Al-Risalah
Forum Kajian Hukum dan Sosial Kemasyarakatan
Vol. 22 No. 2, December 2022 (pp. 165-178)

p-ISSN: 1412-436X
e-ISSN: 2540-9522

THE CONTRIBUTION OF *'URF* TO THE REFORM OF ISLAMIC INHERITANCE LAW IN INDONESIA

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DOI: 10.30631/alrisalah.v22i2.1243
Submitted: June 15, 2022; Revised: December 15, 2022; Accepted: December 20, 2022

Abstract: This library research explains the position of 'urf as the basis for reforming Islamic law and its contribution to the renewal of inheritance law in Indonesia, using the content analysis method. The result showed that '*urf* is of higher importance in the renewal of Islamic law and plays a very important role in reforming the inheritance law in Indonesia. Several KHI book II provisions were based on '*urf,* including the inheritance of adopted children and adoptive parents, *żawul arḥām*, *radd*, *walad*, joint property, and substitute heirs. Among the several forms of *'urf* that have been recognized as Islamic law, *'urf* of joint property comes from the rich culture and traditions of native Indonesia. Therefore, it has made a valuable contribution to the renewal of Islamic law in Indonesia.

Keywords: *'Urf*, Renewal of Islamic Law, Inheritance

Abstrak: Penelitian ini bertujuan menjelaskan bagaimana kedudukan *'urf* sebagai dasar pembaruan hukum Islam dan bagaimana kontribusinya terhadap pembaruan hukum kewarisan Islam di Indonesia. Penelitian ini disusun berdasarkan studi kepustakaan dengan mengunakan metode analisis isi atau content analysis. Hasil penelitian ini menyimpulkan bahwa *'urf* merupakan salah satu sumber hukum yang cukup penting dalam pembaruan hukum Islam dan *'urf* sangat berperan dalam pembaruan hukum kewarisan Islam di Indonesia. Banyak sekali ketentuan yang ada dalam buku II KHI yang didasarkan kepada *'urf*. Antara lain, tentang kewarisan anak angkat dan orang tua angkat, kewarisan pengganti, kewarisan *zawul arham*, *radd*, kewarisan *walad*, dan kewarisan harta bersama. Dari sekian banyak bentuk *'urf* yang telah diakui sebagai hukum Islam, maka *'urf* harta bersama berasal dari kekayaan budaya dan tradisi asli Indonesia. Dengan demikian, *'urf* Indonesia telah ikut memberikan sumbangan yang sangat berharga dalam pembaharuan hukum Islam di Indonesia.

Kata Kunci: *'Urf*, Pembaruan Hukum Islam, Warisan

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Introduction

According to Coulson, there are at least two reasons for the high importance of Islamic inheritance law. The *first* is the establishment of Islamic legal provisions, which are highly individual and firm in character. The second reason is the status of the inheritance as inseparable from family law, which can be seen as the central point from a different perspective. This understanding emerges on the ground that the inheritance law has assigned a priority system and quantitative values to each legal heir based on their level of kinship, a certain scheme defined by the *sharia*, and the basic teaching that inheritance is of family responsibilities. Even when the deceased was still alive, the legal heirs were already awarded the right to inheritance. Therefore, the system reflects the Islamic concept of social values and family structure.

Anderson argued that there is still a paradigmatic debate between conservative and progressive forces in Islamic inheritance law. According to conservative circles, in this case, the *jumhur*/majority of ulama, inheritance law is the *qaṭ'iyyāt* and cannot be changed. Meanwhile, according to the progressive forces, it might undergo changes whenever the *maṣlaḥa* (public good) requires.[1]

M. Atho' Mudzhar, professor of Islamic law at UIN Syarif Hidayatullah Jakarta, stated that the application of inheritance law can be changed by social structure, even for such a lesser reason as the family. For example, '*Aul*, an heir, in the Qur'an is explicitly stipulated to get one-eighth, while under the '*Aul* system, he/she may only get one-ninth of the estate.[2]

The changes referred to by Atho' can be seen in the Indonesian context, including those contained in the laws and regulations, such as in the case of KHI. In this situation, Suparman Usman and Yusuf Somawinata, in the research of *Fiqh Mawaris Hukum Kewarisan Islam* (*Fiqh Mawaris* Islamic Inheritance Law), stated several provisions on inheritance law in the KHI, which are exceptions to the opinion of the *jumhūr* and later interpreted differently by KHI as the prevailing legal provisions in Indonesia.[3] These legal provisions include the issue of adoptive children or parents, the father's share, the *zawul arḥam*, *radd*, substitute heirs, and the definition of *walad*. These modifications are supported by a set of credible and persuasive justifications, such as *'urf*.

Updated inheritance law in Islam has long been the subject of intensive research in Indonesia. At the very least, there are three trends about this. First, the research on updated Islamic heritage law in Indonesia is generally similar to the results of M. Muhibbudin. This research aims to update the law of Islamic heritage in Indonesia generally.[4] Second, research about updated law inheritance in Islam is specific to just law inheritance. For example, the research by N. Fadhilah about the updated law of Islamic inheritance in Egypt and its relevance with draft inheritance substitutes in Indonesia,[5] or Azwar Fajri about inheritance grandchildren in Islamic law in Indonesia.[6] The research in the second category tends to update Islamic law in some parts or topics, but not in a comprehensive manner. The third cat-

1 Fadlih Rifenta and Tonny Ilham Prayogo, "Nilai Keadilan Dalam Sistem Kewarisan Islam," *Al-Manâhij Jurnal Kajian Hukum Islam* 13, no. 1 (2019): 111–27.

2 M. Atho Mudzhar, *Membaca Gelombang Ijtihad Antara Tradisi Dan Liberasi* (Yogyakarta: Titian Ilahi Press, 1998), 161.

3 Suparman Usman and Yusuf Somawinata, *Fiqh Mawaris Hukum Kewarisan Islam* (Jakarta: Gaya Media Pratama, 1997), 197.

4 Muhammad Muhibbuddin, "Pembaruan Hukum Waris Islam Di Indonesia," *Ahkam: Jurnal Hukum Islam* 3, no. 2 (2015): 187–97, doi:10.21274/ahkam.2015.3.2.187-198.

5 Naily Fadhilah, "Pembaruan Hukum Waris Islam: Wasiat Wajibah Mesir Dan Relevansinya Dengan Konsep Waris Pengganti Indonesia," *Al-Mawarid, JSYH* 3, no. 1 (2021): 51–62.

6 Azwarfajri, "Ijtihad Tentang Kewarisan Cucu Dalam Hukum Islam Di Indonesia," *Jurnal Imiah Islam Futura* 11, no. 2 (2021): 100–121.

egory tends to investigate base Islamic heritage law in Indonesia. For example, the research conducted by Darmawan in Indonesia focused solely on reason law (*tahqiq al-manath*) in updated inheritance laws.[7]

The research about the contribution of *'urf* to updating the law of Islamic aristocracy in Indonesia has not yet attracted the attention of many scholars. The only way forward is to investigate *istinbath* law or *ijtihad*, an inside procedure requiring no external weight about theorem law. This significant research was carried out because it has different dimensions from previous studies.

Therefore, this library research aims to investigate the position of '*urf* as the basis for reforming Islamic inheritance law and how it contributes to the renewal of Islamic inheritance law in Indonesia, using the content analysis method. Conclusions are drawn inductively and deductively.

Method

A qualitative method was adopted in this research with data sources based on literature studies. Scientific studies such as journals, theses or dissertations, and books are the basic research materials in this discussion. Content analysis was adopted, and conclusions were drawn using inductive and deductive thinking methods. Therefore, this research unveiled relevant theories on the issue and the relations of each.

'Urf as the Basis for Islamic Law Reform

Linguistically or etymologically, *'urf* means good, which is something humans are accustomed to and have implemented in various aspects of their life.[8] The scholars in the field of *uṣul al-fiqh* explore and differentiate the concept of '*adat* and '*urf* and their position as one of the bases for establishing *syara'* law. '*Adat* is often seen as something that is observed repeatedly without any rational relationship. In other words, it only considers the repeated nature of an action, not its goodness and badness. Meanwhile, '*urf* is defined as the habits of the majority of people in their words and actions.[9]

Mustafa Ahmad al-Zarqa, a professor of Islamic law at Amman University Jordan, argued that '*urf* is part of the concept of '*adat*, which is more general and thus covers the *'urf*. The concept of *'urf* applies to most people in certain areas, not certain individuals or groups. Furthermore, '*urf* is not a natural habit, as understood and has been applied in most customs, but emerges from the dynamics of humans' thought and experience. For example, in the case where most people in certain areas make the dowries given by their husbands as business capital to meet household needs in a marriage.[10] The case will not be subject to scholars of *uṣul* unless it uses '*urf*, not '*ādat*, as part of the arguments.

Basically, the concept of '*urf* is used by all *fiqh* scholars, specifically the Hanafites and Malikites. It is called *istiḥsān* and used in ijtihad by the Hanafites, where one form of *istiḥsān* is *istiḥsān al-'urf* (*istiḥsān* based on '*urf*). For the Hanafites, '*urf* is preferred over *qiyās khafī* and general *naṣṣ*, which is Quranic or Hadith text. In other words, *'urf* can specify the general-implying *naṣṣ*.[11]

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7 Darmawan, "Tahqîq Al-Manâth Dalam Pembaruan Hukum Kewarisan Islam Di Indonesia," *Al-Daulah: Jurnal Hukum Dan Perundangan Islam* 8, no. 1 (2018): 165–92.

8 Putra Halomoan, "Penetapan Mahar Terhadap Kelangsungan Pernikahan Ditinjau Menurut Hukum Islam," *JURIS (Jurnal Ilmiah Syariah)* 14, no. 2 (2016): 107–18, doi:10.31958/juris.v14i2.301.

9 Ibid.

10 Mustafa Al-Zarqa, *Al-Madkhal' Ala Al-Fiqh Al-'Am* (Beirut: Dar al-Fikr, n.d.), 840.

11 Syarial Dedi And Hardivizon, "Implementasi 'Urf Pada Kasus Cash Waqf (Kajian Metodologi Hukum Islam)," *Al-Awqaf: Jurnal Wakaf Dan Ekonomi Islam* 11,

Meanwhile, the Malikite circle makes '*urf* or traditions observed by Medinans as the basis for determining the law, and it is even prioritied over single Hadith. The Shafi'ites share the same stance, as they use '*urf* when the shari'a's definite statement on the matter in question is not found. For example, the time and duration of menstruation and the meaning of separation in *khiyar majlis* are required in determining the criteria of the "safe place" in case of theft. Furthermore, the Shafi'ites have the *qaul qadim* of Shafi'i in Iraq and *qaul jadīd* in Egypt, the change of which can also be used as a reason to state that Shafi'i really considers '*urf* in the *ijtihad*.[12]

Considering the prevalent practice of *ijtihad* among the majority of scholars of *uṣul*, as stated earlier, one may understand that '*urf* can be used as a legal basis in *ijtihad*.[13] In reality, this '*urf* argument is highly effective in producing laws that fit the nuance of society. It was also practiced by Arab *mujtahid*s, who compiled preceding *fiqh* to produce new ones with a high level of Arabic nuance. Fiqh, with an Arabic style, is only suitable for Islamic communities from Arabia and not always applicable for people outside the area.

The Arab *mujtahid*s are good examples in terms of pioneering and using the '*urf* argument. Using Arab *mujtahid*s as a model merely entails adopting their paradigm and the process rather than results, which may be irrelevant to us. For example, it can be stated that the Arab *mujtahid*s restricted the meaning of *walad* to include only boys. Girls are excluded from the definition of *walad* because that is what their '*urf* requires. However, it is irrelevant for our community, whose '*urf* is quite different from patrilineal Arab society. The Indonesians are not obliged to transfer the laws established under or influenced by the Arabic '*urf*. What is required is to transfer the methodology, not the product.[14]

In other words, the Indonesians are required to also use the '*urf* argument in understanding the *shara'*, by considering our '*urf* (customs) to the furthest relevant point. This can enable the ulama to produce laws that fit Indonesians.

In the repertoire of Islamic *fiqh* itself, quite many laws come from the customary approach (*'urf*) that applies among Arabs. In accordance with the facts in the history of Islam, it is asserted that Prophet Muhammad introduced this religion into the structure of a cultured society to allow the Arabs to maintain their customs at that time.

Only 'bad' traditions in the eye of Islam are banned, such as drinking alcohol, gambling, and doing contracts that are usurious. They can practice their customs, such as *ijarah*, *salām*, and *muḍarabah* contract forever when it is considered good by Islam. According to *fiqh* experts, the *muzāra'ah*, which is half-sharing of the rice field, the *salām*, *wafā'*, and *istithnā'* contract are examples of Islamic laws that originate from traditional customs.[15]

Given the explanation above, the '*urf* argument is highly effective yet seems to have not been improperly used, even though the *mujtahid*s of the preceding generation had provided examples of ways it should be applied.[16] In order to use '*urf* argument properly, the fatwas of the Islamic jurists must fit the social life of the Indonesians.

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no. 1 (2018): 33–48.

12 Sri Puji Lestari, "Tinjauan 'Urf Terhadap Praktik Ngelangkahi Di Desa Bawu Batealit Jepara," *Isti'dal: Jurnal Studi Hukum Islam* 7, no. 1 (2020): 118–42.

13 Eka Sakti Habibullah, "Pandangan Imam Abu Hanifah Dan Imam Syafi'i Tentang Al-Istihsan," *Al Mashlahah Jurnal Hukum Dan Pranata Sosial Islam* 4, no. 7 (2016): 451–66.

14 Muhammad Sibawaihi and Mokhammad Baharun, "Adat Pernikahan Melayu Jambi Perspektif 'Urf Dalam Ilmu Ushul Fiqh," *Istidlal* 1, no. 2 (2017): 165–78.

15 Fitra Rizal, "Penerapan 'Urf Sebagai Metode Dan Sumber Hukum Ekonomi Islam," *Al-Manhaj Jurnal Hukum Dan Pranata Sosial Islam* 1, no. 2 (2019): 159–76.

16 Abi Hasan and Khairuddin, "Pandangan 'Urf Terhadap Uang Pekhanjangan Dalam Perkawinan Melangkahi Kakak Kandung," *Istinbath Jurnal Hukum Dan Ekonomi Islam* 20, no. 1 (2021): 181–96.

According to Hasbi Ash-Shiddieqy, there has not been an ulama who have produced a set of *fiqh* laws that fits the characteristics and personality of Indonesians. Therefore, under certain conditions, Indonesians are forced to use Hijazi, Misri, and/or Iraqi *fiqh*. It must be admitted that the fiqh existing and prevailing in the country is partly Hijazi, as it was formed based on conformity with the customs and habits of Hijaz. It is also partly Misri and Hindi, due to its establishment in accordance with the customs of Egypt and India. Hasbi's argument suggested that as long as the Indonesians did not perform *ijtihād* and take the '*urf* method to its farthest level, they will always live the law established by custom and '*urf* in other regions. In spite of the fact that it poses no problems or obstacles in certain legal contexts, in others, it will be challenging.[17]

'*Urf* is not only limited to Hijazi, Iraqiy, or Misri, all of which are Arab in origin, but also the '*urf* of regions outside of Arabia, as long as it fits certain conditions to be the basis for a proposition. The conditions for the validity of '*urf* according to scholars of *uṣūl* are: 1) the '*urf* or '*adat* has the element of *maṣlaḥah* (public good) and rationality; 2) it applies generally and evenly among the people or the majority; 3) it has been prevalent, to the exclusion of the '*urf* that appears in response to the problem in question; 4) it is not contradictory to or ignores the existing *shara'* arguments or definite principles.[18]

The use of '*urf* as a functional argument accelerates the development of Islamic law. Furthermore, its use in determining the law will make Islamic law more fitting and relevant to the society where it is used.[19] Accordingly, Islamic law will always be relevant and functional.

Islamic Law Reform: A Theoretical Framework

Islamic inheritance law is God's law, determined by His revelation. Therefore, the Islamic inheritance law is absolute (*qaṭ'ī*), but sociologically speaking, the establishment or legitimacy of the law can vary due to legal social changes, including time, place, and circumstances. In reality, this change can also occur in the substance of the law, provided that it is required by legal needs. The idea that the law wants to achieve and the reality of time is not a paradigmatic dichotomy in law[20] but rather has a tendency towards stability to ensure the application of law in a social structure of society.[21] According to Atho' Mudzhar, as the above quote suggested, at least in its implementation, Islamic inheritance law can deviate from the original as stated in the Scripture for any possible cause in a larger social structure or even the family.[22]

The theories above are based on those built by Ibn Qayyim al-Jauziyah, a student of Ibn Taimiyah, who stated that changes in laws or fatwas were due to times, places, circumstances, and habits.[23] From these theories, it can be concluded that there is a strong relationship between law and the social conditions of society. Therefore, Islamic inheritance law will undergo changes or updates to fit the context of the times, places, circumstances, or local cus-

[17] Emi Yasir and Shafwan Bendadeh, "'Urf Sebagai Metode Istinbath Hukum Islam (Pemikiran Hasbi Ash-Shiddieqy Dengan Fiqh Indonesianya)," *Syariah: Journal of Islamic Law* 3, no. 2 (2021): 14–36.

[18] Ibid.

[19] Abdel Tawwab Moustafa Khaled Moawad, "The Extent of 'Urf's Authority in Establishing the Legality of Matrimonial Property," *Linguistics and Culture Review* 5, no. S4 (2021): 2259–65, doi:10.21744/lingcure.v5ns4.1921.

[20] Agus Moh Najib, "Reestablishing Indonesian Madhhab 'Urf and the Contribution of Intellectualism1," *Al-Jami'ah* 58, no. 1 (2020): 171–208, doi:10.14421/ajis.2020.581.171-208.

[21] N.J. Coulson, *Conflicts And Tansions in Islamic Yurisprudence* (Chicago: The Unversity of Chicago Press, n.d.), 96–98.

[22] Mudzhar, *Membaca Gelombang Ijtihad Antara Tradisi Dan Liberasi*, 161.

[23] Jayusman et al., "Islamic Law Perspectives and Positive Law on The Reto Tuo Practice of The Rejang Indigenous Community in The Framework of Renewaling Family Law in Indonesia," *Baltic Journal of Law & Politics* 15, no. 2 (2022): 418–38, doi:10.2478/bjlp-2022-001025.

toms.[24] These various changes to Islamic inheritance law in Indonesia can be found in the articles on the compilation of Islamic law in Indonesia (KHI).

The Application of *'Urf* in Renewal of Islamic Inheritance Law in Indonesia

1. *'Urf in the Inheritance of Adopted Children and Adoptive Parents*

There are at least two studies regarding adopted children in the KHI, namely 171 (h) and 209. In 171 (h), it is stated that the financial obligation covering the basic living expenses of an adopted child is handed over to the adoptive parents by a court decision. In 209, paragraphs (1) and (2), it is stated that:

a. The inheritance of the adopted child is divided based on studies 176 to 193 mentioned above, while adoptive parents who do not receive a will are given a mandatory will of up to 1/3 of the adopted child's inheritance.
b. Adopted children who do not receive a will are given a mandatory will of up to 1/3 of the adoptive parents' inheritance.[25]

According to the legal approach of KHI, which is identical to classical *fiqh*, adopted children and adoptive parents cannot inherit from each other. However, KHI provides a legal institution called a mandatory will, based on the provisions of the legislation intended for adopted children or vice versa. In this case, both were previously not given a will by the adoptive parents or adopted children, with a maximum amount of 1/3 of the estate.

The clause on mandatory will in the KHI supposedly appears in response to the phenomenon of child adoption in the community. At least in some Indonesian societies, adoption tends to be appreciated and often happens. However, the practice of adopting a child is not the same as "*tabannī*", which is commonly known. *Tabannī* means the transfer of lineage from the biological to the adoptive parents. On the other hand, the adoption of children is only limited to maintenance, fulfillment of living expenses, education, and affectionate relationships, as it befits children and parents while maintaining their biological kinship.[26]

The practice of inheritance, as mentioned above, is considerably distinct from the practice of *tabannī*, an area that is beyond the scope of the existing *tabannī* concept. People need certain legal provisions that meet their needs in accordance with society's value of justice. Furthermore, KHI's acknowledgment of the institution of child adoption is a legal response to social realities. As stated above, the permissibility of adopting children is contained in 171 (h) of KHI. It also acknowledges the existence of a legal relationship between the two, which is regulated in 209, paragraphs (1) and (2).

Al-Yasa Abu Bakar has deeply discussed the issue in "Wasiat Wajibah dan Anak Angkat". The adoption of children confirmed by customary law before the issuance of KHI often generates difficulties. Most of the time, the adopted children do not receive anything from the inheritance of adoptive parents because they died without a will or were unaware that their adopted children were not entitled to inherit from them (according to *fiqh*). In addition, other methods, such as grants, sometimes do not work well because, in some cases,

[24] Endri Yenti et al., "A Set of Prayer Outfits as a Mahar? Discrimination against Women in the 'Urf Reality of the Archipelago's Fiqh," *Al-Risalah* 20, no. 1 (2020): 17–29, doi:10.30631/al-risalah.v20i1.567.

[25] Ahmad Hafid Safrudin, "Tinjauan Kompilasi Hukum Islam Terhadap Status Harta Warisan Anak Angkat," *Salimiya: Jurnal Studi Ilmu Keagamaan Islam* 3, no. 2 (2022): 103–17, https://ejournal.iaifa.ac.id/index.php/salimiya/article/view/699.

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

the two parties have personal issues after the grant contract.[27]

Muhammad Daud Ali argued that granting rights through mandatory wills to adopted children determined by KHI is carried out with an adaptive approach. This is to ensure that the values of customary law partly conform to Islamic law, specifically regarding the transfer of financial obligation from the biological to the adoptive parents regarding the basic living expenses based on court decisions. The above is stated in a letter (h) of article 171 concerning general provisions for inheritance.[28]

Yahya Harahap argued that according to the provisions of Islamic law, adopted children cannot receive an inheritance from adoptive parents, and vice versa. This kind of legal provision is implied in God's Word, which states that *"Allah has not made for any man two hearts in his (one) body, nor has He made your wives whom ye divorce by Zihar your mothers, nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) way"* (Q.S. 33:4).

The above verse denies the *nasab* relationship between adopted children and adoptive parents, as practiced before Islam. Accordingly, adopted children and adoptive parents are not entitled to inherit from each other. However, the juridical fact in customary law prevailing among Indonesians stated that adopted children have the same rights and positions as biological children in various respects, including inheritance. Yahya Harahap concluded that the legal basis used in KHI when determining the existence of a mandatory will for adopted children was to compromise between Islamic and customary law.[29]

Considering the above arguments that Indonesian ulama had carried out *ijtihad* in compiling KHI, by modifying the rights and obligations between adopted children and adoptive parents through mandatory wills. It was observed to maintain the inheritance law applied in Indonesia in line with the sense of justice and legal awareness community.

The conformity of Islamic law with the value of justice, as stated above, is referred to as *siyasah al-shar'iyyah*.[30] However, the legal drafters of the KHI employ the *siyasah* rather strictly, awarding adopted children a maximum of 1/3 of an obligatory will when they do not receive an ordinary will. This is a strategic way to ensure that adopted children enjoy their rights in the estate of adoptive parents, who have shared love, help, and feelings, as well as protect each other. The authorities and relevant stakeholders seem to realize that the strict rules of *fara'iḍ* are not subject to *ijtihād* because they are eternal and *ta'abbudi*. Based on the above points, the *siyāsah* should help create good conditions for the enactment of the shari'a. According to Al-Yasa Abu Bakar, the ulama build this renewal upon the principle of *al-maṣaliḥ al-mursalah*.

2. *'Urf in Substitute Heirs*

In *fiqh,* Allah regulated the heirs or people entitled to receive the inheritance directly through *ijbariyyah* (forcing). This indicates that no Muslim individuals have the right to determine or appoint who will later become their heirs. The heirs can be divided into several

[27] Ismail, "Wills of 'Wajibah' and Renewal Thoughts of Islamic Inheritance Law in Indonesia," *Innovatio: Journal for Religious Innovation Studies* 21, no. 2 (2021): 122–33, doi:10.30631/innovatio.v21i2.141.

[28] Febry Emawan Dewata, "Pengangkatan Anak Dalam Kompilasi Hukum Islam The Adoptions of Children in The Compilation of Islamic Law Febry," *Voice Justicia Jurnal Hukum Dan Keadilan* 1, no. 2 (2017): 187–210, https://www.ptonline.com/articles/how-to-get-better-mfi-results.

[29] Euis Nurlaelawati, "Hukum Keluarga Islam Ala Negara: Penafsiran Dan Debat Atas Dasar Hukum Kompilasi Hukum Islam Di Kalangan Otoritas Agama Dan Ahli Hukum," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 50, no. 1 (2016): 199–222.

[30] Coulson, *Conflicts And Tansions in Islamic Yurisprudence*, 68.

categories, namely *furuḍ*, *aṣābah*, and *zawul arḥam*. They all have a defined position that even the Prophet cannot change. A grandson, for example, is veiled by his uncle, even though his father had passed away before his grandfather, as the deceased in this case. This is because his uncle had a stronger relationship with the late grandfather.

In the past, grandchildren being veiled by their uncles, as contained in *fiqh*, did not generate problems. This is because the Arab tradition puts that the life of grandchildren became the responsibility of their uncles, even though they did not obtain a share of their grandfather's inheritance. In other words, grandchildren indirectly obtained a share through their uncles, but such distribution does not seem to apply anymore. These uncles no longer accept their responsibility to care for the orphaned nephews as they focus more on their children and wives.

This is similar in Muslim communities, various regions, and other nations.[31] Meanwhile, denying orphaned grandchildren the inheritance rights of their grandfathers is not appropriate and contrary to the principles of justice taught by the Qur'an and Sunnah. On this basis, it is necessary to have a statutory provision as a new interpretation of the provisions contained in *fiqh*.[32]

The Indonesian government established a legal institution called substitute heirs through KHI. The provisions regarding the issue are contained in 185, paragraph 1 of the KHI. It states that an heir who dies before the deceased can be replaced by the child, except for those mentioned in 173, paragraph (2). The share of the substitute heirs may not be more than the share of the heirs who are equal to the heirs being replaced.

As contained in article 185, the principle of replacement has not existed in any literature of the four schools of *fiqh* and other classical. Furthermore, according to classical *fiqh* books, scholars agree that grandchildren whose parents have died are veiled by their father's brothers. This is consistent with the Sunni inheritance principle, which states that the closer heirs veil the "distant" heirs. The principle of Sunni inheritance of making grandchildren veiled by their uncles seems to have been influenced by the practice of pre-Islamic Arab society. In tribal society, elders are obligated to care for their destitute members, including the orphaned nephews. Accordingly, the nephew did not receive inheritance rights from his grandfather.[33]

This institution was first popularized by Hazairin (D. 1975), who stated that grandchildren can occupy the heir position as a substitute for his father, who died before. Hazairin adopted this substitute inheritance concept from customary law, which recognizes heirs as people whose relationship with the deceased is interspersed with those who passed away before the deceased. A good example is the relationship between grandfather and grandchildren that is interspersed with children. Grandchildren will then become substitute heirs when children die before the grandfather.[34] In principle, the substitute takes over the shares that should be the rights of the person being replaced.

Based on the above explanation, Hazairin reinterpreted the issue of "*mawali*" as regulated by Q. 4:33. This opinion is completely dif-

[31] Lalu Supriadi Bin Mujib, "Revitalisasi Hukum Waris Islam Dalam Penyelesaian Kasus Sengketa Tanah Waris Pada Masyarakat Sasak," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 19, no. 1 (2019): 73–85, doi:10.18326/ijtihad.v19i1.

[32] Darnela Putri, "Konsep 'Urf Sebagai Sumber Hukum Dalam Islam," *EL-Mashlahah* 10, no. 2 (2020): 14–30.

[33] Abdul Qodir Zaelani, "Kedudukan Ahli Waris Pengganti (Plaatsvervulling) Dalam Kompilasi Hukum Islam Dan Pemecahannya," *ADHKI: Journal of Islamic Family Law* 2, no. 1 (2020): 91–105, doi:10.37876/adhki.v2i1.32.

[34] Iwannudin, "Ahli Waris Pengganti Menurut Hazairin," *Mahkamah* 1, no. 2 (2016): 301–32, http://www.ncbi.nlm.nih.gov/pubmed/26849997%0Ahttp://doi.wiley.com/10.1111/jne.12374.

ferent from the classical interpretations of the Ahl al-Sunnah or the Shi'ites. According to their (classical ulama) interpretation, a son veils the grandson and granddaughter, regardless of whether the children are the grandchildren's fathers. On that basis, a grandson whose father had died earlier, even though he was very instrumental to the life of the grandfather, is still not entitled to receive a share because of a single surviving son.[35]

It can then be concluded that according to Indonesian Islamic inheritance law, as contained in KHI, the father's position can be replaced by the grandson in the case of death. Such legal provisions are not found in *fiqh*, specifically the classical books.[36] Similarly, the issue of the inheritance of orphaned grandchildren, '*urf* has contributed to shifting from the provisions related by the classical books of *fiqh* to the new provisions stipulated by the law.

3. *'Urf* in *Zawul Arḥam*

Żawul arḥām is a group of heirs outside of the category of *aṣābah* and *ahlul furūḍ*. They become heirs due to their biological relationship with the deceased. However, the relationship is not as strong or close as those between the deceased and the *aṣābah* or *ahlul furūḍ*. *Żawul arḥām* consists of two words in Arabic, namely *żawu* and *arḥām*. The term *żawul arḥām* originally had a broad meaning that included all family structures with kinship ties to the deceased. This breadth comes from the meaning of *arḥām* mentioned in Q. 8:75, which states that "and those who accept faith subsequently and adopt exile and fight for the faith in your company they are of you. But kindred by blood has prior rights against each other in the Book of Allah. Verily Allah is well acquainted with all things."

According to Sayid Sabiq, every relative excluded from the *aṣḥab al-furuḍ* is also excluded from the *'aṣabah* category.[37] Furthermore, the *zawul arḥam* includes 1) son-side granddaughter (*bint al-ibn*); 2) daughter-side grandson (*ibn al-bint*); 3) daughter of full brother; 4) daughter of a paternal (consanguine) brother or her descendant. 5) son of a full sister or his descendant. 6) son of a full sister or his descendant. 7) son of paternal (consanguine) sister or his descendant. 8) maternal grandfather and up the line. However, some ulama, such as Zaid bin Thabit, Ibn 'Abbas, Sa'id bin Musayyab, Sufyan al-Thauri, Imam Malik, Imam Shafi'i, and Ibn Ḥazm argued that *zawul arḥam* does not receive any inheritance at all.[38]

Imam Malik and Imam Shafi'i are of the opinion that there is no inheritance right for *zawul arḥam*. The inheritance for which there is no recipient, be it from the *aṣḥāb al-furuḍ* and *'aṣabah*, was given to Baitul Mal. This is also consistent with the opinion of Abu Bakr, 'Umar, 'Uthmān, Zaid, al-Zuhri, Auza'i, and Daud. Meanwhile, the groups who stated that *żawul arḥām* were entitled to inherit are 'Alī, Ibn Mas'ūd, Shuraih al-Qāḍī, Ibn Sīrīn, 'Aṭā', Mujāhid, Imām Abū Ḥanīfa, and Imām Aḥmad bin Ḥanbal.[39]

The studies regulating inheritance mentioned neither the existence nor defined share *żawul arḥām* will receive. Article 174 of KHI states (1) the groups of heirs according to blood relations consist of male and female groups. The male group comprises father, son, brother, uncle, and grandfather, while the female consists of mother, daughter, sister, and

[35] Zaelani, "Kedudukan Ahli Waris Pengganti (Plaatsvervulling) Dalam Kompilasi Hukum Islam Dan Pemecahannya."

[36] Galuh Nashrullah Kartika Mayangsari Rofam, "Penerapan Konsep 'Urf Dalam Kitab Sabilal Muhtadin (Kajian Terhadap Pemikiran Muhammad Arsyad Al-Banjari)," *Al-Iqtishadiyah Jurnal Ekonomi Syariah Dan Hukum Ekonomi Syariah* 4, no. 1 (2018): 15–31.

[37] Sayid Sabiq, *Fiqh Al-Sunnah* (Semarang: Toha Putra Group, n.d.), 446.

[38] Muhammad Yusuf Musa, *Al-Tirkah Wa Al-Mirats Fi Al-Islam* (Mesir: Dar al-Kitab al-Arabi, n.d.), 277.

[39] Sabiq, *Fiqh Al-Sunnah*, 446.

grandmother. According to the marital status, the groups of heirs consist of a widower or a widow. (2) In a case where all the heirs are present, only children, father, mother, widow, or widower are entitled to inherit. Furthermore, suppose the deceased does not leave heirs at all, or when the presence or absence of the heirs is undefined, then the control of the assets is transferred to the Baitul Mal for the benefit of Islam and a public good, as explained in article 191.

Abiding by the opinions of *fiqh* scholars, as stated earlier, it appears that KHI tends to follow the opinion of most of them. On the other hand, KHI ignores the opinion of a small group of scholars, such as Ibn Mas'ūd, Abu Ḥanīfah, and Aḥmad bin Ḥanbal. Suparman Usman argues that the legal drafters of KHI might consider the current reality in which the *zawul arḥam* rarely exists or is not in line with the basic idea mentioned in classical Islamic inheritance law.

Suparman Usman considers that KHI seems to be more focused on problems occurring in reality. However, since *żawul arḥām* rarely raises a problem, there is no need to renew legal provisions on the issue. According to Usman, the basic idea of inheritance is to give rights to the closest heirs. Therefore, the current public '*urf* shows that the existence of *zawul arḥam* is very rare, and its inclusion as a part of KHI is irrelevant.[40]

4. 'Urf in Radd System

Radd is the assets remaining in the calculation when the heirs are unable to exhaust the estate, and it is returned to the *zawul furuḍ nasab*, excluding husband and wife in proportion to their respective shares.[41] It occurs in the distribution of inheritance when the estate remains even after the heirs of *zawul furuḍ* have obtained their respective rights and shares. The *radd* system is implemented to redistribute the remaining assets to the *zawul furuḍ* heirs proportionally, based on the previous share assigned to each. The base number is reduced to be equal to the shares assigned for *zawul furuḍ*. This method aims to divide the estate evenly between the heirs such that there will be no remainder from the division.

In classical *fiqh* literature, *radd* is one of the heatedly disputed issues. According to some scholars, such as Zayd bin Thabit, Imam Malik, and Imam Shafi'i, *radd* does not exist because there is no *naṣṣ* for it. They stated that the rest of the assets after division were given to the Baitul Mal. These scholars back their claim with Q. 4:13-14 as basic legitimation, that Allah has determined the share for each of *zawul furuḍ* in such a definite way (*qaṭ'ī*), and no one may add or subtract. Furthermore, adding a share indicates making provisions that betray the provisions of the shari'a. The scholars also support their argument with the hadith reportedly issued after the inheritance-related verses were revealed: "Indeed, Allah has given rights to everyone who is entitled to receive, and there is no will for heirs (al-Nasa'i)".

The majority of scholars on the other group tend to justify the existence of this *radd*. However, they disagree about individuals who could receive the residue or the rest of the estate. The majority are of the opinion that *radd* applies to all *żawul furūḍ*, except the husband or wife. The basis for the argument is Q. 8:75 regarding kinship, which is defined as a blood relationship. Another basis is Q. 33:6, which emphasizes that *żawul arḥām* deserve the *tirka* (residue) more than any other parties, even the Baitul Mal. Since the allocation of the Baitul Mal is for all Muslims and, according to the Qur'an, blood relatives have greater rights

[40] M Noor Harisudin, "'Urf Sebagai Sumber Hukum Islam (Fiqh) Nusantara," *Al-Fikr Jurnal Pemikiran Islam* 20, no. 1 (2016): 66–86, http://journal.uin-alauddin.ac.id/index.php/alfikr/article/view/2311/2240.

[41] Wahbah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuh: Hak-Hak Anak, Wasiat, Wakaf, Warisan, Terj. Abdul Hayyie Al-Kattani, Dkk* (Jakarta: Gema Insani Press, 2011), 435.

than non-Muslims, there is no doubt that the closest blood relative of the deceased is neither the husband nor wife. According to Fathurrahman, only 'Uthmān bin 'Affān did not give an exception to any of the heirs for the *radd* case. 'Uthmān did not mention the Q. 8:75, for there is no difference between a husband or wife and other heirs.[42]

The provisions regarding *radd* in the KHI correspond to the opinion of 'Uthmān. According to KHI, all of the *ahl al-furūḍ*, with no exception, are entitled to *radd*. In other words, in the case where the estate remains, and there are no '*aṣābah* heirs, the KHI applies *radd*, as regulated in article 193. However, no criteria or limitations were set for the *ahl al-furūḍ* for receiving *radd*. This point clearly differs from the majority of classical *fiqh* scholars. As stated above, it was only 'Uthmān bin 'Affān who held the opinion that *radd* can be given to all *żawul furūḍ*, including the wife or husband.[43] The KHI studies indicated a tendency for '*urf* of Indonesian Muslims to be concerned about equality of rights, specifically between fellow heirs.

5. 'Urf in the Inheritance of Walad

The meaning of the term *walad* is found in article 182 of KHI and it takes the opinion of Ibn 'Abbas to interpret *walad* in Q. 4:176, that the word includes boys and girls. Therefore, inasmuch as there are children of any gender, the inheritance rights of those related by blood to the deceased are excluded, except parents, husband, or wife (*ḥijab*).

Amir Syarifuddin, a contemporary Islamic jurist, has the same view as Ibn 'Abbās that there is no significant reason to limit the meaning of *walad* to boys and not girls. Amir argued that *jumhur* is biased in interpreting Q.4:176 (the kalala verse) as only referring to boys. According to many scholars, *kalāla* is a person who passes away without leaving surviving father and son. The Arabic rules define *walad* as a boy, not a girl. Whereas the word *walad* in its plural form, *aulad*, means children, referring to both boys and girls, which are *ibn* and *bint*, respectively, in Arabic. Its validity is proven by the absence of the *muannath*, which is a female form of the word. According to Amir, this *ḥaqiqi* (true) way of interpreting *walad* is legally valid (*shar'i*). Within this frame, individuals can understand the word *walad*, as referring to both a boy and a girl. This applies in a number of verses, specifically regarding inheritance. *Walad* appears at least eight times and *aulād* once in inheritance-related verses. In all these appearances, the word means girls and boys.[44]

Considering the above opinions of Ibn 'Abbās and Amir Syarifuddin, KHI seems to have a strong legal basis for not discriminating between boys and girls in the case of *kalāla*, as stated in article 182. Such legal provisions are relevant currently because modern society no longer discriminates between men and women in any aspect of life, including the field of inheritance. Therefore, as long as the issue falls within the realm of *ijtihādī* law, relevant interpretations can be offered and made. There is also a tendency for Amir Syarifuddin to consider '*urf* that applies in modern society in his opinion.

6. 'Urf in the Inheritance of Joint Property

Classical *fiqh* books do not recognize the joint property of husband and wife. Even though they are bound by marital bonds, the property belongs to the individual. Accordingly, when one of the parties dies, his or her estate is subject to devolution and can be divided among the heirs according to the provisions. However, this cannot be applied in the same way in

[42] Lia Murlisa, "Ahli Waris Penerima Radd Menurut Kompilasi Hukum Islam Dan Relevansinya Dengan Sosial Kemasyarakatan," *Jurnal Islam Futura* 14, no. 2 (2015): 275–90.

[43] Ibid.

[44] Muhammad Sopiyan and Siah Khosyi, "Perkembangan Pemikiran Hukum Keluarga Tentang Persamaan Hak Menerima Waris Dalam Masalah Kalalah Dan Radd," Mutawasith Jurnal Hukum Islam 5, no. 1 (2022): 84–97.

Indonesia. According to the prevailing '*urf*, marriage bounds husband and wife in property ownership.

Studies 35, 36, and 37 (Chapter VII), Law number 1 of 1974, explained regulations about a joint property. Paragraph 1 of article 35 states that all assets obtained during the marriage become joint property. In contrast, paragraph 2 (two) stated that the innate property of husband and wife and those obtained as a gift or inheritance is under individual supervision as long as the parties do not specify otherwise.

In respect to the inheritance of joint assets, KHI regulates in article 171 (e) that when one of the parties passes away, the heir must first divide the property into two halves making it the subject to inheritance or, in order words, sorting the wife's property out from the husband. Due to the principle explained by KHI, the subject of inheritance is limited to the property and share of joint-property of the deceased.

The fundamental basis for determining the joint property and its share is the prevalent '*urf* in Indonesians. They have been practicing the '*urf* belief that domestic property rights do not differ between husband and wife. Their earnings are automatically added to the family's funds. Therefore, the marriage contract binds a husband and wife and further makes them partners in fostering a household.

Conclusion

Based on the discussions above, it can be concluded that '*urf* is quite important in the renewal of Islamic law. In the Indonesian context, '*urf* has a very large contribution because it determines most of the reforms in inheritance law. Furthermore, the argument is proven by the application of '*urf* to the provisions regarding the inheritance of adopted children and their adoptive parents, substitute heirs, *zawul arḥam*, *walad*, *radd*, and inheritance of joint assets.

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