijtihad* very carefully. Because of this way used when the scholars brave to set a problem solving in a case which have no clue in Islamic law.

B. Court System in Indonesia

1. Overview of Indonesia

Republic of Indonesia is state in Southeast Asia. Indonesia is an archipelago country that has 13.466 islands crossed by equator. Indonesia is located between Asia and Australia continent.¹⁵. That's why it is also called with Nusantara which means a lot of islands between two continents.

The total population in Indonesia is 237.641.326 people in 2010 which makes Indonesia becomes the world's fourth-most-populous country. According to BPS in 2010, Indonesia has 1.340 distinct native groups and 742 different languages and dialects.

¹⁵http://en.wikipedia.org/wiki/Indonesia, last accessed 2 june 2015

The largest ethnic group is the Javanese which comprise 42% of the Indonesia population. Most of Javanese live in Java Island, but million Javanese people have transmigrated to islands of Indonesia. Even Javanese people are also migrated to other countries, such as Malaysia and Suriname.

The Sundanese, Malay, and Madurese are the largest non-Javanese ethnic. Indonesia still has many secluded ethnic, especially *Kajang* in Sulawesi and *Korowai* Papua that only have a hundred members for each group. Most Indonesians are descended from Austronesian-speaking peoples whose languages can be traced to Proto-Austronesian (PAn), which possibly originated in Taiwan.

Indonesia is the world's most populous Muslim-majority nation with over 207 million people, but officially Indonesia is not Islamic country¹⁶. The religion in Indonesia has big influence in society. As said in Indonesian national ideology, Pancasila: "Belief in the one and only God". Several religions in Indonesia have influence in politically, economic, and cultural society. Based on census in 2010, 87,18% of 237.641.326 Indonesian people are Muslim; 6,96% Protestant; 2,9% catholic; 1,69% Hindu; 0,72% Buddha; 0,05% Confucianism; 0,13% other religion, and 0,38% did not answer or did not ask.

In Indonesian Constitution 1945 article 28E said, "(1) Every person shall be free to choose and practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, and to choose one's place of residence within the state territory, to leave it and to subsequently

¹⁶http://en.wikipedia.org/wiki/Indonesia, last accessed 2 june 2015

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return to it". While religious freedom is stipulated in the Indonesian constitution, the government officially recognizes only six religions: Islam, Protestantism, Roman Catholicism, Hinduism, Buddhism, and Confucianism. Indonesia is a republic with form of government comprises an elected legislature and president.

2. Sources of Indonesian legal system

Sources of law are anything which raises the rules that have coercive powers and if breached will result in sanctions. Indonesian legal sources can be viewed from two aspects, namely material and formal term¹⁷.

In material term, is about source of legal rules which define the content of the law. It also can be interpreted as a source which the legal materials obtain, so it is the factor in forming the law. Meanwhile, in formal term, is about legal power from regulation. It relates to the form or manner that causes the rule of law applies.

a. Statute

According to Act No. 10/2004 on the Establishment of legislation, there are legal sources in Indonesia, namely:

- 1) UUD 1945 (The Constitution of Indonesia and its amendments)
- Undang-Undang / Peraturan Pemerintah Pengganti Undang-undang (The Laws and The Interim Law)
- 3) Peraturan Pemerintah (Government Regulation)

¹⁷C.S.T. Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia*, (Jakarta: Balai Pustaka, 1989), p. 46.

- 4) Penetapan Pemerintah (Government Decree)
- 5) Penetapan Presiden (President Decree)
- 6) Peraturan Daerah (Regional Regulation)

b. The habit (custom)

Habit is the oldest source of law¹⁸. Habits are human actions fixed and repeatable. So it is a pattern of behavior that is fixed, steady, common, and normal/ behaviors which raises a good deed. Habit/*adat*/custom will cause law if the law indicates the habit to be enacted. Habits do not causes the law, unless the Act refers to the habit so habit can be used as source of law,

c. The decision of the judge (*jurisprudentie*)

Jurisprudence is the decision of the judge (court) that follows by the earlier verdict in the same case¹⁹.

d. Treaty

Treaty is an agreement that is held by the two countries / more. If held by two countries it is called bilateral, and if more than two states called multilateral. Meanwhile, the open agreement/collective is multilateral agreement that would allow other countries that did not participate can be and become a party²⁰.

e. The opinion of legal scholars (doctrine)

¹⁸C.S.T. Kansil, *Pengantar Ilmu Hukum...*, p. 46.

¹⁹C.S.T. Kansil, *Pengantar Ilmu Hukum...*, p. 48.

²⁰C.S.T. Kansil, *Pengantar Ilmu Hukum...*, p. 50.

Doctrine became a source of law because international treaty law and jurisprudence do not give legal answers to seek expert opinion on the law.

3. Inheritance legal systems in Indonesia

Indonesia has three inheritance legal systems, namely adat inheritance law, Islamic inheritance law, and western inheritance law²¹. Adat inheritance law is a norm of local adat community about inheritance. Islamic inheritance law is a norm of inheritance based on al Qur'an (Islamic holy book) and hadith (words, acts, and silence of Prophet Muhammad PBUH). In Indonesia, there are three schools of Islamic inheritance law, namely Syafi'i's (patrilineal) system of inheritance law (Imam Syafi'i is the most influenced school for Indonesian people), Hazairin's (bilateral) system of inheritance law (Hazairin was Profesor at University of Indonesia had different view from Imam Syafi'i), and Compilation of Islamic Law system of inheritance law (Compilation of Islamic Law is Islamic law written by Indonesian ulama and Islamic experts). The last, western inheritance law is a norm of heritage based on Burgerlijk Wetboek as legal product of Dutch government when occupied Indonesia. All three inheritance legal systems are available for Indonesian people.

b. Adat

Adat law has been applicable for adat local community or indigenous prior to entering of Islam and Dutch occupied Indonesia. Inheritance is also provided in adat. It is hard to uniform adat inheritance law for all indigenous because familial

²¹Yeni Salma Barlinti, Inheritance Legal System in Indonesia, Indonesia Law Review, 1, (2013), p. 23

system influenced by variety of descendants lines, namely patrilineal, matrilineal, and bilateral or parental.

In adat inheritance law, there are three inheritance systems, namely individual, collective, and $mayorat^{22}$.

- System of individual inheritance is distribution of legacy based on individual or personal heir to be possessed individually. Each heir is free to use or transfer the obtained property to other parties.
- System of collective inheritance is distribution of legacy by transferring undivided legacy to the heirs. Each heir has rights to manage, to use, or to received result of collective legacy.
- 3) System of mayorat inheritance is transferring of rights to occupy undivided legacy to the eldest child considered successor of responsibility of family after his or her parents died. The eldest child manage legacy to earn living and take care of his or her immature siblings until they are matured and independent. There are two kinds of systems of mayorat inheritance, male mayorat and female mayorat. Mayorat of male is transferring of legacy management to the eldest son. Mayorat of female is transferring of legacy management to the eldest daughter.
- c. Burgerlijk Wetboek

The system of western inheritance law is based on the Civil Code or Burgerlijk Wetboek or Kitab Undang-Undang Hukum Perdata. The Civil Code

²²Yeni Salma Barlinti, Inheritance Legal System in Indonesia, Indonesia Law Review, 1, (2013), p. 25.

divides heirs into two kinds, namely heirs of *ab intestato* and heirs of *testamentair*²³. Heirs of *ab intestato* is heirs due to marriage and kinship relations. Heirs of *testamentair* is heirs pointed in testament or wills.

There are classifications of heirs of *ab* $intestato^{24}$. The meaning of classification of the Civil Code is different from classification of heirs in Islamic inheritance law. Classification of the Civil Code has means the groups entitled to inherit in order. Classifications of heirs set forth in the Civil Code are:

- 1) Child or offspring and wife or husband.
- 2) Parents (father and mother) and sibling.
- 3) Grandfather and grandmother or other ancestors in a straight line upward.
- 4) Relatives of side line until the sixth degree
- d. Compilation of Islamic Law

Compilation of Islamic Law is a special regulation for Indonesian muslim. The regulation consists of marriage, inheritance, and *waqf* (endowment). Purpose of the compilation is to serve as guidelines for judges of Religious Judicature in resolving cases. Prior to the compilation, they used 13 books as a guide to settle cases. Principally, provisions of the compilation have no different from al Qur'an. Compilation of Islamic Law consist of three books, namely Book I about Law Marriage (article 1-170), Book II about Inheritance Law (article 171-214), Book III about Endowment law (article 215-229).

²³Yeni Salma Barlinti, *Inheritance Legal System...*, p. 32

²⁴Yeni Salma Barlinti, *Inheritance Legal System* ..., p. 32

Commonly, in the Compilation of Islamic Law, inheritance law consists of the discussion of inheritance, such as heir, deceased, and property as mention in Book II. The Compilation of Islamic Law is general and accommodative, because it only regulates basic aspects that had been clearly written in Quran and Hadith, such as the heir and his/her share.

4. Indonesian Court System

The court system in Indonesia has some resemblance with the court system in any other countries adopting modern (western) legal system. The resemblance is the direct result of European influence on the existing Indonesian legal system. The influence traces back from the period when the Netherlands colonized Indonesia.

The court structure in Indonesia is complex. The jurisdiction of courts is divided into four tribunals, namely, the General Tribunal, Religious Tribunal, Military Tribunal and Administrative Tribunal²⁵. These tribunals have their own jurisdictions, which is referred in Indonesian as the '*Peradilan*²⁶'.

Under the Judicial Power Act the court hierarchy consists of three tiers. The lowest hierarchy is the lower court, which is referred in Indonesian as '*Pengadilan*'. The court of first instance is established based on Presidential

²⁵Hikmahanto Juwana, *Dispute Resolution Process in Indonesia*, IDE Asian Law Series No. 21, (2003), p. 8.

²⁶Ahmad Mujahidin, *Pembaharuan Hukum Acara Peradilan Agama*, (Bogor: Ghalia Indonesia 2012),p. 26.

Decree²⁷. The next hierarchy is the court of appeal, which is referred to as *'Pengadilan Tinggi*.' The appellate court is established in each province by an Act. The apex of Indonesian courts is the Supreme Court which is referred to as *'Mahkamah Agung*.'

In the General Tribunal, the courts consist of three tiers²⁸. The lowest is the District Court which is referred to as '*Pengadilan Negeri*'. The appellate court is the High Court which is referred to as '*Pengadilan Tinggi*'. The court of last instance is the Supreme Court.'

In the Religious Tribunal, the courts consist of three tiers²⁹. The lower court is the Religious Lower Court referred to as '*Pengadilan Agama*.' The appellate court is the Religious High Court referred to as '*Pengadilan Tinggi Agama*.' The court of last instance is the Supreme Court.

In the Military Tribunal, the courts consist of three tiers³⁰. The lower court is the Military Lower Court referred to as *'Pengadilan Militer*.' The appellate court is the Military High Court referred to as *'Pengadilan Tinggi Militer*.' The court of last instance is the Supreme Court.

Lastly, in the Administrative Tribunal, the courts also consist of three tiers³¹. The lower court is the Administrative Lower Court referred to as '*Pengadilan Tata Usaha Negara*. The appellate court is the Administrative High Court

²⁷Hikmahanto Juwana, *Dispute Resolution*..., p. 9.

²⁸Satjipto Rahardjo, *Peradilan Satu Atap di Indonesia*, (Bandung: Refika Adhitama, 2007), p. 83.

²⁹Satjipto Rahardjo, Peradilan Satu Atap di Indonesia..., p. 81

³⁰Satjipto Rahardjo, *Peradilan Satu Atap di Indonesia...*, p. 84

³¹Satjipto Rahardjo, Peradilan Satu Atap di Indonesia..., p. 84

referred to as '*Pengadilan Tinggi Tata Usaha Negara*.' The court of last instance is the Supreme Court.

C. Court System in Malaysia

1. Overview of Malaysia

Malaysia is a federal constitutional monarchy located in Southeast Asia. It consists of thirteen states and three federal territories and has a total landmass of 329,847 square kilometers. Malaysia separated by the South China Sea into two similarly sized regions, Peninsular Malaysia and East Malaysia (Malaysian Borneo).

West Malaysia is divided into eleven federations, namely Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Perak, Perlis, Pulau Penang, Selangor, Terengganu, and two federal territories, namely Kuala Lumpur (Malaysian capital city) and Putrajaya (federal government). While, in East Malaysia is divided into two federations, namely Serawak dan Borneo Utara (Sabah), and one federal territories, Labuan.

According to the 2010 census³², the population of Malaysia was 28,334,135, making it the 42nd most populated country. In 2010, Malaysian citizens were consisted of 66,7% Malayan, 24,6% Chinese, and 7,4% India. According to census in 2000 held by Jabatan Perangkaan Malaysia, 60,4% were Muslim; 19,2% Budha; 9,1% Crishtian; 6,3% Hindu; 2,6% Confucianism. The rest practiced other religions or did not provide any information.

³² https://en.wikipedia.org/wiki/Malaysia, last accessed 10 June 2015.

Malaysia is a federal constitutional elective monarchy. The system of government is closely modeled on that of the Westminster parliamentary system, a legacy of British colonial rule. The head of state is the Yang di-Pertuan Agong, commonly referred to as the King. The King is elected to a five-year term by and from among the nine hereditary rulers of the Malay states; the other four states, which have titular Governors, do not participate in the selection. Malaysia also embraces *trias politica* system, such as executive, legislative, and judicial branches, with styles and patterns as well as its own uniqueness.

Sarawak positions slightly different with other states. There are several important and unique protections for them³³. Generally, the protection of this special cannot be amended or repealed without the support of two-thirds of the members of the House of Representatives and the Senate with permission *Yang di-Pertuan* in every state.

Among other things, Sarawak can control people who go into these countries. Therefore, Malaysian who is not from Sarawak must go through immigration first. Sarawak High Court also has jurisdiction separately cited as the High Court of Sarawak.

Sarawak also has a source of income and has special authority from Federal Government's and they can impose their own sales taxes. For example, the Federal Government provides an annual grant to Sarawak for cost of services and

³³http://www.malaysianbar.org.my/members_opinions_and_comments/sabah_sarawak_yang_istimewa .html, last accessed 10 June 2015.

the management of this state. Sarawak also receive income from the land, mines and forests, entertainment tax, fees for specific services rendered overseas departments, revenue from local authorities and water supply. In addition, Sarawak also may impose import duties and excise duties on petroleum products, export duties on timber and other forest products, sales taxes and fees from the port.

Natives of Sarawak have a special status in Article 153 of the Federal Constitution. Not just the Malays only. This is just part of the protection and special interest Sarawak. Not many people know the existence and protection of special interests and the status of Sarawak in the Constitution as compared to other states

2. Sources of Malaysian Legal system

Malaysia practices the mixed legal system which consists of the Customary Law, Islamic Law and Common Law. The sources of Malaysian legal system law are from two different laws which are the Written and Unwritten law³⁴.

In Malaysian Legal System, the most important source of law is the Written Law which comprises of: The Federal Constitution, State Constitutions, Legislation and Subsidiary Legislation. In another word, Written Law refers to the law stated in the Federal Constitutions which is the supreme law of Malaysia and it enshrines the basic or fundamental rights of the individual. The Federal

³⁴http://www.malaysianbar.org.my/members_opinions_and_comments/sabah_sarawak_yang_istimewa .html, last accessed 10 June 2015.

Constitutions also stipulates the *"Yang di-Pertuan Agong"* who owes his position to the Constitution and act according to it.

Besides the Federal Constitution, every state has their own constitution controlling the government of that state which is known as the State Constitution. The provision comprises the Ruler, the Executive Council, the legislature and other related subjects like the Legislative Assembly, financial provisions, state employees, and amendment of the Constitution.

Delegated Legislation is a legislation made by individual or bodies under powers given on them by Act of Parliament. It is important because the legislation made by Parliament and the state is not enough to give the laws needed to govern everyday matters.

Another source of Malaysian legal system law is the Unwritten Law which consists of English Law, judicial decision, customs and Islamic Law³⁵. Part of the laws of Malaysia is formed by the English Law. It can be found in rules of equity and English Common Law. However, the application of the law is subject for two limitations where it is applied only in the absence of local statutes on particular matters and only part of the English law that is suited to local circumstances will be applied.

Judicial decisions of the High Court, Court of Appeal and Federal Court was known as Judicial Precedent which is the basic decisions made by judges in

³⁵http://www.lawteacher.net/free-law-essays/constitutional-law/explain-the-sources-of-malaysian-legal-system-constitutional-law-essay.php, last accessed in 2 june 2015.

similar situations. These courts were following the "doctrine of binding judicial precedent" which means to stand by cases already decided. Judges always contribute to the growth of unwritten law in Malaysia.

Some customs of the local inhabitants such as Adat Perpatih, Adat Temenggung and custom related to family law are given legal force by courts in this country. In Sabah and Sarawak, land dealing over native customary lands and family matters are applied by native custom-matters.

The last source is the Muslim Law which is relating only to Muslims and is managed by a different court system, the Syariah Courts. It is the court which enforces the Islamic law relating to marriage, divorce and family matters. It is bases on Quran and Hadith, Fatwa and Ijma Ulama. The Federal Constitution provides that the States have the power to administer Muslim Law. The State Legislature has power over the constitution, organization and accepted way of the Syariah Courts and is also given permissions to make Islamic laws connecting to persons professing the religion of Islam.

3. Inheritance legal system in Malaysia

As in Indonesia, the inheritance law which prevails throughout Malaysia is of diversity. This is due to the British government's law policies which make the law of their own effective among each native people (Malayan, Chinese and Indian). These laws are closely related with their spiritual factors and cultures³⁶.

a. In Peninsular Malaysia

³⁶Lili Rasjidi, "Aneka hukum Malaysia dan Indonesia", (Bandung: Alumni), p. 87.

The death of a person not only can cause the break of a marriage but also raises the issue of inheritance. There are some regulations in Peninsular Malaysia which regulates the rights of heir, namely:

- 1) Distribution Act 1958;
- Parsee Intestate Succession Ordonance Cap 54 of the Straits Settlements. (for Parsi people in Malacca and Pinan Island only)
- 3) The Will Ordinance no. 38 of 1959
- 4) Inheritance (Family Provision) Act. 1939.

Among those provisions the important one is the Distribution Ordinance, 1958³⁷. As Regulations in Malaysia, this provision does not apply to those who embraced Islam or those who governed under the Parsee Intestate Succession Ordinance. Cap 54 of Laws of the Straits Settlements, 1936.

In the case of property which is inherited from the deceased, in Malaysia is divided into movable and immovable property. According to the Ordinance, 1958 Distribution there are different regulation about the division of property. The division of movable property is governed by regulations in the country where the property located at the time when the owner died. While for

³⁷Lili Rasjidi, "Aneka hukum... p. 88.

immovable property will be governed by Distribution Act 1958 wherever the owner passed away.

a) The Will Ordinance number 38 of 1959.

This Ordinance gives an opportunity to a man and woman who are married or not to freely alienate their property. For that purpose it should fulfilling all the requirements based on the Ordinance. This Ordinance does not apply to those Muslims in Malaysia. Further mentioned that the provisions contained in the Ordinance 1959 it will not cancel a wills which made in contemplation on the marriage³⁸.

b) The Inheritance (Family Provision) Act. 1939.

This Act provided for a nonexistent regulation of inheritance, not in the form of a testament (will) or in the other provisions. Likewise, The Court is authorized to organize the Division of inheritance from deceased one to the husband or wife, and to all his/her sons, male or female. The power of this Court is only done if there are no other provisions that can be used³⁹.

4. Malaysian Court System

In implementing the law, one of needed instruments is legal institutions such as the judiciary, police, prosecutors, and advocacy organizations. The other instrument is a set of regulations written and unwritten

³⁸The Will Ordinance number 38 of 1959.

³⁹The Inheritance (Family Provision) Act. 1939.

At this moment the system of judicial power in Malaysia consists of 40 :

- a. Civil court (similar with General tribunal in Indonesia) which under authority
 of Federal Government named *Badan Kehakiman Malaysia* (Malaysian
 Judiciary), and applies to all citizens of Malaysia, both Muslims and nonMuslims. There are several institution in Malaysian Civil Court, namely:
 - 1) Mahkamah Tinggi (Superior Court):

Malaysian legal system hierarchy comprises the Malaysian High Court, the Court of Appeal, the Federal Court and the Court of Sarawak and Sabah.

2) Mahkamah Persekutuan (Federal Court);

This is the highest court in Malaysia and hears appeals of civil decisions of the court of appeal where the federal court gives the permission. This court also hears criminal appeals but only on those cases when first the High court has exercised its original jurisdiction in the matter.

3) Mahkamah Rayuan (Court of Appeal);

The Court of Appeal hears all the civil and criminal cases against the judgments of High Court.

4) Mahkamah Tinggi (High Court).

⁴⁰Rusliansyah, *Mengenal Sistem Kekuasaan Kehakiman di Malaysia*, p. 4.

The High Court has general revisionary and supervisory jurisdiction over all Subordinate Courts and hears appeals related to criminal and civil cases from Subordinate Courts. The High Courts have rights to hear cases concerning all the criminal matters.

There are 2 high courts in Malaysia which have revisionary and general supervisory jurisdiction over the subordinate courts. One is Malaysian High Court in Malaya and second is High Court in Sarawak and Sabah⁴¹.

5) Mahkamah Rendah (Subordinate Court):

In Malaysian legal system hierarchy, the Subordinate Courts comprises the Sessions Courts, the Penghulu's Courts in western part of Malaysia and the Magistrates' Court⁴².

a) Mahkamah Sesyen (Sessions Court);

The Sessions Courts hear all the issues in which the claim crosses RM 25, 000-00 but not more than RM 250,000-00. It also hears criminal cases except matters of death penalty.

b) Mahkamah Majistret (Magistrate Court).

The Magistrates' Courts hear all the civil issues in which the claim is not more than RM25, 000-00. In criminal issues, the Courts have

⁴¹http://www.hierarchystructure.com/malaysian-legal-system-hierarchy/, last accessed 12 june 2015.

⁴²http://www.kehakiman.gov.my/node/531, last accessed 12 june 2015.

the power to try all the offences in which the imprisonment term is not more than 10 years.

c) Mahkamah Penghulu (Court of *Penghulu*);

The Penghulu's Courts hear civil issues in which the claim is below RM50-00 and where the offenders are of Asian race and speak and understand the Malay language. In Penghulu's Court's criminal cases are heard in which the fine is not more than RM25-00

d) Mahkamah Juvenil.

This court is for the issues related to the minors who are below the age of 18 years.

- b. Sharia Court (similar with Religious Court in Indonesia) which located in the power of the federal government named Syariah Judiciary Department Malaysia. Syariah Courts in Malaysia is still under the control of each state government. The Syariah Court is classified into three categories, namely:
 - 1) Mahkamah Rayuan Syariah (Shariah Appeal Court);

Shariah Appeal Court has jurisdiction to hear and determine any appeal against any decision made by the Shariah High Court in the exercise of original jurisdiction and appeal against the decision of the Shariah Subordinate Courts⁴³.

2) Mahkamah Tinggi Syariah (Shariah High Court);

⁴³http://www.mswp.gov.my/index.php/en/mengenai-mswp-3/perkhidmatan/jurisdiction/syariahappeal-court, last accessed 12 june 2015.

The Syariah High Court hears appeals from the Syariah Subordinate Court and it may revise decisions of the lower court. Besides that, any claim above Fifty Thousand Ringgit Malaysia (RM50000) is also heard in the Syariah High Court. ⁴⁴.

3) Mahkamah Rendah Syariah (Shariah Subordinate Court).

Most subject matters begin in the Syariah Subordinate Court, except on matters pertaining to custody of children and the division of matrimonial assets (*'harta sepencharian'*). These are under the jurisdiction of the Syariah High Court⁴⁵.

5. Sarawak Court System

Technically, sarawak court system is similar with Malaysia. The difference is only in subordinate court hierarchy. The Subordinate Courts in Sarawak consist of the Sessions Court, Magistrates' Courts and Native Courts⁴⁶. In addition to the above, there is also a Juvenile Court for offenders below the age of 18.

1) Native Court

This court only for natives in Sarawak and the jurisdiction of this court breaching the customary marriage, sex, estate or land.

⁴⁴http://www.eraconsumer.org/eraconsumer/index.php?option=com_content&view=article&id=251:str ucture-of-the-syariah-court-and-its-jurisdiction&catid=82:syariah-law&Itemid=108, last accessed 12 june 2015.

⁴⁵http://www.eraconsumer.org/eraconsumer/index.php?option=com_content&view=article&id=251:str ucture-of-the-syariah-court-and-its-jurisdiction&catid=82:syariah-law&Itemid=108, last accessed 12 june 2015.

⁴⁶http://www.nyulawglobal.org/globalex/Malaysia.htm, last accessed 12 june 2015

CHAPTER III INHERITANCE RIGHT FOR NON MUSLIM HEIRS IN INDONESIA AND MALAYSIA

A. Right of non-Muslim Heirs under Indonesia and Malaysian Law

1. Right of non-Muslim Heirs under Indonesian Regulation

Inheritance is the condition when someone died and left a property¹. During his life, he certainly has some relations with the other community. These relationships are blood relations and marriage as well that cause legal consequences for the heirs. There are many laws that regulate inheritance in Indonesia, namely Islamic law, civil code or *burgerlijk wetboek*, and *adat*.

¹Eman Suparman, *Hukum Waris Indonesia*, (Bandung: Refika Aditama), p. 1

In the law of inheritance distribution, there are some restrictions or prohibitions from receiving the inheritance. If there is one restriction, despite all of the terms and causes of inheritance have been fulfilled, the right became invalid. There are two kinds of restrictions², namely restriction agreed by scholars and the restriction still debated by scholars. The restriction that has been agreed by scholars is religious differences. Difference of religion means the religion of the deceased is different from the religion of the heirs. Religious differences happens when the descendant's wife or relatives are not Muslim and not because of converting from Islam to non-Muslims.

Meanwhile, there is also restriction that is still debated by scholars. Some scholars make it as a restriction for person to get a property, while some other scholars do not regard it as a restriction.

Restriction of inheritance that still debated among scholars is apostasy (*ar-riddah*). Etymologically, *al-riddah* is *al-irtidad* which means back and turn away from something³. According to fiqh scholars, it is a phrase that is intended as "a Muslim commits an act or utters a word or a particular belief which is in no way condoned by Islam".

In case of apostasy, Maliki Scholars, Al-Shaafi'i and Ahmad said that the apostasy became an absolute restriction to get inheritance. Meanwhile, Madzhab of Abu Hanifa stated that apostasy could not block the inheritance right, except

²Muhammad Muhyiddin, Ahkam Al-Mawarits..., p. 46

³Muhammad Muhyiddin, Ahkam Al-Mawarits..., p. 77

the apostate obtained a property when he has already become apostate; it's only applied for man. It is different from Madzhab of Abu Yusuf and Muhammad bin Hasan al-Syaibani which stated that apostate is not an absolute restriction for getting inheritance⁴.

As a country with a Muslim majority population and they embraced the Madhzab Shafi, Indonesia does not have a law specifically devoted to apostasy. It is because Indonesia is not a muslim country, even it has largest muslim in the world.

However, Indonesia has the jurisprudence which is used as a reference for resolving the inheritance case between Muslims and non-Muslims. It is because jurisprudence is also one of the sources of law that the legal system in Indonesia is embraced.

Since Indonesia was colonized by Dutch, the Indonesian legal system belongs to civil law system. Just as continental legal system, Indonesian judge is not bound to the case law. Civil law system derives its system from Roman strict law that does not apply the doctrine of *stare decisis*⁵. In this system, judge is given broad discretion to interpret laws. It is optional for the court. Nevertheless, there is a current trend that civil law judges prefer to apply the previous decisions for

⁴Muhammad Muhyiddin, Ahkam Al-Mawarits..., p. 85

⁵essentially the doctrine of precedent. Courts cite to stare decisis when an issue has been previously brought to the court and a ruling already issued.

the similar case which are considered to be landmark decisions. It is likely the judges copy their counterpart of the common law system⁶.

What the civil law judges have taken is understandable, since the judge of the system is obliged to find law shared by the society which may be unwritten law or customs, if the judges do not find what written law applies for the case at hand. Exploring the unwritten law and applying it to the case that handle, the judge makes a law for the unique case. If there is a similar case on the other day, the decision may be considered to be a law. This process is taken for achieving legal certainty.

The verdict of the Supreme Court number 368 K/AG/1995 is one of the verdicts used as a reference for handling inheritance cases that embraces disparate beliefs. The verdict is regarded to the children from Muslim parents who obstructed the right to inherit due to embrace Christianity (converted/apostate). The different religions within the family raise the disputes of inheritance. As a result of *Rakernas* the Supreme Court of the Republic of Indonesia in Yogyakarta on March 21-March 23, 1985 stated, "If there is a difference of religions between the deceased and the heirs or between the heirs, then the law that applied is the law to the deceased one⁷.

About heirs of non-Muslims, there is a Hadith that explains related to this case, namely the words of the Messenger of Allah which reads "Of Osama bin

⁶Peter Mahmud Marzuki, *An Introduction to Indonesian Law*,(Malang: Setara Press), p. 27 ⁷Dian Mustika,"*Wasiat Wajibah Kepada Non-Muslim dalam Perspektif Hukum Islam*", Innovatio, 2 (2011), p.381.

Zaidra. That the Messenger of Allah said: *A Muslim does not inherit from the estate of a non-Muslim and a non-Muslim as well do not inherit from the estate of a Muslim*". Furthermore, in the compilation of the Islamic law article 174 letters (c) also explains that "the definition of the heir is the person who had a blood relationship or marital relationship with deceased one, Muslim, and not restricted because of law to be heirs". So, based on those two sources, the different religion heirs are not inheriting property from deceased Muslim.

And the Supreme Court verdict Number 368 K/AG/1995 rules that non-Muslim heirs are not inheriting property as regard to the Hadith and Islamic law compilation. However, non-Muslim heirs could inherit property of deceased Muslim through *wasiah wajibah*, as mention in Fatwa MUI No. 5/MUNAS VII/MUI/9/2005 which stated:

- Islamic law of inheritance did not give non-Muslim right to inherit Muslim property.
- 2. Giving property to non-Muslim heirs can be known as *wasiah wajibah* or *hibah*.

2. The right of non-Muslim heirs under Malaysia regulation

Conversion to Islam or *muallaf*, is specially refers to whom embracing Islam and giving devotion to the teaching of Islam and its law. On opposite, apostasy or *murtad* refers to an act of leaving the belief of Islam. Convert from Islam to other faiths is forbidden by the Islamic law and would be punished. In another word, apostasy as an abandoning of what one has compulsory to belief in as a faith. Thus, conversion to Islam is contradictory an act of apostasy, which the former refers to obedient and righteousness while the latter refers to rebellious and astray.

Muslims in Malaysia face enormous challenges as a community following the shocking allegations of rampant cases of apostasy. Apostasy is viewed as a serious issue consequent to the statement made by the Mufti of Perak in lieu of a study which reported that more than 100,000 Muslims in Malaysia have now converted⁸. For *murtad*, it is an offence under shariah criminal offences. In fact, apostate would accelerate anger and included as a sensitive issue among Muslims in this country.

In Malaysia, the statistics indicates that Negeri Sembilan has the largest number of apostates, with 84 applications made to renounce Islam from 1994 until July 2003, 16 of which succeeded⁹. This is due to the fact that Negeri

⁸Helwa Mohammad ZainalJasri Jamal," *The Legal Position of Apostasy and Spreading of Non-Islamic Teachings in Malaysia: Analysis and Challenges*," JurnalUndang-undang&Masyarakat, 17 (2013), p. 13

⁹NurSuriya, The Phenomenon of Apostasy in Malaysia: A Study of Its Causes From 2003 Until 2006,(Malaysia: International Islamic University Malaysia, 2008), p. 1

Sembilan is the only state which permits apostasy¹⁰. There are at least five states in Malaysia that have incorporated the punishment for apostasy either in the Islamic Criminal Law Enactments or the Administration of Islamic Law Enactments.

However not every state has provided directly pertaining to *murtad* except Pahang, Perak, Melaka, Sabah and Terengganu. Other states such as Penang (1996), Federal Territories (1997), Johor (1997) and Sarawak (2001) do not provide the offence of *murtad* except indirect provision pertaining to wrongful worship, false doctrine, and false claim. While in Kelantan (1985), Kedah (1988), and Perlis (1993) there is no provision which provided for apostasy either directly or indirectly¹¹.

Sarawak seems lenient in approving applications to renounce Islam. As the majority of the applicants are Muslims by conversion, the Chief Minister appears to have compromised on the matter. Although the Sharia Court seems reluctant to declare a person has apostatized, such approval could be obtained from the Religious Department. The procedure seems very straightforward. A Muslim who wishes to convert out of Islam may apply for approval from the Religious Department. The officer-in-charge will ask the applicant the reason why he/she intends to renounce Islam. In most cases, the applicant will undergo a series of counseling for the purpose of repentance. If such process fails, the officer will

¹⁰NurSuriya, *The Phenomenon...*, p. 2

¹¹Jasni bin Sulong, "The Implications of Relgious Conversion..., p. 128.

issue a letter confirming that such person is no longer professing the religion of Islam. By this document, the person can apply to change his Muslim name to a non-Muslim name at the Department of Registration, which in this case faces no obstacle. It is believed that Sarawak has one of the highest numbers of such applications to renounce Islam in Malaysia.

In Malaysia, the distribution of apostate will be governed by the Distribution Act 1958. Section 2 of this statute provides that nothing in this act shall apply to the estate of any person professing the Muslim religion or shall affect any rules of Muslim law as varied by local custom in respect of the distribution of the estate of any such person. The issue is whether the apostate can inherit his estate or not depends on which interpretation is adopted. If the court adopts the perspective that the Muslim heirs of an apostate cannot inherit, then this perspective will prevail by virtue of section 2 of the Distribution Act 1958. On the other hand, if the other perspective (that the Muslim heirs of an apostate can inherit) is adopted, then the provisions of the Distribution Act will have to be construed accordingly¹².

In the distribution of inheritance involving Muslim and non-Muslim heirs in Malaysia references generally based on classical Islamic law. There is neither statute nor by-law that provides the matter, except court cases. According to the majority of jurists, the three most essential impediments to inheritance are: *Al*-

¹²Pawancheek Marican, Islamic Inheritance laws In Malaysia, (Malaysia: LexisNexis), p. 84

Qatl (homicide), difference or change of religion, and slavery¹³. It was decided in Re Timah binti Abdullah (1941), that non-Muslim heirs were excluded from inheriting a Muslim successor. If there is no Muslim heir, then the treasury will escheat_the entire property.

Likewise, In Re Zaitonbinti Abdullah (1989)¹⁴, all of the estates were inherited by treasury due to no Muslim heirs with her. Similar decision reached in Re Emily binti Abdullah @ Yeo Leng Neo (1996)¹⁵, that the remaining of estates was submitted to treasury (1/4) as the deceased had no other Muslim heirs except a husband who received a quarter (¹/₄) as his share of inheritance and half (¹/₂) as matrimonial property. Likewise in Re Zarinabinti Abdullah @ Ooi Po Tsuan (2002)¹⁶, her estate was inherited by her husband (1/4), daughter (1/2) and treasury (1/4) after no more Muslims heirs were qualified.

In these cases of inheritance involving Muslim and non-Muslim heirs, these cases can be used as source of law according to Malaysian Law. It is source of law that is commonly used in common law system. The judge applies the previous decisions for the similar case which are considered as the landmark decisions.

Although Islam has stated that faith is a qualification for inheritance, on the other hand, Islam does not obstruct alternative way to facilitate non Muslim heirs.

¹³PawancheekMarican, Islamic Inheritance..., p. 81

¹⁴Jasni bin Sulong, "The Implications of Relgious Conversion..., p. 128.

¹⁵Jasni bin Sulong, "The Implications of Relgious Conversion..., p. 128.

¹⁶Jasni bin Sulong, "The Implications of Relgious Conversion..., p. 128.

However, there are neither statutes nor judgments that restrain a Muslim from giving testament to non-Muslims¹⁷.

Meanwhile, Sarawak has ordinance about non-Muslim heirs called Sarawak Muslim Converts (Property) Ordinance (Cap 95). This provision states that non-Muslim heirs cannot inherit from Muslim successor, but Muslim can convert the property (make will) as one-third for non-Muslim heirs¹⁸.

If the heirs are converted from Islam, the notification of change of religion must be submitted to the District Officer who will conduct an examination of the notification and will determine what rules will apply. District Court has the power for give an order to the Muslims who change religion, so the apostate can prepare everything that is necessary in court and regulate by right and useful provisions for Apostate. If the sharia court considers that this case would bring trouble then it can be refused for getting decisions/orders. Also, Islamic law that contained in the Custom in Sarawak Malay Muslim and Malay Act will only regulate to the property which belongs to Muslim who changed religion and who dies and it can be implemented if the needs from non-muslim/who dies are fulfilled.

Thus, a non-Muslim heir can receive the will from a Muslim successor, provided within the limit of one-third of the testator's net estate after the payment of all his debts, and with consent of the heirs. Apart of wills, the alternatives way

 ¹⁷_____, "Refuge Review Tribunal Australia", RRT Research Response, MYS33057 (2008), p. 4
 ¹⁸Lili Rasjidi, "Aneka hukum Malaysia dan Indonesia", (Bandung: Alumni), p. 116.

to benefit non-Muslim heir is by grants (*hibah*) during lifetime or make a charitable fund $(waqf)^{19}$ for them.

B. The Court authority in handling case of non-Muslim heirs in Indonesia and Malaysia

1. The Indonesian Court authority in handling case of non-Muslim heirs

Since Indonesia was colonized by Dutch, the Indonesian legal system belongs to civil law system. Civil law system also affects to the judicial system in Indonesia. Although it is not fully the same with the judicial system in European continental, Indonesia has unique style on its own²⁰. Indonesia's judicial power is held by the Supreme Court and courts under it, which are general tribunal, religious tribunal, Military tribunal, administrative tribunal, and Constitutional Court.

Related to the authority of the Tribunal in Indonesia, there are two kinds of court competences applied namely absolute competence and relative competence²¹. The Relative competence is related to the jurisdiction of the court in the same category and linked to the jurisdiction of the territory. While the Absolute competence is related to the case that held by four categories of courts (General Court, State Administrative Court, Religion Court, Military Court) and Special Court (Arbitration, Commercial Court, others).

¹⁹Jasni bin Sulong, "The Implications of Relgious Conversion..., p. 129.

²⁰Peter Mahmud Marzuki, An Introduction to Indonesian Law, (Malang: Setara Press), p. 27

²¹ErfaniahZuhriah, *Peradilan Agama Indonesia*, (Malang: UIN Press), p.193.

The authority which applies in inheritance matters is the absolute competence, because absolute competence is linked to the case that deals by a court. There are two tribunals that handle inheritance case in Indonesia, namely General tribunal and religious tribunal.

The absolute competence of general tribunal is organized in Act No. 2 of 1986 of general tribunal as it has changed with Act No. 8 of 2004 concerning the Amendment of Act No. 2 of 1986 of general tribunal and by Act No. 49 of 2009 about second amendment of Act No. 2 of 1986 of general tribunal. These acts regulate the order, power, and the position of the judge and the administrative work in the District Court and the High Court. The power of Justice in the general tribunal is held by the District Court and the High Court.

The District Court is based in the capital of regency/city and the covers an area of regency/city. The High Court is based in the provincial capital and the ruling covers an area of the province. In the General Tribunal, the courts consist of three tiers. The lowest is the District Court which refers as '*Pengadilan Negeri*. *Pengadilan Negeri* has the power to examine, decide, and handle criminal and civil cases at the first instance. The appellate court is the High Court which refers as '*PengadilanTinggi*'. *Pengadilan Tinggi* has two powers, which are to examine criminal and civil cases at the appellate level and to decide conflicting jurisdiction between the courts of first instance under its jurisdiction. The court of last instance is the Supreme Court.

District Court as one of the powers of the General tribunal has a duty and authority as mentioned in Act No. 8 of 2004 that concerns the Amendment of Act No. 2 of 1986 on Public Justice, in article 50 States: District Court on duty and authority are check, make a decisions, and solve criminal cases and civil cases at the first level, in article 52, paragraph (1) and paragraph (2) states: The Court may provide information, consideration, and advice about the law to government agencies in the area, when requested and in addition to the authority and the duty in article 50 and 51, the Court can be delegated tasks and authorities by law.

One of the district court authorities is handling the civil case. According to *KUHPer* (Indonesian Civil Code) civil law can be classified among 5 types, namely: 1. Family law, 2. Patrimony Law, 3. Property Law, 4. Testament, and 5. Inheritance.

The Religious Court (*Pengadilan Agama*) is based on Islamic law and to resolve marriage and family law problems for Moslems. The *Pengadilan Agama* is a court of first instance and the Religious High Court (*Pengadilan Tinggi Agama*) is an appellate court. Conceptually, the Religious Courts can trace their history to *tahkim* which was an early dispute resolution mechanism for resolving disputes between Moslems by acknowledged religious experts.

On 29 December 1989, Law No. 7 of 1989 on the Religious Court (*Pengadilan Agama*) was passed by the House of Representatives (DPR). This law indicates the important role that the Religious Court plays in Indonesian law and the community generally. The Religious Courts can be found at the municipal

level and those are located in the capital city of each province. The Religious Courts are within the jurisdiction of the Supreme Court.

The authority of Religious Courts as stated in Act No. 3 of 2006 about the changes of the Act No. 7 of 1989 concerning religious courts, namely: a. marriage;, b. heir;, c. Wills;, d. grant;, e. endowments;, f. zakat;, g. *infaq*;, h. *shadaqoh*, i.; economic Shariah.

In the Religious Tribunal, the courts consist of three tiers. The lower court is the Religious Lower Court referred to as: *Pengadilan Agama*.' The appellate court is the Religious High Court referred to as '*PengadilanTinggi Agama*.' The court of last instance is the Supreme Court.

The Religious Court has jurisdiction over disputes between Indonesian Moslems in the areas of marriage, inheritance, will, grants based on Islamic law, and *wakaf* (property which is donated for religious purposes) and *shadaqah* (voluntary donation). The Religious Court Law states that in inheritance matters, the parties involved are given the freedom to choose the applicable law for their dispute before they submit the dispute to the court. Furthermore, the parties are encouraged to resolve the matter amicably and to the mutual satisfaction of the parties concerned prior to commencing the litigation process.

Generally, only two institutions have the authority to handle the cases of inheritance. In Indonesia, inheritance is one of the problems that easily rises debate among legal experts as well as political activists²². In its development, there are a lot of analysis and scientific journals related to the issue of this problem. But, the conclusion still has not appeared yet and the related parties have never tried to create regulations or legislation to governing the issue of inheritance for in Indonesia.

As explained above, the inheritance case is belonging to the authority of the Religious Court and the District Court. The religious court is for Muslim communities only, whereas the District Court reserved for the general public or for another religion. In addition, in the application of the law of civil liability, these two institutions also have no meaningful difference.

However, in Act No. 7 of 1989 article 2 and 49 (1) in general explanation number two, the third paragraph stated that basic principle that used in religious tribunal is *asas personalia keislaman* (Islamic personal principle). Provision of Islamic principle means religious tribunal has absolute authority to handle, make a decision for Muslim.

According to this principle, the authority of religious tribunal covers all Muslim in Indonesia. It is also understandable if there are disputes of inheritance in Muslim society, the only institution that has authority to handle those cases is religious tribunal, and not includes in general tribunal. Thus, the range of religious tribunal to adjudicate cases is covering all of Muslims.

²²RatnoLukito, "*The Enigma of National Law in Indonesia*," Journal of Legal Pluralism, 52 (2006) p.
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Besides that, in the consideration of judgment of High Court No. 59/Pdt.G/2009/PTA Mks, states if there is someone died as Muslim, the authority to solve his property is in religious tribunal, eventhough there are any non-Muslim heirs. Under this consideration, the Islamic personally principle that stated in act No. 7 of 1989 article 2 and 49 (1) is viewed on the deceased one, not on the heirs. It is also in line with the result of *Rakernas* the Supreme Court of the Republic of Indonesia in Yogyakarta on March 21-March 23, 1985 which states²³, "If there is a difference of religions between the deceased and the heirs or between the heirs, then the law that applied is the law to the deceased one".

Religious court also has authority to give an order for giving non-Muslim heirs, even the Muslim heirs did not want to, as mentioned in verdict No. 368/K/AG/1995 which regard to the children from Muslim parents who obstruct the right to inherit due to embrace Christianity (converted/apostate). In this verdict, even though the parents did not admit his daughter as an heir, but the judges from Supreme Court may have different interpretation. It is true that the daughter is not treated as an heir, but the judges of Supreme Court give an order to giving *wasiah wajibah* for the daughter. This *wasiah wajibah* treats as an obligation for the family, and must be done by the family.

²³Dian Mustika,"Wasiat Wajibah kepada Non-Muslim dalam Perspektif Hukum Islam", Innovatio, 2 (2011), p.381.
2. The Malaysian Court authority in handle case of non-Muslim heirs

The Malaysian legal system shares a substantial heritage with the common law and has England Code as its prototype. Some essential flavors from other Commonwealth jurisdictions, such as India are also embodied in the system. However, upon a closer examination one finds that it is not entirely English or foreign in orientation, as some local and autochthonous values are found in the system²⁴. This is further strengthened after independence by subsequent developments to the law and legal system. It can be said that the Malaysian legal system contains plural legal systems which are formed from a mixture of the Syariah law, customs, and British law.

Meanwhile, the position of religious court in Malaysia (in peninsular Malaysia and west Malaysia) is lower than civil court. It means religious court only handle civil and criminal cases that have low levels of crime. It can be seen in the fine of religious court is lower than fine in general court of Malaysia²⁵.

Malaysian Religious court jurisdictions does not only handle family cases, but also criminal cases for Muslim, such as *zina*²⁶, *khalwat*²⁷, did not do *zakah* and did not do fasting in *Ramadhan*. Furthermore, more than half cases that handled by religious court is about family matters.

²⁴Shamrahayu A Aziz," *The Malaysian Legal System: The Roots, The Influence and The Future*" Malayan Law Journal Articles, 3 (2009), p. 1.

²⁵Ahmad Irahim, "*Perkembangan Kodifikasi Hukum Islam di Malaysia*", perkembangan Mutakhir Hukum Islam di Asia Tenggara, 1 (1993), p. 92.

²⁶Illegally sexual relationship between men and women according to islam.

²⁷Intimate relationship between men and women but does not have sexual intercourse.

The Malaysian Constitution permits states to establish courts with jurisdiction over Muslims, and recently has given them exclusive power to adjudicate matters of their state's Islamic laws²⁸. State Syariah courts can adjudicate cases arising under "Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, and guardianship." The Syariah courts refer to Islamic family laws enacted by the states.

State governments also have the authority to establish their own body of Islamic law to regulate inheritance. To date, however, there is no codification of substantive Islamic inheritance law in any state, although several states do enact regulations concerning certain aspects of Islamic inheritance law.

Since federal law controls property rights, Syariah courts and civil courts must cooperate in cases of Muslim inheritance. When a Muslim dies intestate and leaves an estate of less than two million Malaysian ringgit, the matter may be resolved by Syariah courts alone without the need to go to the civil courts. However, in cases where the value of a deceased Muslim's estate is more than that, the civil court will issue a letter of administration of the estate or a letter of probate under the Probate and Administration Act of 1959 and the Small Estate (Distribution) Act of 1955. The common pattern of cooperation between the courts in such cases is that the Syariah court certifies the allotted shares of the

²⁸Perlembagaan Malaysia [Constitution] Aug. 27, 1957, art. 74, sched. 9, list II (State List), item 1.

property to be distributed, and the civil court carries out the prescribed division of shares in effecting the transfer of property.

Based on that, it is understood that Malaysia practices a dual system of courts. Civil courts set up under article 121 of the Malaysian Constitution and command the larger portion of the constitution, thus all Malaysians are subject to this jurisdiction. On the other hand, Syariah courts were set up by the States and these courts administer Islamic law only on Muslims.

Syariah courts have limited jurisdiction with regards to Islamic inheritance. Syariah courts have the authority to issue *Faraid* certificates that can be used to confirm the list of legal inheritors and their proportionate allocations to the inheritance, and certify a will, if one is present. However, these Faraid certificates do not provide the person obtaining them the authority to distribute the inheritance²⁹. It is the person who obtains the Letter of Administration from the Civil High Courts who has the power to do that.

Islamic laws are State Laws, but this does not provide that Syariah courts have total authority to handle Islamic inheritance cases. Section 50 of Act 505 (Administration of Islamic Law Federal Territories Act 1993) stipulates that:

If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or a Syariah Subordinate Court, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the Syariah Court may, on the request of such court or authority, or on the application of any

²⁹NorainiNoordin, AdibahShuib, "*Review on Issues and Challenges in Islamic Inheritance Distribution in Malaysia*" OIDA International Journal of Sustainable Development, (2012), p. 31.

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person claiming to be a beneficiary or his representative and on payment by him of the prescribed fee, certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and as to the shares to which they are respectively entitled.

This clearly indicates that Federal Constitution has provided the Civil Courts with the jurisdiction to deal with the procedural aspects of the administration of Muslim estates, and the civil jurisdiction of the Syariah courts only entitles them to hear and determine actions and proceedings dealing with subject matters with a value not exceeding RM50000.

In the distribution of inheritance involving Muslim and non-Muslim heirs in Malaysia only references on classical Islamic law. There is neither statute nor by-law that provides these cases, except court cases. Likewise, in Majlis Agama Islam Wilayah Persekutuan Iwn Lim EeSeng&satulagi. The matter that has been argued in this case is the property of a man namely Chew Toong Lee @ Ali Cheow Bin Abdullah that in sum of RM 265,315.71 (provisional). Chew has converted to Islam and been registered as a Muslim on 23 January 1973 and passed away on 28 July 1988.

During his life as a Muslim, he (Chew) neither returns to his origin religion nor to another religion. The first defendant is the Chew's wife which solemnized under the civil law. From that marriage, they have two daughters which are the second defendant and other. "*Surat Kuasa Mentadbir*" (LA) has been issued on 27 August 1992 to the defendants. The issue in this case is whether the defendants have beneficial interest on the

Chew's heredity property. Distribution Act 1958 No. 1/1958 Section 2 stated that:

Nothing in this Act shall apply to the estate of person professing the Muslim religion or shall affect any rules of Muslim law as varied by local custom in respect of the distribution of the estate of any such person ...

According to the Re Timah Binti Abdullah [1941] MLJ 51, Gordon Smith J at that time said that:

The Shafii school or the interpretation of Muhammadan Law is applicable in Malaya and both according to Tyabij's Principles of Muhammadan Law $(2^{nd}$ Edition) page 834 paragraph 4 and Howard's Translation of the Minhaj et Talibin, paragraph 9 page 253, an infidel is excluded from and cannot succeed to the estate of a Muhammadan.

The principle of Re Timah has been used in this court. The beneficial interest

does not exist to the defendants. Consequently, they do not have rights to succeed

the estate.

With this provision, although the Syariah Court has the power to dissolve the case, it (Syariah Court) cannot give an order upon the Muslim heirs to give a *wasiah wajibah* for non-muslim heirs. This is because the Syariah Court does not have jurisdiction on the non-Muslim.

C. Comparison between Indonesia and Malaysia

1. Comparative of Indonesia and Malaysia Law for Non-Muslim Heirs

Based on the law of inheritance in Indonesia and Malaysia, both countries do not give the inheritance to non-Muslim heirs. However, it does not mean non-Muslim heirs do not get the property at all. The law of inheritance in both countries is given another way for non-Muslim heirs to get property. Therefore, even though they are not considered as the heirs, they still get the property from the deceased Muslim.

As mentioned in verdict No. 368/K/AG/1995 and Muslim Converts Ordinance of Sarawak the different religious heirs still get the property in the form of *wasiah wajibah*, grants, or *waqf*. It is not contrary with the Hadith of the Prophet which says "from the Osama bin Zaydra. That the Messenger of Allah said: A Muslim does not inherit from the estate of a non-Muslim and a non-Muslim as well does not inherit from the estate of a Muslim". Because the property that received by non-Muslim heirs is not shaped as an inheritance, but his property is the form of a grant or *wasiah wajibah* or *waqf*. It can be seen in the table in table below:

Inheritance Law	The Similarities	
Inheritance right for	a.	The source of inheritance law for non-Muslim heirs only
non-Muslim heirs		refers to the cases in court.
	b.	Non-Muslim heirs do not inherit property from Muslim.
	c.	Give another way for non-Muslim heirs to get the
		property, such as wasiah wajibah, hibah or waqf.

Although Indonesia legal system belongs to civil law system, but Indonesian sources of law are almost the same as the source that embraced by common law. That is because Indonesia is a country with a wide variety of ethnic, tribal, religious, and race. So, the judge is required to make a decision that is fair and does not seem one-sided. If the source of law that used only limited by the Constitution, the laws, regulations, and customs, then the authority of the judge only as 'implementing law ' and judge is not possible for judge referring other sources, such as opinions, writings pundits leading law, and previous court decisions.

According to the implemented of the case of non-Muslim heirs in Indonesia and Malaysia, Al-Shaafi'i Scholars have strong influence in both countries. It can be seen in the judgments in both countries that prohibited non-Muslim heirs get the inheritance, because Maliki Scholars, Al-Shaafi'i and Ahmad said that the apostasy became an absolute restriction to get inheritance. And from the judgments, it can be concluded that even though Islam has states that faith is a qualification for inheritance, at the other hand Islam does not obstruct alternative way to facilitate non-Muslim heirs. It is because biological link between siblings cannot be denied, as well as mutual responsibilities among them. In this case, roles and responsibilities among family member as parents, children, and close relatives are continuing even though after religion conversion, furthermore if the new converts is the breadwinner of the family. Islam always reminds that each member of Muslim community has to be responsible towards others, and even more, if they are his own flesh and blood. Allah has made a command as follow (Q2:233):

نِسَآؤُكُمْ حَرْثُ لَّكُمْ فَأْتُوا حَرْثَكُمْ أَنَّىٰ شِعْتُمَ وَقَدِّمُوا لِأَنفُسِكُرْ وَٱتَّقُوا ٱللَّهَ وَٱعْلَمُوَا أَنَّكُم مُلَنَقُوهُ وَبَشِّرِ ٱلْمُؤْمِنِينَ ٢

Meaning: It was the responsibility of father to feed and wear (his family) in a good manner.

Pertaining to this point, the Prophet also said that, "a husband is a guardian (leader) of the family and hold responsibilities for them as well as his wife, who are a guardian (leader) in the household of her husband and children, and hold responsibilities for those under her obligation" (al-Bukhari.).

These responsibilities are applied generally both for Muslim family members and for non-Muslim. Thus, a responsible successor should protect and give an assurance to his heirs in all matters in which the latter lives will not be idle when the former had passed away.

In the other hand, giving property for non-Muslim heirs through *wasiah wajibah* is expected to keep good relationship between siblings. So, the harmony of religious relationship can be maintained and does not easily break apart just because of inheritance issue. The encouragement for doing an alternative method was analyzed from Surah al-Mumtahanah (Q60:8) which says,

لَّا يَنْهَاكُمُ ٱللَّهُ عَنِ ٱلَّذِينَ لَمْ يُقَايِلُوكُمْ فِي ٱلدِّينِ وَلَمْ يُخَرِّجُوكُم مِّن دِيَارِكُمْ أَن تَبَرُّوهُمْ

وَتُقْسِطُوٓا إِلَيْهِمْ إِنَّ ٱللَّهَ مُحِبُّ ٱلْمُقْسِطِينَ ٢

"Allah does not forbid you respecting those who have not made war against you on account of (your) religion, and have not driven you forth your homes, that you show them kindness and deal with them justly; surely Allah loves the doers of justice".

2. Comparative of Indonesia and Malaysia Court authority for Non-Muslim Heirs

In the implementation of court regulation, it clearly seems that the colonial countries are strongly influence Indonesia and Malaysia's court system. Indonesia adopts civil law system of the Netherlands, though not entirely similar. Meanwhile, Malaysia clearly adopts the British system of common law, because Malaysia is a British Commonwealth country.

Also in the judicial system, both countries apply special court for Muslim society. In Indonesia, this institution is known by the religious courts (*Pengadilan Agama*), while in Malaysia known as the Syariah Court (Mahkamah Syariah).

Indonesian legal system belongs to civil law system. Civil law system also affects to the judicial system in Indonesia. However, it is not fully the same with the judicial system in European continental because Indonesia has unique style on its own. In this system, judge is given broad discretion to interpret laws. It is optional for the court, whether or it will apply the case law. Nevertheless, Indonesian judges prefer to apply the previous decisions for the similar case which are considered as the landmark decisions. It is likely the judges copy their counterpart of the common law system.

Besides that, the authorities of religious court are not bound by other institutions. Religious court has its own authority as mandated in Act No. 3 of 2006 that stated (states) the Religious Court has jurisdiction over disputes between Indonesian Moslems in the areas of marriage, inheritance, will, grants based on Islamic law, and *wakaf* (property donated for religious purposes) and *shadaqah* (voluntary donation).

Meanwhile in Malaysia, although the judge has the power to find the law, but the authority of the sharia court is still limited by the federal constitution. This is because Malaysia is still included Commonwealth English and tied with the

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English legal system,	thus causing the	sharia court has	limited authority.	This
is clearly seen in the table	below:			

Court Authority	The Differences				
	Indonesia	Sarawak			
Distribution of	- Religious Court has the	- Syariah courts only have			
Inheritance	authority in distribution of	authority to issue Faraid			
	property in Islamic family.	certificates. However, these			
11.0	P'SAMALIK,	Faraid certificates do not			
	5	provide the person obtaining			
		them the authority to			
	4 8 6 70	distribute the inheritance. It			
(is the person who obtains the			
		Letter of Administration from			
		the Civil High Courts that			
2		has the power to do that.			
Inheritance case	- Religious Court has an	- Mahkamah Syariah cannot			
involving	authority to give an order	give an order upon the			
Muslim and	upon the Muslim heirs to	Muslim heirs to give a wasiah			
non-muslim	give a wasiah wajibah for	wajibah for non-Muslim heirs.			
	non-Muslim heirs.				

Based on that table, authority to adjudicate the case that involving non-Muslim heirs in the religious courts is in accordance with the *Rakernas* of the Indonesian Supreme Court on 21-23 March 1985 about the point of tangency between Religious Courts and General Court Jurisdiction that stated "If there is a difference of religions between the deceased and the heirs, then the law that applied is the law to the deceased one". With this consideration, because the deceased is Muslim then the court that has authority to prosecute this case is Religious Courts. It also means that Indonesian Religious court has total authority to handle inheritance case between deceased Muslim and non-Muslim heirs.

Malaysia's court system is different with Indonesia, because Malaysia practices a dual system of courts. Syariah courts in Malaysia have limited jurisdiction with regards to Islamic inheritance. Syariah courts only have authority to issue *Faraid* certificates that can be used to confirm the list of legal inheritors and their proportionate allocations to the inheritance, and certify a will, if one is present. However, these *Faraid* certificates do not provide the person obtaining them the authority to distribute the inheritance. While, the court that has jurisdiction to deal with the procedural aspects of the administration of Inheritance is Civil Court.

Malaysia adopted Islamic laws as State Laws, but this does not provide that Syariah courts have total authority to handle Islamic inheritance cases. Section 50 of Act 505 stipulates that: "If in the course of any proceedings relating to the administration and distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or a Syariah Subordinate Court, ..., the Syariah Court may on the request of such court or authority, or on the application of any person claiming to be a beneficiary or his representative and on payment by him of the prescribed fee".

This clearly indicates that Federal Constitution has provided the Civil Courts with the jurisdiction to deal with the procedural aspects of the administration of Muslim estates. The judgments on some civil cases also indicate that the Syariah courts cannot issue orders within their jurisdiction because there are no provisions in the State Laws that would levy the power to do so. In addition, the existence of a dual system in Malaysia caused the administration of inheritance became longer and more complicated because it requires more time and cost.

CHAPTER IV CLOSING

A. Conclusion

Based on the results of the study as described in previous chapters, and according to the purpose and objectives of this thesis, the researcher drew the following conclusions:

 Based on the law of inheritance in Indonesia and Malaysia, both countries do not give the inheritance to non-Muslim heirs. However, it does not mean non-Muslim heirs don't get the property at all. The law of inheritance in both countries is given another way for non-Muslim heirs to get property. So, even they are not considered as heir, they still get the property from the deceased Muslim property in the form of *wasiah wajibah*, grants, or *waqf*. In Indonesia the authority to solve the inheritance case between muslim and nonmuslim is in religious tribunal, even though there are any non-Muslim heirs. Religious court also has authority for giving *wasiah wajibah* to non-Muslim heirs, even the Muslim heirs did not want to.

Malaysia practices a dual system of courts. Syariah courts have limited jurisdiction with regards to Islamic inheritance. Syariah courts have the authority to issue *Faraid*. While, the court that has jurisdiction to deal with the procedural aspects of the administration of Inheritance is Civil Court.

- The comparison between Indonesia and Malaysia has similarities and differences result.
 - a. The similarities:
 - 1) The source of inheritance law for non-Muslim heirs only refers to the cases in court.
 - 2) Non-Muslim heirs do not inherit property from Muslim.
 - Give another way for non-Muslim heirs to get the property, such as wasiah wajibah and hibah.

Al-Shaafi'i Scholars have strong influence in both countries. It can be seen in the judgments in both countries that prohibited non-Muslim heirs get the inheritance, because Maliki Scholars, Al-Shaafi'i and Ahmad said that the apostasy became an absolute restriction to get inheritance. And from the judgments, it can be concluded that even though Islam has states that faith is a qualification for inheritance, at the other hand Islam does not obstruct alternative way to facilitate non-Muslim heirs.

- b. The Differences:
 - 1) Indonesia
 - Religious Court has the authority in distribution of property in Islamic family.
 - b) Religious Court has the authority upon the Muslim heirs to give a wasiah wajibah for non-Muslim heirs.
 - 2) Malaysia
 - a) Syariah courts only have authority to issue *Faraid* certificates. However, and Syariah court have no authority in distribute the inheritance. It is the person who obtains the Letter of Administration from the Civil High Courts that has the power to do that.
 - b) Syariah courts have no authority upon the Muslim heirs to give a *wasiah wajibah* for non-Muslim heirs.

Indonesian Religious court has total authority to handle inheritance case between Muslim and non-Muslim, so the administration of inheritance case can be quickly execute and do not takes big cost. Meanwhile, because Malaysia practices a dual system of courts, it caused the administration of inheritance became longer and more complicated because it requires more time and cost.

B. Suggestion

Indonesia and Malaysia only use jurisprudence as reference to adjudicate inheritance case that involving Muslim and non-Muslim heirs. Even both countries are use jurisprudence as source of law, they still need any regulation about inheritance especially regulation that involving different religion between deceased and heirs.

Indonesian Religious court has total authority to handle inheritance case between Muslim and non-Muslim, so the administration of inheritance case can be quickly execute and hopefully the religious court always developing become good institution that can give absolute justice for Indonesian people.

Meanwhile, because Malaysia practices a dual system of courts, it caused the administration of inheritance became longer and more complicated because it requires more time and cost. In particular, it would be great advantage for Muslims in terms of time and money if Malaysian Council could draft and enact separate authority on administration of inheritance for the Syariah courts.

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CHAPTER IV CLOSING

A. Conclusion

Based on the results of the study as described in previous chapters, and according to the purpose and objectives of this thesis, the researcher drew the following conclusions:

 Based on the law of inheritance in Indonesia and Malaysia, both countries do not give the inheritance to non-Muslim heirs. However, it does not mean non-Muslim heirs don't get the property at all. The law of inheritance in both countries is given another way for non-Muslim heirs to get property. So, even they are not considered as heir, they still get the property from the deceased Muslim property in the form of *wasiah wajibah*, grants, or *waqf*. In Indonesia the authority to solve the inheritance case between muslim and nonmuslim is in religious tribunal, even though there are any non-Muslim heirs. Religious court also has authority to give an order for giving non-Muslim heirs, even the Muslim heirs did not want to.

Malaysia practices a dual system of courts. Syariah courts have limited jurisdiction with regards to Islamic inheritance. Syariah courts have the authority to issue Faraid. While, the court that has jurisdiction to deal with the procedural aspects of the administration of Inheritance is Civil Court.

- 3. The comparison between Indonesia and Sarawak has similarities and differences result.
 - a. The similarities:
 - 1) The source of inheritance law for non-Muslim heirs only refers to the cases in court.
 - 2) Non-Muslim heirs do not inherit property from Muslim.
 - 3) Give another way for non-Muslim heirs to get the property, such as *wasiah wajibah, hibah* or *waqf*.
 - b. The Differences:
 - 1) Indonesia
 - a) Religious Court has the authority in distribution of property in Islamic family.
 - b) Religious Court has an authority to give an order upon the Muslim heirs to give a wasiah wajibah for non-Muslim heirs.

- 2) Sarawak
 - a) Syariah courts only has authority to issue Faraid certificates.However, and do not have authority to distribute the inheritance.It is the person who obtains the Letter of Administration from the Civil High Courts that has the power to do that.
 - b) Mahkamah Syariah cannot give an order upon the Muslim heirs to give a wasiah wajibah for non-Muslim heirs.



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