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# Legal Pluralism in the Context of the Distribution of Women's Inheritance: Constellation of State, Islamic and Customary Laws

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## Abstract

This paper is a legal pluralism research on the partition of women's inheritance. It investigates the reality that not all existing and applicable legal laws are being followed. Furthermore, the distribution of women's inheritance is regulated in the Compilation of Islamic Law regarding the share of an heir. There is also a judicial institution that resolves disputes with material law and is accessible to the community. However, it is not always used as a downstream dispute resolution that involves inheritance. The emergence of customary law amongst other diverse sources cannot be ignored as having its place within society, which is frequently used to address normatively controlled legal issues. The results of this study showed the settlement of inheritance is not always handled by trial or litigation, particularly for indigenous peoples in Padangsidempuan City. Hence, to minimize conflict, it is better to decide inheritance issues by consensus amongst families, with regulations that are ambiguous but geared toward the common interest. This paper is expected to be a study among legal practitioners and academics, even though law has restricted the inheritance share of each heir, and society strives to avoid litigation and settle disputes amicably. Therefore, this study can be pursued by examining whether other indigenous groups handle inheritance disputes in the same manner.

## Keywords:

**Legal Pluralism; Women's Inheritance Law; Inheritance Distribution; Effort to Achieve Consensus.**

## Abstrak

Tulisan ini merupakan kajian pada pembagian warisan perempuan dengan pendekatan pluralisme hukum, yang mengkaji realitas bahwa tidak semua aturan hukum yang ada dan berlaku kemudian ditaati sebagai sebuah hukum. Dalam pembagian warisan perempuan, telah jelas diatur dalam Kompilasi Hukum Islam

mengenai bagian masing-masing ahli waris dan hadirnya lembaga peradilan untuk menyelesaikan sengketa dengan hukum materiil yang bisa diakses oleh masyarakat, pada kenyataannya tidak selalu dijadikan hilir penyelesaian sengketa yang berkaitan dengan warisan. Lahirnya hukum adat ditengah beragam sumber hukum tidak bisa dipungkiri memiliki tempat tersendiri ditengah-tengah masyarakat, yang seringkali ditempuh untuk menyelesaikan sengketa yang secara hukum telah diatur secara normatif. Maka menjadi penting untuk melihat perilaku sosial masyarakat dalam menggunakan hukum, sebagai jalan keluar bagi berbagai masalah yang ada, hasil penelitian ini menunjukkan bahwa penyelesaian waris tidak selalu diselesaikan dengan persidangan (litigasi), terlebih pada masyarakat adat di Kota Padangsidempuan yang menjadi lokasi penelitian penulis. Penyelesaian sengketa waris lebih diutamakan diselesaikan secara musyawarah mufakat antar keluarga, dengan hukum yang tidak pasti namun memiliki tujuan untuk kebaikan bersama demi meminimalisir konflik. Penelitian ini diharapkan menjadi kajian akademik dikalangan praktisi hukum maupun kalangan akademisi, bahwa meskipun hukum telah sedemikian rupa mengatur bagian waris masing-masing ahli waris, namun masyarakat sebisa mungkin menghindari persidangan dan menyelesaikannya secara kekeluargaan. Penelitian ini bisa dilanjutkan dengan meneliti pada masyarakat adat lainnya, apakah melakukan hal serupa atau tidak ketika berhadapan dengan sengketa kewarisan.

**Kata Kunci:**

**Pluralisme Hukum; Hukum Waris Perempuan; Pembagian Warisan; Musyawarah Mufakat.**

## 1. Introduction

Women are accorded the same status as male heirs under Islamic law. This is different from the inheritance system that existed before Islam.<sup>1</sup> The right to inherit from someone's death is only given to adult men who are still strong in the battlefield and have kinship relations and pledges of allegiance, as well as men. In this system, only adult men have the right to inherit from someone's death. son, a child who was adopted. While this is going on, women, children, and the elderly are denied inheritance rights.<sup>2</sup> The book Quraish Shihab refers to the fact that during that era, women and widows had the potential to be included as components of what was deemed property and handed to the son or brother of the heir.<sup>3</sup>

To properly discuss the position of Indonesian women in inheritance law, it is necessary for us to first lay out some of the most pressing concerns that are

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<sup>1</sup> Halimah Basri et al., "Inheritance Rights of Women in Makassar Society: A Study of Living Qur'an and Its Implications for Islamic Law," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (2022): 24–42, <https://doi.org/10.22373/sjkh.v6i2.13882>.

<sup>2</sup> Mahrus Ali et al., "Compensation and Restitution for Victims of Crime in Indonesia: Regulatory Flaws, Judicial Response, and Proposed Solution," *Cogent Social Sciences* 8, no. 1 (2022), <https://doi.org/10.1080/23311886.2022.2069910>.

<sup>3</sup> Muhammad Saleh, "Women's Professional Career Through Al-Qur'an's Perspectives," *Interdisciplinary Social Studies* 1, no. 9 (2022): 1133–49.

prevalent across Indonesian inheritance law in general.<sup>4</sup> The fact of Indonesia's inheritance law is that it is both complex and multifaceted. The first is found in Western Civil Law, and the regulations regarding inheritance can be found in the second book of that law (Articles 830 to 1130). The second is found in Islamic inheritance law, and it refers to faraid, which is derived from Islamic Jurisprudence and the Compilation of Islamic Law issued by presidential instruction No. 1 of 1991, which regulates about inheritance in book two of Articles 171 to 214. Both laws can be found on their respective websites. In the meantime, the customary law of inheritance is incorporated into the customary law that is practiced in many different ethnic groups that have patrilineal, matrilineal, or bilateral kinship.<sup>5</sup> People who are confronted with inheritance concerns have legal options available to them thanks to the application of the same legislation in the inheritance framework. These options concern the legal laws they will be subject to, depending on the many circumstances that are considered.

However, in Islamic inheritance law, girls are placed as heirs with a share of the son's share (Article 82 of the Compendium of Islamic Law). The share of widows and widowers is also different depending on whether they have children or do not have children. In western civil law, girls have the same rights as boys in their right of access to inheritance.<sup>6</sup> This contrasts with the common law of inheritance, which does not adhere to a specific legal formulation but can serve as a foundation for the development of law.<sup>7</sup> Because people live in a variety of different customary rules, such as the kinship system known in Indonesia as Bilateral, Matrilineal, and Patrilineal, each of which brings its own style in the settlement of inheritance disputes, the part of women and men in customary law does not have written and

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<sup>4</sup> Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," in *Legal Evolution and Political Authority in Indonesia* (BRILL, 2000), [https://doi.org/10.1163/9789004478701\\_007](https://doi.org/10.1163/9789004478701_007).

<sup>5</sup> Sulistyowati Irianto, *Pluralisme Hukum Waris Dan Keadilan Perempuan* (Jakarta: Yayasan Pustaka Obor Indonesia, 2016), p. 11.

<sup>6</sup> Mukhtar Zamzami, "Kajian Hukum Terhadap Kedudukan Dan Hak Perempuan Sebagai Ahli Waris Dalam Sistem Hukum Kewarisan Indonesia, Dikaitkan Dengan Azas Keadilan Dalam Rangka Menuju Pembangunan Hukum Kewarisan Nasional" ( Disertasi, Program Doktor Ilmu Hukum, Universitas Padjajaran Bandung, 2012).

<sup>7</sup> Kgotso Maunatlala and Charles Maimela, "The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture," *De Jure Law Journal* 53, no. 1 (2020), <https://doi.org/10.17159/2225-7160/2020/v53a3>.

definite rules. This is since customary law does not have written rules. Even though Indonesia has regulations regarding inheritance law in such a way, the rules of inheritance law can be sought, particularly from Islamic law, in addition to customary law and other new laws that are growing and practicing.<sup>8</sup> This is the case even though Indonesia has regulations regarding inheritance law in such a way.

The downstream settlement of inheritance is currently handled by the Court, which incorporates a variety of legal regulations into its procedures; however, it is not unusual for the downstream settlement of inheritance to be carried out without the formalities of the trial being followed. As a legal community, in addition to state law, the community also lives and interacts with customary law.<sup>9</sup> Because customary law has its own place in the hearts of the community, it is trusted and becomes an alternative in the process of resolving various disputes in society. This includes inheritance cases, which tend to be sensitive and are frequently the source of conflict.<sup>10</sup>

The existence of customary institutions that make use of a variety of legal procedures is a fact that comes the closest to satisfying people's sense of justice. A society have the capability to devise its own system of rules and to determine the type of justice system that best suits its requirements. In customary societies, a variety of procedures for the resolution of inheritance disputes can be found. In certain circumstances, it might be challenging to disentangle these mechanisms from the local political system and the local culture. The application of customary law, which refers to people's law, may be the result of cultural concerns that are beyond the state's ability to comprehend.

In this paper, we will investigate the issue of women's access to justice, which refers to legal issues that must be resolved outside of the courtroom to settle

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<sup>8</sup> Fransisca Utami Masakke, Irena Hapsari, and Syaumah Az-Zahro, "The Existence of Customary Inheritance Law in Indonesia," *Tadulako Law Review* 5, no. 1 (2020): 89–98, <http://jurnal.untad.ac.id/jurnal/index.php/TLR/article/view/15199>.

<sup>9</sup> Iwan Erar Joesoef, "The Idea of Customary Law Community Representation in the Regional Representative Council," *Unnes Law Journal* 6, no. 1 (2020): 119–42, <https://doi.org/10.15294/ulj.v5i2.26984>.

<sup>10</sup> Hazar Kusmayanti, Linda Rachmainy, and Dede Mulyanto, "Settlement Of Customary Inheritance Dispute Cases According To Sharia (Islamic Law) In Indigenous Communities In Indonesia," *NVEO - NATURAL VOLATILES & ESSENTIAL OILS Journal | NVEO* 8, no. 6 (2021): 807–18, <https://www.nveo.org/index.php/journal/article/view/3687>.

disputes involving women's inheritances. To do so, we will investigate the reality of inheritance law pluralism within the context of state law, Islamic law, and customary law. Even though in a legal mechanism, inheritance issues must be resolved with a set of laws that have been ratified, the fact that the settlement of inheritance does not always lead to a trial even though inheritance issues are sensitive and prone to conflict even though for indigenous peoples, state law is not a solution to problems. This is since inheritance issues are sensitive and prone to conflict. current inheritance, taking into consideration the fact that many disputes around inheritance are not settled through the judicial system.

## 2. Literature Review

Before the author conducted this research, there have been many articles that have examined the position of women's inheritance, in terms of three legal systems, namely state law, Islamic law, and customary law. To differentiate this research from previous research, the author will describe several similar studies that has previously been published, both in the form of journals and books, as follows: State law, Islamic law, and customary law:

The writings of Iklilah Muzayyana Dini Fajriah,<sup>11</sup> which state that the practice of applying inheritance law has undergone a shift in meaning from faraidh law, such practice can be seen at the time of distribution, which is not always carried out after death, inheritance which is not always divisible by the heirs, and the share of the heirs which does not always match their respective share. The system that is currently in place for the debate of inheritance distribution practices has created a space that can open women's access to inheritance laws more equitably and equally. This space was supplied by the mechanism for inheritance distribution practices. This study reveals that women are frequently overlooked when it comes to fulfilling their inheritance rights, including their share, even though the regulations have so regulated the share of each heir. Furthermore, the researcher demonstrates

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<sup>11</sup> Iklilah Muzayyanah Dini Fajriah, "Kedudukan Perempuan Dalam Hukum Waris Islam Dan Praktikanya," in *Perempuan Dan Anak Dalam Hukum Dan Persidangan*, ed. Sulistyio Irianto (Jakarta: Yayasan Pustaka Obor Indonesia, 2020).

that consensus deliberation is the best solution to open communication between heirs, to eliminate the possibility of inequality in the distribution of inheritance.

According to the article titled "Women's Inheritance Rights According to Toba Batak Customary Law Before and After the Supreme Court Decision No. 179/K/SIP/1961" by Dian Kemala Dewi,<sup>12</sup> the Toba Batak are a culture that adheres to the Patrilineal kinship system, which means that men receive inheritance rights. As stated in the Jurisprudence of the Supreme Court of the Republic of Indonesia No. 179/K/SIP/196, inheritance law in Indonesia has experienced numerous changes, including the granting of equal inheritance rights to males and females. The goal of this study was to evaluate whether women's inheritance rights under Toba Batak customary law changed before or after the issuance of MA.NO Decision 179 K/Sip/1961. This research is descriptive in nature, employing the techniques of Library Research (Library Research) and Field Research (Field Research), which are subsequently assessed qualitatively utilizing theories and positive laws that have been outlined and conclusions derived. Prior to the issuance of the Supreme Court Decision No.179 K/Sip 1961, in the Toba Batak society, only boys became heirs and girls were not heirs. After the issuance of the Supreme Court Decision No.179 K/Sip 1961, a daughter has been able to claim that she has the same right to inherit from her parents as a son. The conclusion of this study is that with the issuance of Supreme Court Decision No. 179 K/Sip in 1961, the inheritance rights of women under Batak Toba customary law have shifted such that women have inheritance rights over their parents' inheritance and can sue if they do not receive an inheritance.

The journal titled Women's Inheritance Rights in the Perspective of Surat An-Nisa' between Theory, Practice, and Its Relevance in the Indonesian Context by Warty A.<sup>13</sup> Saefuddin argues that the law of inheritance is required to eliminate the harm caused by the seizure and unfair distribution of inheritance. Inheritance law

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<sup>12</sup> Dian Kemala Dewi, "Hak Waris Perempuan Menurut Hukum Adat Batak Toba Sebelum Dan Sesudah Keluarnya Keputusan Ma. No. 179K/Sip/1961," *Warta Dharmawangsa* 14, no. 4 (2020): 585–601, <https://doi.org/10.46576/wdw.v14i4.911>.

<sup>13</sup> Warty A Saefuddin, "Women's Rights In The Perspective Of Surat An-Nisa' Between Theory, Practice And Their Relevance In The Indonesian Context," *Darul Hikmah: Jurnal Penelitian Hadits Dan Tafsir* 6, no. 1 (2020), <https://ojs.stiudarulhikmah.ac.id/index.php/jt/article/view/4>.



provides the most prudent and equitable approach. However, Muslims do not fully embrace and apply this approach. The text of the Koran has also been the target of criticisms and false beliefs. Specifically, the interpretation of the unequal distribution of inheritance between men and women, which is viewed as discrimination and injustice against women. This study seeks to investigate the inheritance verses completely and incorporate the perspectives of numerous Muslim scholars and experts. Using an interpretive strategy involving the study of language, history, and its relation to the present environment, it is discovered that the presumption regarding discrimination is not totally accurate. In many cases, the proportion of women exceeds that of men, indicating that this assumption is erroneous.

Implementation of the Inheritance Rights of Girls in the (Old) Rambang Kapak Tengah Community of Prabumulih City in Islamic Inheritance Law According to Islamic inheritance law, this contradicts the principle of justice regarding the inherited rights of girls in accordance with custom.<sup>14</sup> The Compilation of Islamic Law (KHI) can serve as a definitive source of law for the Religious Courts as well as a guideline or standard of inheritance law for the Indonesian Muslim community, particularly the (old) Rambang Kapak Tengah community, with the goal of protecting the customary inheritance rights of girls so that they can implement the distribution of inheritance in accordance with the religion adopted, namely Islam.

According to the article titled "Legal Principles of the Position of Women in the Customary Inheritance Law of the Banjar Society" by Gusti Muzainah,<sup>15</sup> the legal principles of the position of women in the customary law of the Banjar community are reflected in the legal norms used to implement inheritance distribution in institutions. By way of *Islah* and *Faraid-Islah*, there is peace. This calm institution's procedure demonstrates how women are acknowledged for their status as heirs and the magnitude of their bequest. This study seeks to identify the norms of inheritance law and the legal principles governing the role of women in the Banjar community's

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<sup>14</sup> Astuti Maryulaini, "The Implementation Of The Indigenous Inheritance Rights Of Dauhgters In The (Old) Ethnic Of The Rambang Kapak Tengah In Prabumulih Based On The Islamic Inheritance Law," *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 4, no. 1 (2015), <https://doi.org/10.28946/rpt.v4i1.167>.

<sup>15</sup> Gusti Muzainah, "Prinsip Prinsip Hukum Kedudukan Perempuan Dalam Hukum Waris Adat Masyarakat Banjar," *DiH: Jurnal Ilmu Hukum* 8, no. 15 (2012): 10–19, <https://doi.org/10.30996/dih.v8i15.259>.

customary inheritance law. The results of the study indicate that the customary inheritance law norms of the Banjar community are contained in peaceful institutions, which are carried out by means of *islah* and *faraid islah*, the legal status of women as heirs is recognized, and the size of the share is relative; it can be greater than men, equal to men, or less than men. The relative portion of the inheritance is derived from research on the existence of God's principles, the principle of benefit, and the principle of balance, all of which are based on the proposition of *maslahah mursalah*, so that the customary inheritance law of the Banjar community does not differentiate between the legal positions of women and men.

In addition to focusing on the respective divisions of men and women, this research also discusses the implementation of inheritance distribution in several indigenous peoples, including the Batak Toba and Banjar indigenous peoples as well as the people in Prabumulih. Thus, the object of previous research is distinguished from the object of this research, and there is no research that compares the two.

### 3. Research Method

This study was conducted in the city of Padangsidempuan. This is normative-empirical law research, which is a comprehension of the law in terms of norms (rules) and the implementation of legal rules in real conduct because of the adoption of legal norms. Such behavior is easily observable and provides evidence of whether persons have acted in conformity with the provisions of normative legislation or not (laws and other written documents).

Normative-empirical (applied) legal study analyzes the implementation or execution of positive legal provisions (laws) and written documents in action (factual) on any given legal event that takes place in society. The purpose of the study is to determine whether the results of the application of the law to specific legal events are consistent with the requirements of the law. In other words, whether the provisions of the law have been adequately executed so that the interested parties attain their objectives.

This research was conducted by first examining the normative rules of inheritance law (State law, Islamic law) and then examining the reality of the



implementation of the normative law among indigenous peoples; in this case, samples were taken from the indigenous peoples of Batunadua Village, Padangsidempuan District, Batunadua, Padangsidempuan City.

## 4. Discussion

### 4.1. Pluralism in Indonesian Inheritance Law

In the practice of dividing and settling inheritance disputes, the concept of inheritance and what inheritance law entails are put to the test, particularly Islamic inheritance.<sup>16</sup> In practice, concepts and rules that have been regarded standard are flexible and gain new meanings; hence, the notion of inheritance law must be reconsidered. The meaning of inheritance law changes, not only because the legislation itself differs, but also due to differences in culture, meaning systems, social classes, and gender viewpoints.<sup>17</sup> Moreover, the subject of inheritance is vital, delicate, and prone to controversy, so its resolution must involve a predetermined sequence of steps and balanced justice. Therefore, when discussing inheritance law, particularly for indigenous peoples, traditional origins, education, gender, and understanding of inheritance itself determine the techniques and methods people use to address inheritance disputes.

Islamic inheritance law in Indonesia is a synthesis of three inheritance law systems: Islamic inheritance law, customary inheritance law, and inheritance law from the Civil Code.<sup>18</sup> In Indonesia, inheritance cases are uncommon because inheritance concerns occur only after the death of the testator. The inheritance case graph differs greatly from the divorce case graph, both of which fall under the jurisdiction of the Religious Courts, yet a small number of inheritance cases still end up in the Religious Courts. Although the Religious Courts have the authority to hear

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<sup>16</sup> Shahbaz Ahmad Cheema, "Distribution of Inheritance under Islamic Law: An Appraisal of Online Inheritance Calculators," *Journal of Islamic Thought and Civilization* 11, no. 1 (2021), <https://doi.org/10.32350/jitc.111.07>.

<sup>17</sup> Irianto, *Pluralisme Hukum Waris Dan Keadilan Perempuan*.

<sup>18</sup> Purwosusilo and Sugiri Permana, *Hukum Waris Di Indonesia, Pergeseran Penerapan Hukum Waris Islam Dalam Putusan Hakim* (Surabaya: Pustaka Saga, 2021), p. 1.

inheritance disputes for the Muslim community, they are not the only venue chosen by the community to resolve inheritance disputes.<sup>19</sup>

In Indonesia, inheritance is not a major issue, even though the case of inheritance has always been a source of contention between political interests who use law as a venue for power, particularly between Islamic law and customary law, or the Religious Courts (court judiciary) and customary courts (adat judiciary). Daniel Lev has examined this subject for a long time (1962, 1972), and it turns out that the problem has hardly changed even though the customary court was disbanded in 1952. The dispute involves three judicial bodies: the District Court, the Customary Court, and the religious courts.

To date, Indonesia does not have a *lex specialis* inheritance law, a concept that Islamic jurists have long addressed in numerous gatherings supported by the Ministry of Religion.<sup>20</sup> Nonetheless, several legal references already exist in the sphere of inheritance, including civil law, customary law, and the Compilation of Islamic Law, as well as a variety of jurisprudence and societal practices for settling inheritance disputes.<sup>21</sup> Consequently, there is no legal vacuum in inheritance law. With inheritance law regulated by three distinct legal systems, namely state law, customary law, and Islamic law.

This study's examination of legal pluralism departs from the concept of legal pluralism, for which numerous definitions and attributes have been suggested by experts. In the early 1970s, legal pluralists introduced the idea of legal pluralism, which, albeit ambiguous, referred to the coexistence of multiple legal systems within the same social space. Legal pluralism is commonly characterized as the coexistence of two or more legal systems within the same social space, as expressed by Sally Engle Merry. In the context of legal pluralism, this means that there is state law on the one hand and people's law, which does not come from the

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<sup>19</sup> Rachmat Trijono, "Which Is The Fairest Between Civil Inheritance Law, Customary Inheritance Law or Islamic Inheritance Law?," *Himmah: Jurnal Kajian Islam Kontemporer* 3, no. 1 (2021): 186–99, <https://doi.org/10.47313/jkik.v3i1.1096>.

<sup>20</sup> Irawaty, "Inheritance Laws in Indonesia," *Hayula: Indonesian Journal of Multidisciplinary Islamic Studies* 1, no. 2 (2017): 209–28, <https://doi.org/10.21009/hayula.001.2.05>.

<sup>21</sup> Yuli Prasetyo Adhi, Triyono Triyono, and Muhyidin Muhyidin, "Questioning the Customary Inheritance Law After Law No. 3 of 2006 about Religious Jurisdiction," *Indonesian Journal of Advocacy and Legal Services* 3, no. 1 (2021): 111–22, <https://doi.org/10.15294/ijals.v3i1.45728>.

state and consists of customary law, religious law, customs, and social conventions regarded as law, on the other.

Legal pluralism is neither a novel subject nor an emerging field of study in Indonesia. Legal pluralism is, in the simplest words, a critique of centralism and positivism in the application of law to the people. Legal pluralism may be understood in several ways.<sup>22</sup> First, legal pluralism explains the link between diverse working legal systems in society. Second, legal pluralism outlines the numerous laws that now exist in a social sphere. Thirdly, describe the interaction, adaptability, and rivalry between legal systems. Thirdly, legal pluralism demonstrates that citizens can choose which laws to use in dispute. From these three viewpoints and many others, we can conclude that legal pluralism is a reality in the lives of individuals. Accordingly, to use a word from Brian Z. Tamanaha, legal diversity is pervasive. It can be claimed that legal pluralism is the solution to the deficiencies of Indonesia's national legal system, which tends to be centralized. Several policies and clauses of laws and regulations containing the concept of legal plurality demonstrate this. The classic illustration involves inheritance.

Legal pluralism does not automatically resolve societal problems. However, legal pluralism exists to provide legal practitioners, state law makers (legislators), and the broader community with a new understanding that, in addition to state law, there are other legal systems that existed earlier in society, and that these legal systems interact with state law and even compete with one another. In addition, legal pluralism explains the existence of a social order that is distinct from the legal order of the state. The centralist viewpoint asserts that the only institution that contributes to the formation of social order is the state, through the formation and enforcement of laws. In truth, many "additional powers" do not originate from the state. Among these are customary law, religious law, customs, international commercial agreements, etc. Both forces have the capacity to regulate the behavior of those who are linked to them; in fact, occasionally members or communities of society prefer to follow the rules established by their groups rather than state legislation.

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<sup>22</sup> Zaid Abubakari, Christine Richter, and Jaap Zevenbergen, "Plural Inheritance Laws, Practices and Emergent Types of Property-Implications for Updating the Land Register," *Sustainability (Switzerland)* 11, no. 21 (2019): 10–12, <https://doi.org/10.3390/su11216087>.

## 4.2. Comparative Analysis of the Constellation of Inheritance Law in Indonesia

### 4.2.1. Islamic Law

Because it symbolizes the social and religious identity and character of a society, the problem of inheritance assumes great significance. In the area of Islamic legal thought, inheritance regulations have a prominent position. Indonesian Muslims paid a lot of attention to inheritance law.<sup>23</sup> Inheritance is extensively governed by Islamic law.<sup>24</sup> Nonetheless, it should be acknowledged that Indonesian Muslims do not represent a homogeneous identity, as there are so many sects within Islam, and Islamic law is characterized by a large diversity of ideas.

Inheritance is one of the grounds for the transfer of property rights, namely the transfer of property and material rights from the beneficiary to the beneficiary (*wara'ah*) by way of substitution under *syara'* law following the death of the beneficiary. The transfer of inheritance from the heir to the heir occurs after the heir's death, when the heir has fulfilled the deceased's duties, either by bearing his *fardhu kifayah* charges or by paying off his debts during his lifetime.

As for the basis for the right to inherit or for obtaining a share of the inheritance according to the Qur'an, namely: 1. Due to blood relations; 2. Sexual relations or marriage; 3. Brotherly relations, because the share of religion determined by the Qur'an is not more than one-third of the inheritance of the heir; The implication of the third relationship above is the birth of a legal relationship of mutual inheritance, in addition to the relationship of inherency.<sup>25</sup>

First, the Qur'anic heirs or those who have been determined by the Qur'an are referred to as *dzul fara'idh*, as their inheritance is permanent and unchanging. *Ashabah* are the descendants from the lineage of the father who receive an open

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<sup>23</sup> Ismail Ismail, "The Philosophical Values of Islamic Inheritance Law," *INNOVATIO: Journal for Religious Innovation Studies* 20, no. 2 (2020): 125–36, <https://doi.org/10.30631/innovatio.v20i2.112>.

<sup>24</sup> Muhammad Habibi Miftakhul Marwa, "Al-Walā` in Islamic Inheritance Law: Looking for Its Legal Effects," *Jurnal Hukum Novelty* 11, no. 1 (2020): 56, <https://doi.org/10.26555/novelty.v11i1.a15307>.

<sup>25</sup> Noor Handayani, Akhmad Khisni, and Achmad Sulchan, "Juridical Implementation of Distribution Assets for the Inheritance to Adopted by Islamic Law Compilation," *Jurnal Akta* 6, no. 4 (2019): 763–70, <https://doi.org/10.30659/akta.v6i4.7578>.

share or the remainder. Therefore, the first portion of the heirs to be distributed is the dzul fara'idh, and the remainder is distributed to the ashabah.

Second, heirs according to the lineage of the mother, known as dzul arham. This group will only inherit if neither dzul fara'idh nor ashabah exist. Among the heirs, there are people who do not deserve and are not entitled to the inheritance portion of the heirs for a number of reasons, including: 1. The heir who murders the heir is not eligible to inherit from the family he murdered; 2. Slaves are not entitled to inherit from their masters; 3. (*al-Riqq*).

Third, Different religions. The inheritance of women in Islamic law is based on the verses of the Qur'an pertaining to inheritance law, which are contained in q.s An-Nisa verse 11. This verse is frequently debated by academics and legal practitioners in formulating the concept of women's inheritance justice by departing from the translation of this verse. The Qur'an places men and women on an equal footing and both are entitled to inheritance, but the most prominent aspect of Islamic inheritance is the discussion of justice, where the share of men and women is 2:1. The 2:1 portion is frequently questioned, sued, or even blasphemed by disgruntled parties, including Muslims, giving rise to arguments to pressure Islamic legal experts to genealogical reform. According to them, justice means having the same rights and receiving the same amount, which equals 1:1.

According to Article 176 of the Compilation of Islamic Law, Islamic inheritance law is controlled in positive Indonesian law with an equal share, that the portion of men and women is two to one. Although KHI is the initial reference for judges' deliberations in inheritance matters that lead to the Religious Courts, there are various other legal sources that impact judges' decisions.

Similarly, what is referred to as Islamic inheritance law in Indonesia differs considerably, demonstrating the existence of legal heterogeneity. First, with respect to the legal substance, who has the right to be heirs and their proportional shares. Second, Islamic law applies variably depending on the circumstances, as does the content of the Compilation of Islamic Law, which is the essence of numerous fiqh publications. Likewise, in accordance with what is outlined in the Qur'an, males and women receive an equal share of the inheritance. In practice, however, the

separation is not absolute; courts frequently stray from the rule of law in order to protect the benefit, based on a variety of legal concerns.

In the framework of Islamic inheritance outside of the court, legal diversity is evident from the community's background, which cannot be isolated from the community's kinship system. In a patrilineal society, for instance, the placement of women and men and their separate roles is comparable to Islamic law, therefore the two are often compatible. Due to Islam's acknowledgment of *ashabul faraidh*, the effect of Islamic law in a wide sense may also be substantial in bilateral family systems such as those in Java and Aceh. In contrast, in matrilineal communities, such as Minangkabau, it is very impossible to assert that Islamic law governs inheritance, except for families that have forsaken conventional family bonds. Because Islam is highly prominent in Minangkabau, but not in inheritance law, this is a very intriguing finding.

#### 4.2.2. State Law

The question of inheritance and its settlement is a continuation of the colonial policy of dividing the Indonesian population into three groups with separate legal subjects, from the standpoint of state law.<sup>26</sup> Since then, legal plurality in the realm of inheritance has begun to emerge. The Dutch Civil Code, which applies to foreign orientals and Indonesian Christians in Java and Eastern Indonesia in accordance with a 1933 ordinance, governs inheritance concerns for Europeans.

The reference to inheritance law has implications for the court's jurisdiction, and history documents how the choice of law arose from the resolution of inheritance conflicts between the Religious Courts and the District Courts.<sup>27</sup> The jurisdiction of the authority that adjudicates inheritance disputes also reflects the intricacy of inheritance-related regulations. In Indonesia, this is particularly evident not only because of the policy of splitting the population into three categories since 1926, but

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<sup>26</sup> Yeni Salma Barlinti, "Inheritance Legal System in Indonesia: A Legal Justice for People," *INDONESIA Law Review* 1, no. 1 (2013): 23–41, <https://doi.org/10.15742/ilrev.v3n1.28>.

<sup>27</sup> Fakultas Hukum and Universitas Airlangga, "Dynamics of Reasonableness and Fairness in a Pluralistic Legal System: Perspectives from Adat, Islamic and Civil Inheritance Law," *Yuridika* 36, no. 1 (2021): 1–14, <https://doi.org/10.20473/ydk.v36i1.19170>.



also because of the 1973 law on the partition of inheritance jurisdiction between the Religious Courts and the District Courts.

In the history of law in Indonesia, Staatsblad 1882 number 152 is the source of the Religious Courts' authority to resolve inheritance disputes. This power was subsequently restricted to Staatsblad Nos. 116 and 610 of 1973. Since the establishment of the Staatsblad, the Religious Courts no longer have jurisdiction over inheritance issues. Since the promulgation of Law No. 7 of 1989 concerning the Religious Courts, however, the absolute competence of the Religious Courts has been restored in resolving inheritance disputes that have been lingering since 1937. This not only restores the Religious Courts' authority, but also gives them complete independence.

The history of the resolution of inheritance conflicts between the Religious Courts and the District Courts has unquestionable bearing on the conclusions made, given that the two judicial institutions have different legal bases of material law. In the district court, for instance, prior to the ratification and enactment of the religious court's absolute competence in resolving inheritance issues, the district court retains the same Civil Code-based authority. Western civil law (KUHPerd) applies to Chinese/non-Muslims and those who are subject to the Criminal Code; under civil procedural law, the settlement is the responsibility of the district court, as outlined in Law No. 2 of 1986 jo. Law No. 49 of 2009 pertaining to General Courts. However, after the promulgation of Law No. 7 of 1989, which was revised to Law No. 3 of 2006, the Religious Courts' authority to resolve inheritance disputes amongst Muslim communities by reference to numerous legal sources, including the Compilation of Islamic Law, was strengthened, and defined.

It is impossible to disentangle the situation of women in Islamic inheritance law in Indonesia from the presence of a law that governs marital law because the two go hand in hand.<sup>28</sup> There are at least three articles in Law no. 1 of 1974 that discuss the arrangement of property in marriage, and several of the articles in it have

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<sup>28</sup> Endang Sriani, "Fiqh Mawaris Kontemporer: Pembagian Waris Berkeadilan Gender," *Tawazun: Journal of Sharia Economic Law* 1, no. 2 (2018): 133–47, <https://doi.org/10.21043/tawazun.v1i2.4986>.

a close relationship to the Indonesian Islamic inheritance law that is contained in the Compilation of Islamic Law. These articles are as follows: Article 1:

1. Article 29 includes a marriage agreement that allows a husband and wife to enter into a marriage agreement about property, including inheritance, gifts, inheritance, and the purchase of other assets. This marriage agreement can be found in the constitution.

2. The division of property in marriage is governed by Article 35, which covers both jointly owned property and property acquired from other means, such as inheritance and gifts.

3. The rights of existing wives to share in joint property are regulated by Article 65, which also governs the ownership of joint property by polygamous marriages.

Even though the following items are relevant to inheritance law and have significance for the presence or lack of a person's right to inheritance, or the legal protection of a person against inheritance:

1. Article 2, which addresses the topic of "legal marriage," is important since it determines who can be legally acknowledged as heirs.

2. The functions of men and women in the household are separated into distinct categories by articles 31 and 34 of the constitution. This legally regulated distribution of duties has an effect on the way in which women's inheritance rights are recognized and distributed.

3. The position of children, including both children who have been recognized by the law and children who were born outside of marriage, is regulated by Articles 42, 43, and 44. This topic has ramifications for the process by which children acquire their inheritance rights, particularly children who were born outside of wedlock.

In addition, the presence of the Compilation of Islamic Law is a legal breakthrough in the positivization of Islamic law in Indonesia, which is the essence of sharing fiqh books. This aims to homogenize judges' decisions in terms of inheritance, and in regard to the distribution of female inheritance, it has adjusted to the male and female portions as contained in Islamic law, specifically the formula

2:1. Lastly, the presence of the Compilation of Islamic Law is a legal breakthrough in the positivization of Islamic law in Indonesia.

Book II of the Compilation of Islamic Law is the section that is specifically dedicated to the discussion of Islamic inheritance law. In the KHI, women are given the same inheritance rights as men and are entitled to the same share of the inheritance. The recognition of women in the KHI can be observed in Article 174, which states that the heirs of the blood link of the female group consist of grandmothers, mothers, daughters, and sisters. This demonstrates that the female group is recognized in the KHI. However, widows are the rightful inheritors due to the marriage relations. The ratio of the son's share to the daughter's share, if simplified into 2:1 parts, makes the content clear with an easy-to-understand editorial, which of course is not foreign to the Muslim community given that Al-Quran also has previously set the same thing. The share of female inheritance in the article has been clearly regulated.

Article 176 of the KHI provides guarantees for the acquisition of women's inheritance, but on the other hand, the article has distinguished the position of women as being unequal to boys. However, from the perspective of CEDAW, the article has placed girls and boys in an unequal position. Even though the legal standing of children is the same in every situation.

Both feminists and academics who have examined the Article and its effect on girls have found various reasons to criticize it. These criticisms come in a variety of forms. However, on the other hand, what is more interesting is that although the normative rules have so regulated the share of each heir, even based on gender, the percentage of settlement of inheritance disputes in the Religious Courts is not high. This percentage is inversely proportional to the percentage of divorce cases that both are absolute competences of the Religious Courts. However, inheritance dispute cases are sensitive and prone to conflict, so the resolution of these cases requires certainty.

According to the Annual Report of the Directorate General of Badilag, the total number of inheritance cases that were brought before Indonesia's Religious Courts in the year 2020 was 1679. Despite the fact that this number is significantly lower

than that of other civil cases, such as divorce and guardianship, it is still significantly lower than other civil case types. In the meantime, data from the Directorate General of Population and Civil Registration of the Ministry of Home Affairs stated that the percentage of deaths that occurred in Indonesia from November 2020 to February 2021 amounted to 87,161 people. This figure was allegedly lower than in previous months, especially considering that when the covid pandemic hit, hundreds of thousands of people died. A thousand people lost their lives. The question that needs to be answered is where the inheritance case will ultimately be decided. In the meantime, the proportion of inheritance cases heard by Religious Courts across all of Indonesia is still a long way from reaching this figure.

#### 4.2.3. Customary Law

The discussion of inheritance law in customary law does not only talk about heirs and their relationship with other heirs.<sup>29</sup> One of the reasons for this is that customary law is not only the transfer of inheritance rights from heirs to heirs, but it also refers to the transition from one generation to the next. In the study of customary law, there is no legal unification like there is in the Compilation of Islamic Law.<sup>30</sup> This is since the indigenous peoples in Indonesia are quite different and multiple in their composition. Ethnicity and culture, of which customs are a part, are the primary drivers behind the kind of inheritance law known as customary law, which is used to settle legal disputes. Customary inheritance law is heavily influenced by three different kinds of genealogical ties: patrilineal (fatherly), matrilineal (motherly), and parental.<sup>31</sup> Patrilineal partnerships are those that trace back to the father, while matrilineal alliances trace back to the mother (father-mother).

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<sup>29</sup> Fipy Rizky Amalia Luawo and Haswida Amalia, "The Implementation of Inheritance Based on The Tribe of Kaili Ledo and Islamic Inheritance Laws," *Jurnal Dinamika Hukum* 19, no. 2 (2019): 318, <https://doi.org/10.20884/1.jdh.2019.19.2.2525>.

<sup>30</sup> Ninuk Tri Welas, "Comparative Study of Development between Islamic Inheritance Law According to Compilation of Islamic Law (KHI) & Faroid Science," *Sultan Agung Notary Law Review* 3, no. 1 (2021): 164, <https://doi.org/10.30659/sanlar.3.1.164-180>.

<sup>31</sup> Executive Editor Al-Shajarah et al., "THE HARMONIOUS RELATIONSHIP BETWEEN MINANGKABAU CUSTOM AND ISLAM IN THE DISTRIBUTION OF INHERITANCE," *Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilization (ISTAC)* 24, no. Special Issue: Shariah and Law as Catalysts for Global Peace (2019): 39–55.

In a patrilineal legal system, male offspring are given precedence over female offspring in the process of inheritance. The line of the father, which is the emanation of the original father and becomes the determining factor in subsequent generations of offspring, is where descendants are derived from.<sup>32</sup> Women are not the blood vessels that carry the genetic material that ties the family together. When a woman weds a man, she becomes a part of his family, and when they have a child, the child is adopted into the family of the child's father. This linking system can be found in Nias, Gayo, and Batak, as well as in some speakers of Lampung, Bengkulu, and Maluku. In a community that follows the patrilineal inheritance system, only boys are eligible to inherit, while women do not inherit.

Only blood ties from the maternal line can be used as a basis for claiming inheritance rights, as the matrilineal system traces family trees back to the mother rather than the father. While married women will remain in their communities and be members of their own families, their children will be welcomed into the families of their mothers. In the provinces of Minangkabau, Kerinci, and Semendo, as well as in some other parts of Eastern Indonesia, the matrilineal system is practiced.

The bilateral system operates under the presumption that males and females are equally entitled to the right to inherit. In a civilization like that of Java, where there is a bidirectional system of blood relations that is observed from both sides between men and women, fathers and mothers, and ancestors, descendants are not only sons and daughters, but also the descendants of both sons and daughters, as well as women.

Not only is it possible to understand the pluralism of customary law due to the different content of customary law, but it is also possible to understand the pluralism of customary law since customary law has changed in response to the shifting demands of society for justice.<sup>33</sup> Given the rhetoric of global influence on human

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<sup>32</sup> Yayan Sopyan, Nusrwan, and Isnawati Rais Asmawi, "Degradation of Customary Inheritance Law in The Sai Batin Lampung Tribe," *AL-'Adalah* 17, no. 2 (2020): 295–316, <https://doi.org/10.24042/adalah.v17i2.7137>.

<sup>33</sup> Leni Nurmala and Yoslan Koni, "Differences And Similarities In The Division Of Inheritance Law According To Islamic Law And Javanese Customary Law In Indonesia In A Comparative Study Of Law, so That," *International Journal of Educational Review, Law And Social Sciences (IJERLAS)* 2, no. 1 (2022): 129–42, <https://doi.org/10.54443/ijerlas.v2i1.134>.

rights and women's rights, there is such a strong need for access to justice from the standpoint of women, particularly in family law. This desire is particularly high in countries where there is less of an emphasis on women's rights. The significance of customary law, and in particular customary inheritance, for the people of Indonesia can be deduced from the fact that has been shown here. In general, the term "ethnic identity" refers to a device that will continue to exist for as long as people recognize it. When it comes to the maintenance of customs, the rules regulating customary inheritance are quite significant. Citizens require both the consistency of their existence and the foundations of their own imaginative capacities toward themselves. Assigning inheritance rights to some members of society while denying such rights to other members of society causes society to develop social ties that are meant to endure and be represented. If this is the case, then the existence of customary law will continue to exist and evolve within the context of an indigenous community that is pluralistic.

In the research on women's inheritance in customary law, the author did some basic research on the residents of Batunadua Village, Padangsidempuan District, Batunadua, Padangsidempuan City. This was done in Batunadua, which is in Batunadua, Padangsidempuan City. In the Indonesian province of North Sumatra lies the city of Padang Sidempuan, which is often referred to by its alternative name of Padangsidempuan. The capital of the Tapanuli region, Padang Sidempuan, is the largest city in the area, and South Tapanuli Regency encompasses the entire territory on all sides. The social and cultural values of the city of Padangsidempuan are structurally and functionally contained in the kinship system known as 2Dalihan Na Tolu (three furnaces), which stands in its respective locations and is an indivisible unit. 2 There are two cultural systems, two social systems, and two personality systems that are constructed and developed within the context of the two kinship systems that make up 2 Dalihana Na aTolu.

Batunadua Village is one of several villages in Padangsidempuan City, and it has a majority Muslim community. The community in this village still adheres to strong customary rules, both in terms of marriage practices and in terms of the practice of inheritance distribution, which can lead to conflict. However, the



understanding of inheritance in the Batunadua village community does not place women as parties who do not have inheritance. Rather, their understanding is more to the rules of Islamic law that women also have the right to inheritance, although the women's share does not always depart from these rules. This is because the kinship system in the Batunadua village community is patrilineal, which gives men priority over women, especially in matters pertaining to inheritance.

In the community of Batunadua Village, the author investigates and investigates cases of inheritance distribution with the following issues: "A is an heir who has one wife and no biological children, A has 6 surviving siblings, 2 brothers and 4 sisters, while the heir's parents have passed away earlier. A was responsible for the upbringing of a child who had lived and grown up with an heir during his lifetime. The heirs leave behind a significant amount of property in the shape of land, gardens, houses, and other forms of movable property. These items make up the heirs' inheritance.

The division of inheritance, by departing from the case described above, becomes very easy if it is returned to normative rules, namely state rules with a clear and accessible set of laws, that the share of brothers and sisters is 2:1. However, according to the findings of the author's research, family Majority A (including the heirs) did not take the case to the Religious Courts because they were aware that cases leading to the Religious Courts were cases that contained disputes, and inheritance should be distributed without

Because the settlement of the inheritance distribution was initially recognized by the extended family of the heirs, has the potential to become a dispute, and is allegedly capable of causing divisions between relatives, the decision was made to bring the inheritance distribution in a familial manner, by presenting all of the heirs in the deliberation.<sup>34</sup> Due to the fact that they hold the position of "mora," which means they are someone who must be respected due to their high status, brothers have a significant amount of power over how inheritances are divided. However, in practice, the distribution of inheritance is based on deliberation and consensus; the share of

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<sup>34</sup> Sonny Judiasih and Efa Laela Fakhriah, "Inheritance Law System: Considering the Pluralism of Customary Law in Indonesia Sonny Dewi Judiasih \* and Efa Laela Fakhriah \*\*," *PADJADJARAN Jurnal Ilmu Hukum* 5, no. 2 (2018): 315–30, <https://doi.org/10.22304/pjih.v5n2.a6>.

females with boys is not in line with the 2:1 formula; however, the amount received is quite far from the 2:1 part of the inheritance.

An interview conducted by the author with four of the heir's sisters revealed the following: "a sister's share of her brother's property does not have to be in accordance with existing legal rules, although in this case our share is not as big as it should be, but family integrity, maintaining good relations, and avoiding dispute is the initial goal of inheritance distribution." [Citation needed]

The 2:1 formula is still widely criticized and reaps the pros and cons on the pretext of the absence of justice, the majority of which are certainly voiced by women, especially feminists who want equal justice.:1, but the case above makes us aware that what is seen as justice is not necessarily justice for others. For example, in the community of Batunadua Village, they understand that what is considered justice for one person may not be justice for another person.

The settlement of the distribution of inheritance is carried out by means of consensus deliberation, which includes the entire family, without any other party, with uncertain legal rules, depending on the heirs, but can give birth to a new law that binds all heirs, and this is considered fair, an opportunity for access women's justice in inheritance will not be enjoyed by women if it is not based on the understanding that the main purpose of inheritance distribution is not the share of each that must be fulfilled, but an agreement that benefits is much closer to fairness.

This inheritance sharing mechanism is a portrait of the people of Batunadua Village, who choose to resolve the inheritance distribution dispute through family deliberations, with different results of course. So, according to the author's analysis, customary law that develops and exists during the Batunadua Village community has a strong position compared to the other two legal systems.

## 5. Conclusion

The section on women's inheritance becomes a discussion that often colors various writings and even legal seminars, in various legal rules the women's inheritance section has clearly regulated it, both in Islamic Law, State Law and Customary Law. In Islamic law and state law, for example, which places the share of

women with men at 2:1, it has received various rejections, especially from feminists who consider that this formula is unfair, because the rights and responsibilities of men and women are the same. the inheritance should be the same. In contrast to customary law, the law that was born and lived during society, regulates the part of women is not through a definite rule of law, although basically every customary law in Indonesia has its own style. As in Batunadua Village, the distribution of women's inheritance is not based on state law and Islamic law with a 2:1 formula, but the distribution is emphasized on the principle of deliberation and consensus, the second part is not important, but the division of inheritance without causing disputes is the essence of inheritance itself.

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