

INFLUENCES OF 'URF IN ISLAMIC LAW COMPILATION CONCERNING MARRIAGE IN INDONESIA

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Abstract: The scholars of ushul fiqh (*uṣūliyyīn*) agree that '*urf al-ṣaḥīḥ*', representing an appropriate custom, serves as the legal basis since this is congruent with what is intended in *naṣṣ* (Quran and Sunnah). Thus, determining Islamic law should take into account the customs or traditions people adhere to, including inheritance-related matters. In Indonesia, Islamic Law Compilation, the law governing inheritance based on society and religious courts, set forth several articles accommodating '*urf*' in the inheritance system. This study aims to investigate which '*urf*' has been adopted as a legal guideline in Islamic Law Compilation, and what implications can be caused by '*urf*' in Islamic Law Compilation concerning inheritance. With an Islamic Law approach and the theory of '*urf*' al-syatibi, this study concludes that there are at least four essential articles regarding the influences of '*urf*' in Islamic Law Compilation, consisting of Articles 171 and 174, Article 183, and Article 190, where Article 171 point c mentions the definition of inheritor and Article 174 regulates the classification of inheritors that has an implication on the system of inheritance adopted by Islamic Law Compilation with a strong bilateral principle. Moreover, Article 183 deals with the mechanism of peace in inherited asset distribution, indicating an elaborate individual principle in Islamic Law Compilation. Article 190, however, governs the distribution of marital properties or shared properties, having an implication on the customs of the people of Indonesia who are used to equally sharing assets as adopted by Islamic Law Compilation.

Keywords: Inheritance, Islamic Law Compilation, '*Urf*'.

Introduction

The *ijtihād* among Islamic scholars to anticipate the shifting time involves the reference to the concept of *‘urf*, a representation of a tradition that has been long established and living in society. *‘Urf* can be *ṣaḥīḥ* (good) or *fāsid* (bad)¹. *‘Urf* that can be referred to as the legal basis is the *ṣaḥīḥ ‘urf*. In Indonesia, *ṣaḥīḥ ‘urf* needs to be nurtured among the traditions in Indonesia, including the *‘urf* regarding Islamic inheritance law.

All Islamic inheritance-related matters are governed in Islamic Law Compilation (henceforth referred to as KHI) in Book II. Articles governing Islamic inheritance are 171 to 193. These articles represent the two: not reflecting pure *farāʿid* and accommodating the traditions/customs in Indonesia. This research aims to delve deeper into the articles of KHI regarding Islamic Inheritance that accommodates the traditions in Indonesia.

Departing from the above issue, this study is intended to investigate why are such traditions included, can these articles that accommodate the traditions still be put in place, or do they require amendments? This study, however, aims to discuss the study of *‘urf* as a conceptual basis to portray and analyze the articles in the KHI concerning inheritance law, including those in Articles 171 to 193.

The definition of *‘Urf*

The word *‘Urf*, based on etymology, is defined as ‘good’, ‘acceptable’, or ‘appropriate’ by humans, while *uṣulīyyīn* (the scholars of *uṣhul fiqh*) defines *‘Urf* as follows:

مَا أَلْفَهُ الْمُجْتَمَعُ وَاعْتَدَاهُ وَسَارَ عَلَيْهِ فِي حَيَاتِهِ مِنْ قَوْلٍ أَوْ فِعْلٍ

“Something created by people, and the people are used to living their life along with this creation that is represented by the spoken words and behavior”.

¹ Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal ‘alā al-Fiqh al-‘Aṣm* (Beirut: Dār al-Fikr, 1968), 844.

'Urf from the perspective of Ah'mad al-Zarqā':²

عَادَةُ جُمْهُورٍ قَوْمٍ فِي قَوْلٍ أَوْ فِعْلٍ

"People's tradition represented by their spoken words (*qaul*) or behavior (*fi'il*)".

Uṣuliyyīn compares '*adat* (tradition) and '*urf*, where *Adat* (tradition) is defined as follows:

الْأَمْرُ الْمُتَكَرِّرُ مِنْ غَيْرِ عِلَاقَةٍ عَقْلِيَّةٍ³

"Something that often takes place without any logical relevance".

The above definitions can be summed up that they all come down to the behavior shown, and this is not referred to as *adat* or tradition. This also indicates that a tradition has a broader scope than '*urf*. A tradition could involve individual matters, such as the tradition of eating particular types of food, or collective matters such as shared opinions that can represent something good or bad. A tradition can also come from something natural, as in children reaching maturity (*baligh*).

The differences between '*urf* and tradition are elaborated in the following Table:

'urf	Tradition (<i>Adat</i>)
'urf represents a narrower scope of meaning	A tradition represents a broader scope of meaning
'urf is broken down ' <i>Urf shahih</i> (good) and <i>fasid</i> (bad)	There is no good or bad tradition
'urf represents the tradition of the majority of people	A tradition consists of individual tradition and the tradition of the majority of people
	The tradition is born from a natural cause

² ibid, 840, dan 'Abdul 'Aziz al-Khayyāt, *Nazariyyat al-'Urf* (Amman: Maktabat al-Aqṣā, t.th.), 24.

³ Ah'mad Fahmi Abū Sunnah, *al-'Urf wa al-Ādah fī Ra'yi al-Fuqahā'* (Mesir: Dār al-Fikr, al-'Arabī, t.th.), 8.

This is *'urf* that was studied by *uṣūliyyīn* to decide *shara'* law, not *adat*. Despite this fact, imam al-Shāṭibī as a scholar in *ushul fiqh*, believes that researchers should in advance have sufficient comprehension of *adat* laws (*al-aḥkām al-'awā'id*).⁴ This is because *taklīf* law in the responsibility of *mukallaḥ* is established based on the absoluteness of *adat mukallaḥ*.

Type of *'Urf*

Uṣūliyyīn maintain *'urf* in three kinds:⁵

- 1) Seen from the object, *'urf* is divided into two: (a) الغُزْفُ اللَّفْظِي (the tradition related to *lafaz*) (b) الغُزْفُ الْعَمَلِي (the tradition related to human behavior)
 - a) *Al-'urf al-lafẓī* (العرف اللفظي) means a custom/tradition related to *lafaz* (an expression) often used by most people so that the meaning of *lafaz* can be understood by people. For example, the word "meat" can refer to the "meat mostly bought by most people". Specifically, a customer will just need to say "can I have some meat" in order to get beef. This has been the tradition that meat is always referred to as beef, so in this case, people only need to say "meat" to mean "beef".
 - b) *Al-'urf al-'amalī* (العرف العملي) means a custom/tradition that represents the behavior of the majority of people, whether or not this behavior is related to *muamalah* (private) matters. The examples of this definition can be seen from the tradition where family members never miss the moment of eating out when they go on a vacation or a

⁴ Abū Ishāq Ibrāhīm al-Shāṭibī, *al-Muwāfaqāt Fi Uṣūl al-Sharī'ah*, Jilid III (Beirut: Dār al-Ma'rifah, 1975.), 227.

⁵ Aḥmad Fahmī Abū Sunnah, *al-'Urf wa al-'Ādah* 16 and Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal 'alā al-Fiqh al-'Ām*, 844.

tendency where the majority of people wear uniforms (with similar or the same types and colors) during an occasion such as in a wedding. Another example is also obvious in *bay' al-mu'āṭah* in an Islamic boarding school when all students enjoy their eating in the canteen and pay for the food they eat after they finish it.

- 2) Based on its scope, 'urf is divided into two, الغُرف العام (common tradition/*adat*) and الغُرف الخاص (special tradition/*adat*).
 - a. *Al-'urf al-ām* (العرف العام) represents common tradition or the tradition that commonly takes place in a community. An example of this case is when a customer buys a new car from a showroom, he/she will also get the jack and pliers that come together with the car.
 - b. *Al-'urf al-khāṣṣ* (العرف الخاص) refers to the tradition that applies to the people or a certain country or specific region or a community. An example of this case is when a customer buys an item but later, he/she finds out that it has flaws. For such a case, some countries or regions do not accept returned items while some others do.
- 3) In terms of its legality, 'urf is divided into two العرف الصحيح (appropriate custom or tradition or *adat*) and العرف الفاسد (inappropriate custom or tradition or *adat*).
 - a) العرف الصحيح (*al-'urf al-ṣaḥīḥ*) is categorized as an appropriate custom that complies with the intention of naṣṣ, the Quran, and the Sunnah of the Prophet and it brings merits to all people. That is, this custom is deemed to be appropriate. For example, a man proposing to a woman usually approaches with some dowries to be given to the woman. another example is when the month of Ramadhan is approaching, when people prepare *syukuran* (thanksgiving or *bancaan* in Javanese) to represent their happiness of the coming Ramadhan.

- b) العرف الفاسد (*al-'urf al-fāsid*) is defined as an inappropriate custom or tradition or *adat* that contravenes naṣṣ of the Quran and the Sunnah of the Prophet. This custom may be potential to allow for actions that are condemned haram by Allah SWT. This practice can be seen in the tradition to send offerings to graveyards performed by peasants since they believe fortunes may come from the graveyards. This practice indicates that they believe more in what the graveyards can do than in Allah.

Imam Shāṭibī does not divide *'urf*, or in the original term *al-'awā'id al-mustamirah* (the ongoing custom or tradition) into the category *ṣaḥīḥ* or *fāsid* as above, but it is rather divided into two categories whose meaning is equal to the two that have been classified⁶.

First, "The tradition of *shar'ī* recognized by sharia (validated by sharia) or proscribed by sharia". Imam Shāṭibī intends to position the tradition responded to by the propositions of sharia by either legalizing or erasing it.

Second, "The tradition that applies to people where there is nothing mentioning the *syar'i* that erases (proscribes) or enforces (legalizes) it". Imam al-Shāṭibī argues that many have not got any clear responses in the perspective of sharia.

The Hujjah (Rationale) of 'Urf

The legal basis of *'urf* is derived from:

1. Verse 199 of Surah al-A'rāf
"Be tolerant, and command decency, and avoid the ignorant."
2. The Hadith of Prophet Muhammad SAW
"What is deemed to be appropriate by Moslems also holds true for whatever comes from Allah".

⁶ Al-Shāṭibī, *al-Muwāfaqāt*, Volume II, 230.

Imam al-Shāṭibī,⁷ and Imam Ibn Qayyim al-Jauziyah,⁸ argue that 'urf can serve as a legal basis if no verses or hadiths are highlighting legal issues being discussed. Al-syarakhshyl mentions the principle cited by Muhammad Abū Zahra: (something that is الثَّابِتُ بِالْعُرْفِ كَالثَّابِتِ بِالنَّصِّ⁹ decided according to 'urf, then it has the same value as that decided based on *nas*)

An example of the above principle is the money charged for the use of a public toilet (as much as Rp. 2000). This charge is only based on the service used, not based on how long a person uses the toilet, and this is certainly acceptable from the perspective of Islam.

Uṣūliyyūn opine that the law set based on 'urf can change following *zaman* (the shifting time) and *makān* (place).¹⁰ Every *fiqh* law shifts along with changing traditions. Imam al-Shāṭibī once added an intriguing statement when commenting on the conclusion of the discussion about *adat* or tradition asserting that the condition where the changing laws that rely on the changing traditions (اِخْتِلَافُ الْأَحْكَامِ عِنْدَ اِخْتِلَافِ الْعَوَائِدِ) do not essentially change *aṣl al-khiṭāb* (the originality of something that is being discussed in the law of *shara'*), but it rather means that each tradition will return to its originality of *shara'* that condemns the matter concerned when a tradition experiences a change.¹¹

In addition to the two categories above, Imam al Shāṭibī also divides the tradition into two according to whether or not *adat* or tradition exists,¹² first:

الْعَوَائِدُ الْعَامَّةُ الَّتِي لَا تَخْتَلِفُ بِحَسَبِ الْأَعْيَانِ وَالْأَمْصَارِ وَالْأَحْوَالِ

“Common traditions will not experience any changes of time, place, and condition.”

⁷ Ibid, Volume II, 179-188.

⁸ Ibn Qayyim al-Jauziyah, *I'lām al-Muwaqqi'in*, (Beirut: Dār al-Fikr, t.th.), Volume II, 293 and Volume III, 3.

⁹ Muḥammad Abū Zahra, *Uṣūl al-Fiqh* (Mesir: dar al-fikr, t.t), 273

¹⁰ Jalāluddīn 'Abdurrahmān al-Suyūṭī, *al-Ashbāh wa al-Nazā'ir*, (Beirut: Da'r al-Fikr, t.th), 80 and 88.

¹¹ Al-Shāṭibī, *al-Muwāfaqāt*, Volume II, 232.

¹² Ibid., 241.

This statement is relevant to eating and drinking, happiness or sadness, asleep and awake, enjoyment and comfort, and the chance to avoid anything painful or bad.¹³

Second:

وَالْعَوَائِدُ الَّتِي تَخْتَلِفُ بِالْإِخْتِلَافِ الْأَعْيَانِ وَالْأَمْصَارِ وَالْأَحْوَالِ

“The tradition or *adat* that experiences some changes according to time, place, and condition”, such as in outfit models, houses, and many more¹⁴.

Requirements of ‘Urf as Legal Basis

‘Urf should meet the following criteria in order to serve as a legal basis:¹⁵

- 1) ‘Urf is general. That is, a preexisting tradition or *adat* applies to all people.
- 2) ‘Urf must preexist when an event based on ‘urf takes place. This case is relevant to an example where a person bequeaths his/her land to a kyai (an expert in Islam). During this process, the person who bequeaths the land does not mention any academic titles such as a bachelor, master, or doctor of philosophy attached to the kyai. Then, the term kyai should be defined in a scope that is widely accepted by the locals of the area where the kyai lives (the kyai is probably defined as the person who owns an Islamic boarding school), not as a kyai seen on TV or a famous kyai that has been preaching or any kyai with an academic title. Regarding this issue, the following principle can be referred to the principle of *uṣūliyyah*: “It does not indicate any ‘*ibrah* for the coming ‘*urf*’.”¹⁶
- 3) ‘Urf should be the good one or *ṣaḥīḥ*, meaning that it does not contravene the teachings of the Quran and the sunnah

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal ‘alā al-Fiqh al-‘Am*, 873; and ‘Abdul ‘Azīz al-Khayyāt, *Naẓariyyat al-‘Urf*, 52-57.

¹⁶ Zainal ‘Abidin Ibn Ibrāhīm, *al-Ashbāḥ wa al-Naẓāir ‘alā Madhhab Abī Ḥanīfah al-Nu‘man* (Mesir: Muassasat al-Habi wa Shurakā, 1968), 133.

of the Prophet Muhammad SAW. The 'Urf contravening the Quran and Sunnah cannot be taken as *shara'* proposition. For example, a tradition in an area showing that returning assets to a wife or a child of the seller or another party in charge is always allowed. This tradition can be a reference in case of a charge filed by the party that owns the asset.

- 4). 'Urf does not contravene the agreement that has been agreed by the two parties concerned. This can be illustrated by the condition where a buyer buys a mattress in a shop, but this time this mattress is not delivered home by the seller simply because there is an agreement between both parties that the customer has agreed to bring the mattress home on his own although this shop usually delivers mattresses to customers

A Clash between Propositions of Syara' and 'Urf

The clash between these two propositions is further explained by the thoughts given by Moslem Clerics :¹⁷

- 1) The clash between elaborate *naş* and *urf*.

The elaborate *naş* that conflicts with *urf* (interrupting the meaning of *naşş*) has put the 'urf in a rejected position. For example, it was common to adopt a child during *Jahiliyyah* time (the days of ignorance). The adopted child had the right almost equal to biological ones since the adopted also received inherited asset. 'Urf in such a context is explained as conflicting with *naşş*, as elaborated in al-Nisa verses 11 to 13 that elaborate the proportions received by inheritors. The inheritors refer to those caused by *sababiyah* (a marriage) (coming from a husband/a wife) and *nasabiyah* (kinship). That is, adopted

¹⁷ See Abū Hāmid al-Ghazālī, *al-Mustasfā min 'Ilm al-Uşūl*, Juz II (Kairo: al-'Amfīriyyah, 1422 H), Jilid II, 35-36 and 'Abdul 'Azīz al-Bukhārī, *Kashf al-Asrār 'an Uşū Fakhr al-Islām al-Bazdawī*, Jilid II (Lebanon: Dār al-Kutub al-Ilmiyah, 1997), 2.

children are not categorized as inheritors despite the tradition during *Jahiliyyah* time.

2) The clash between general *naṣṣ* and 'urf

If a tradition pre-exists before the general *naṣṣ* emerges, the Moslem clerics may differentiate these two matters. If 'urf represents a tradition or *adat* such as spoken words, the 'urf can apply, so that the *naṣṣ* is understood as the general one including spoken words/expressions that have been around in a particular place. For example, fasting, hajj, prayer, or sale and purchase can be defined according to 'urf unless other statements define them differently.

'Urf that represents a tradition or *adat* obvious in human's behavior when general verses or hadiths are revealed indicates that *ikhtilaf* takes place. The followers of *Ḥanafīyyah* argued that when a tradition ('urf) shows the characteristic of 'ām, this 'urf could specify the meaning of *naṣṣ* that represents the nature of 'ām since this specification does not stop the application of *naṣṣ*. That is, they highlighted this case only within the purview of *al-'urf*.¹⁸ Rasulullah once expressed:

لَا تَبِعْ مَا لَيْسَ عِنْدَكَ (رواه ابوداود)¹⁹

"Do not ever sell properties that do not belong to you".

This *Ḥadīth* carries general meaning, indicating that the transaction of a property is not valid when the seller does not have any full right to the ownership of the property, unless this involves *salām* contract.

¹⁸ Ibn 'Ābidīn, *Radd al-Mukhtār 'alā al-Durr al-Mukhtār*, Volume IV (Mesir: al-Babi al-Habi, 1966), 281.

¹⁹ Abū Dāwūd, *Sunan Abū Daūd*, hadith no 3505, dari sisi sanad semua sanad hadith ini bernilai *ṭhiqah*, sehingga hadith ini bernilai *ṣaḥīḥ*.

Influences of 'Urf in Islamic Inheritance Law in Indonesia

Inheritance Law of Islam in Indonesia is set forth in the KHI, Articles 171 to 193, and not all these articles are seemingly derived from the Quran and the Sunnah of the Prophet SAW. Some are based on the concept of *maṣlahah*, *istiḥsān*, and some are taken from the concept of the appropriate 'urf that has been living in Indonesia.

The influences of the appropriate 'urf, according to KHI, are obvious in the position of a daughter that is categorized as *dhawil arḥām* as in *farā'id*, but the KHI Article 171 (c) regulates this case in a different way, in which everyone can inherit assets as long as they are Moslems. Specifically, Article 171 point c states "an inheritor refers to a Moslem person having a blood relationship with a testator when this testator passes away, and this person is not interrupted by any legal matters".²⁰

This case had to take substantial revision since it reformed patrilineal culture in *farā'id* repertoire. *farā'id* highlights that inheritance goes through male lineage, allowing males to become inheritors. The notions of *jumhūr* confirmed the clerics coming from female lineage can be represented by *dhawil arḥām*, understood as the relative of the testator that does not have any particular proportion (*furūd*) in naṣṣ as explained in either the Quran or the Sunnah of the Prophet SAW, and this person is also defined as the party that receives the proportion of *aṣābah*.

In terms of the factor of kinship as highlighted in the KHI Article 171 point c, the descendants coming from either the female or male lineage can serve as inheritors. Inheritance takes place due to two causes: *sababiyah* and *nasabiyah*. *Sababiyah* represents the condition where either the husband or wife passes away. This case causes one of them that is alive to be entitled to the inheritance since both have marital ties. *Nasabiyah*, however, highlights the kinship of an inheritor with his/her testator. *Nasabiya* further elaborates on this matter based on the three lines as follows:

²⁰ Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 1992).

1. *Uṣūliyyah* line (the origin of the deceased)²¹

It refers to whoever causes the death of a person, or it may refer to the person who bore the person that passes away. The *nasab* relationship between the living and the deceased is based on the *nasab* connection that refers to the upward line.

However, inheritors categorized as *uṣūl al-mayyit* involve:

- a. Father, as mentioned in the words of Allah SWT:
“..... And for the parents, each gets one-sixth of what he leaves, if he had children. If he had no children, and his parents inherit from him, his mother gets one-third.....”. (QS. Al-Nisā’: 11)
- b. Mother, as mentioned in the words of Allah SWT above.
- c. *Ṣaḥīḥ* Grandfather
Ṣaḥīḥ grandfather refers to the father of a father, the father of the father’s father, and so forth through the line upwards for as long as the relationship between the *nasab* and the deceased without any interruption from females. A grandfather in his *nasab* relationship with the deceased interrupted by females is categorized as a *ghairu ṣaḥīḥ* grandfather. The *ṣaḥīḥ* grandfather is included in this category as an inheritor, while *ghairu ṣaḥīḥ* grandfather is not, but in the category of *dhawil arḥām*. The position of *ṣaḥīḥ* grandfather as an inheritor is also elaborated in the following Hadith:
“Prophet Muhammad SAW categorized the proportion received by the grandfather as one-sixth”. (HR. Aḥmad and Abū Dāwūd from Ma’qil bin Yasar).
- d. *Ṣaḥīḥah* grandfather

²¹ Darmawan, *Hukum kewarisan Islam* (Surabaya : Imtiyaz,2018), 31-35.

The *ṣaḥīḥah* grandmother is classified as the person with her *nasab* relationship with the deceased not interrupted by the existence of *ghairu ṣaḥīḥ* grandfather. That is, the *nasab* connection to the deceased is not at all discontinued by the grandfather or the *ṣaḥīḥ* grandfather.

On the other hand, the *nasab* relationship of a grandmother interrupted by *ghairu ṣaḥīḥ* grandfather or *ghairu ṣaḥīḥah* grandfather means the *ṣaḥīḥah* grandmother serves as an inheritor, and not *ghairu ṣaḥīḥah* grandmother, but the latter is classified as *dhawil arḥām*. The position of a grandmother as an inheritor is further explained in the following Hadith:

إِنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ جَعَلَ لِلْجَدَّةِ السُّدُسَ إِذَا لَمْ يَكُنْ دُونَهَا أُمٌّ.
رواه أبو داود

“That Prophet Muhammad SAW has determined one-sixth of the inherited property for the grandmother if this grandmother is not with a mother”. (HR. Abū Dāwūd)

Farā'id recognizes *ghairu ṣaḥīḥ* grandfather and *ghairu ṣaḥīḥ* grandmother since *farā'id* refers to patrilineal system and culture. That is, a grandfather or grandmother whose line is interrupted by the female deceased will not receive any inherited assets since they are deemed to be *dhawil arḥām*, while *dhawil arḥām* is not defined as an inheritor.

2. The al-ḥawāshī path, the line that goes horizontally, consists of²³ a brother, a sister, a half-brother of the same father, and a half-sister of the same father. This refers to the words of Allah SWT as in surah an-Nisa verse 176:

²² Abū Dāūd Sulaimān Al-Sijistānī, *Sunan Abī Dāwūd*, (Beirut: Dār al-Kutub al-Ilmiyyah, t.th), 18.

²³ Darmawan, *Hukum kewarisan Islam*, 38-40.

“They ask you for a ruling. Say, “God gives you a ruling concerning the person who has neither parents nor children.” If a man dies and leaves no children, and he had a sister, she receives one-half of what he leaves. And he inherits from her if she leaves no children. But if there are two sisters, they receive two-thirds of what he leaves. If siblings are men and women, the male receives the share of two females...” (QS. Al-Nisā’: 176)

And this is also based on the words of Prophet Muhammad SAW:

الْحُقُّوا الْفَرَائِضَ بِأَهْلِهَا فَمَا بَقِيَ لِأَوْلَى رَجُلٍ ذَكَرٍ. رَوَاهُ الْبُخَارِيُّ²⁴

“Distribute the parts of inherited assets to those who deserve, while the rest should be given to the males of closest relation (based on his *nasab* relationship with the deceased)”. (HR. al Bukhāry)

The case of a half-brother of the same mother refers to the words of Allah SWT :

“If either a male or female dies leaving no father and children but only a half-brother (of the same mother) or a half-sister (of the same mother), share the assets with those two as much as one-sixth, but if this is more than one half-sibling of the same mother, they have to share the one-third,”. (QS. Al-Nisā’: 12)

3. *Furū’iyyah* Line (Downward lineage) consists of²⁵ a daughter, a son, a granddaughter of a son, and a grandson of a son. This matter is based on the words of Allah SWT in Surah Al-Nisa Verse 11:

“God instructs you regarding your children: The male receives the equivalent of the share of two females”. (QS. Al-Nisā’: 11)

²⁴ Abū Abdillāh al-Bukhāry, *Ṣaḥīḥ Bukhāry* (Beirut: Dār al Fikr, tt.), 55.

²⁵ Darmawan, *hukum kewarisan islam*, 31-33

The condition where they receive the inheritance from their grandfather or grandmother, no matter how long the lineage goes up, is based on the word: أولادكم (a son) as in surah Al-Nisā' verse 11 as above. The word أولادكم in Arabic refers to a son and a daughter and his/her sons or daughters or further male or female descendants from a son, while further male or female descendants from a daughter are not mentioned as أولادكم.

This is because *farā'id* strongly refers to the patrilineal system and culture (male lineage) so that grandchildren or great-grandchildren are deemed to be *dhawil arḥām* and they cannot serve as inheritors.

Their position as inheritors can also be understood through the words of Rasulullah SAW:

الْحَقُّوا الْفَرَائِضَ بِأَهْلِهَا فَمَا بَقِيَ لِأَوْلَى رَجُلٍ ذَكَرَ. رَوَاهُ الْبُخَارِيُّ²⁶

“Leave your inherited assets to those who deserve and the rest to the males of the closest relation (based on the *nasab* relationship with the deceased)”. (HR. al Bukhāry)

Zaid bin Thābit a Moslem cleric and an expert in inheritance theory once said:

“The son of a son (a grandson) is positioned as a son as long as the deceased does not leave any son, where they (grandsons) are (placed) in the position of a son and they (granddaughters) are (placed) in the position of them (granddaughters). They (the grandchildren) receive the inheritance as the sons and daughters do, and they (grandchildren) interrupt as the sons and daughters do, and the son of a son cannot inherit as long as the son is alive. If the deceased leaves a daughter and a son from a son (a grandson), the daughter is only entitled to half of the proportion while the son from a son (grandson) receives the rest”.

²⁶ Abū Abdillāh al-Bukhāry, *Ṣaḥīḥ Bukhāry*, 32.

This case is also based on the following Hadith on inherited asset distribution to a daughter, a granddaughter descended from a son and a sister:

قَضَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لِلْبِنْتِ الْكَصْفُ وَلِلْبِنْتِ الْأَبْنِ السُّدُسُ تَكْمِلَةَ الثَّلَاثِينَ وَمَا بَقِيَ فَلِلْأَخْتِ. رَوَاهُ الْجَمَاعَةُ إِلَّا مُسْلِمًا وَالتِّرْمِذِيُّ عَنْ ابْنِ مَسْعُودٍ

“Rasulullah SAW set the proportion received by a daughter a half, a daughter from a son one-sixth to round it to two-third, and the rest is left to a sister)”. (HR. al Jamā’ah except Moslem and al-Tirmidhī of Ibnu Mas’ūd)

The statement from Zaid bin Thābit also clarifies the position of a daughter from a son as an inheritor. The KHI regarding grandchildren or great-grandchildren that have blood relationships with the deceased (testator) accommodates all, including descendants from male lineage or female lineage. This is because it follows a bilateral system (the lines from males or females). This bilateral system has been implemented in Indonesia for a long time ago, especially in the Javanese tradition that has adhered to a bilateral system.

The bilateral system existing in Javanese traditions and adopted by KHI serves as a solution to enable all inheritors from either male lineage or female lineage to receive their inheritance. The situation where a person coming from female lineage is not recognized as an inheritor may lead to conflicts among inheritors or even murders since this is seen as unfair. Thus, the bilateral system governed in KHI is expected to minimize the likelihood of conflicts among inheritors.

KHI revision can also be affected by the tradition or the *ṣaḥīḥ ‘urf*, as agreed in this study since no explicit propositions in nas} state that only those coming from male lineage deserve the inheritance. This is in line with surah al-Aḥzāb of the Quran verse 6:

“And blood relatives (who deserve inheritance more) are closer to one another in God’s Book than the believers or the emigrants though you should do good to your friends. That is inscribed in the Book”²⁷.

The word “*ulūl arḥām*” carries a general meaning, not only restricted to male lineage but also involving a female lineage as long as there is blood relationship. The word “*walad/aulād*” meaning “child/several children” in surah al-Nisā’ verse 11 is not only restricted to male lineage but also takes into account the female one. This study, thus, is in line with what is set forth in KHI, implying that female lineage represents an inheritance proportion equivalent to that of male lineage.

Inheritance law also recognizes the fairness principle. More specifically, descendants coming from female lineage have an equal position to those coming from male lineage, while the matter of the proportion received still refers to what has been set forth in naṣṣ, known as *furūd al-muqaddarah* (fixed proportions).

This implementation follows the principle of the merits for all people in Indonesia instead of daughters as *dhawil arḥām* (not as inheritors). Moreover, Article 183 of KHI implies that inheritors agree to peacefully distribute the inheritance after they are aware of their proportions.” This principle has seemingly been affected by pre-existing and repeated practices in society, growing as a part of traditions.

Inheritance usually takes place under the agreement made by inheritors, not through the consideration of the prior calculation according to *farā'id*, while *farā'id* requires the proportions to be calculated. Islamic law sees it as an individual principle, in terms of either the proportions of inherited assets, inheritance distribution, or *ahliyah al-adā* as in

²⁷ Kementerian Agama, *al-Qur'an dan terjemahnya*, 418

the distribution of inherited assets.²⁸ That is, the proportion that every inheritor should receive must be calculated before they have the right to receive the calculated proportion. Upon receiving the proportions, they can decide on their own where they will share their inheritance, and peaceful inheritance distribution is one of the steps taken after they are aware of their proportions.

In the study of *ushul fiqh*, this repeated tradition is known as '*urf*'. The word '*urf*' is equal to the word *ma'ru>f* meaning good. In other words, a tradition growing in society can be deemed to be '*urf*' as long as this represents something good. From the perspective of Imam Shāṭibī '*urf*' (*al-'awā'id al-mustamirah*/current tradition), this principle is acceptable as long as it does not contravene *shara'* law or as long as there is no *naṣṣ* proscribing this practice. Imam al-Shaṭībī divides this practice into two categories: first:

العَوَائِدُ الشَّرْعِيَّةُ الَّتِي أَقْرَاهَا الدَّلِيلُ الشَّرْعِيُّ أَوْ نَفَاهَا

"The *shar'iy* tradition recognized by the sharia (validated by sharia) or proscribed by sharia".

In other words, Imam al-Shaṭībī intended to position the tradition that was responded to by sharia propositions, either by legalizing or erasing it. Second:

العَوَائِدُ الْجَارِيَّةُ بَيْنَ الْخَلْقِ بِمَا لَيْسَ فِي نَفْيِهِ وَلَا إِنْتِبَاهِهِ دَلِيلٌ شَرْعِيٌّ

"Referring to *adat* or tradition living in a society without any relevant sharia proportion that should proscribe or legalize it."

Imam al-Shaṭībī implies that some traditions, or many, have not got any responses from relevant sharia. In the books of *ushul fiqh*, '*urf*' is commonly divided into two: '*urf al-ṣaḥīḥ*' and '*urf al-fāsid*'.²⁹

Inheritance distribution performed peacefully is acceptable as long as it involves the prior calculation of the

²⁸ *Ahliyah al-adā'* adalah kepantasan seseorang untuk dipandang sah segala perkataan dan perbuatannya menurut *shara'*. Lihat Abdul Wahab, *Ilm Uṣūl Fiqh*, 136.

²⁹ 'Abd al-Wahab Khallaf, *Ilm Uṣūl al-Fiqh* (Beirut: Dār al Fikr, tt), 89. See Muhammad Abū Zahrah, *Uṣūl al-Fiqh* (Mesir: dar al-Fikr al-'Araby,t.th), 273-274.

shares. every inheritor must know the proportion received. This proportion is determined based on *furūd al-muqaddarah*. The calculation must precede inheritance distribution to every inheritor before they have the right to further share the proportion received. Upon the distribution, they also have the right to discuss it with other inheritors in case of the expectation to have the distribution peacefully after each knows his/her proportion.

This is also in line with the spirit carried in the Quran (QS Al-Nisā', 4: 128, al-Anfāl, 8:1, al-Hujurāt, 29: 9-10) encouraging every person to do it peacefully (*al-ṣulh*). Moreover, this is also another effective way to avoid family conflicts usually emerging in inheritance distribution. 'Umar bin al-Khaṭṭāb once said: "peaceful distribution is acceptable among Moslems, except the peaceful distribution intended to turn the halal into haram due to the expectation to get something halal" (H.R. Abū Dāwud)".³⁰

Furthermore, 'Umar bin al-Khaṭṭāb once said: "Leave the resolution to the hands of the family members for them to further reconcile, while litigation at court may spark revenge.."³¹

The provision in *farā'id* needs to be first taken into account before they hold a deliberation in *islāḥ* for the sake of all. The deliberation considers whether inheritors are in need of the share or there should be another consideration that needs to follow for the sake of all family members involved.

However, the distribution that takes equal proportions for all from the start without any further notification of the proportions ones have to receive is not accepted since it allows the portion of an inheritor to be taken by another inheritor, and so forth. This proscription is in line with al-baqarah verse 188 :

³⁰ Abi Daud Sulaiman Al-Sajastani, *Sunan Abī Dāwud*, Juz III, 304.

³¹ Ibid., 68.

“And do not consume one another’s wealth by unjust means, nor offer it as bribes to the officials in order to consume part of other people’s wealth illicitly, while you know.”

Shared or marital properties, as they are called, refer to the assets obtained as long as marital ties remain, and these assets are not equal to the properties ones have before marriage, including the properties inherited from their parents or as a result of their earned money before marriage.

This is based on Law concerning Marriage Number 1 of 1974 Article 35³² :

- (1) Assets obtained as long as marital ties remain are considered shared properties.
- (2) The assets brought by a husband or a wife as part of an inheritance or a gift are under each ownership unless each party expects otherwise.

This matter is also implied in surah al-Nisā’ verse 32 ³³:

“For men is a share of what they have earned, and for women is a share of what they have earned,”.

Marital properties should be distributed first before the distribution of *tirkah* (inherited/separate properties). For example, when a husband passes away leaving 2 billion rupiahs of *tirkah* (after deducted for the deceased treatment, debt payment, and *zakat* (almsgiving), this amount must be divided by two, where one billion is given to the husband and the other one billion is for the wife. That is, the *tirkah* of the deceased husband is one billion rupiahs, and the one billion for the deceased will be further shared with the inheritors of the deceased, where the wife will receive more of this one billion since the wife is also positioned as an inheritor.

³².Soemiyati, *Hukum perkawinan Islam dan Undang-Undang Perkawinan no 1 th 1974* (Yogyakarta: Liberty, 1999), 148

³³ Kementerian Agama, *al-Qur'an dan terjemahnya* (Bandung: PT. Sygma Examedia Arkanleema, 2011), 78.

If there are two wives left by the deceased, the marital properties are to be fairly shared between them according to the duration of marital ties between them and the deceased has taken.

Each region has its different terms for marital or shared properties. In East Java, for example, the locals call this term *guna-kaya* (the mixed assets), in Minangkabau it is called *suarang* assets, and in Aceh this term is known as *Hareuta Suhareukat*.³⁴ The distribution of this type of property is regulated in Article 190 of KHI, stating:

“In the condition where a husband has been married to more than one wife, each wife is entitled to the part of the shared properties earned during marital ties with the husband, while the whole entity of the inheritance goes to the right of inheritors”.

From the perspective of methodology, such a distribution system of marital properties is intended to fairly spare the living spouse(s) the shares, and this is considered fair enough recalling that the living has been supporting the household and managing the finance in the family. The legal provisions regarding marital properties, however, are not discussed in old *fiqh*.

These shared properties are similar to *shirkah* or a joint venture between a husband and a wife. The financial burden in the family is taken as the responsibility of a husband while the wife serves as a housewife who is responsible to manage the economy of the family. This case can be categorized as *shirkah al-abdān*, implying that the money earned by the husband is managed by the wife. These days, the wife could work outside but with the consent and agreement of the husband, and there is always the possibility that the wife could earn more than the husband does. Finally, this case can also be

³⁴ Fathur Rahman, *Ilmu waris* (Bandung: PT al-ma'arif, 1994), 41.

categorized as *shirkah 'inān*, where both the husband and wife financially contribute to the household.³⁵

From the perspective of modern families and Moslem families, including a nuclear family consisting of a husband, a wife, and children, the concept of these marital properties is seemingly intended to protect the spouse when the other dies and to leave the spouse the share to help the other survive later in life. Married spouses are not only responsible to build and run the family and manage the finance, but they have to take into account another aspect if one of the spouses dies, especially when the case is that the wife also works hard to support the economy. A husband without a child receives $\frac{1}{2}$ or $\frac{1}{4}$ with a child, while the wife without a child receives $\frac{1}{4}$ or $\frac{1}{8}$ with a child. In addition, the existence of a son will not lead to any further issues, but when there are some daughters, the rest of the assets are to be shared with the relatives beyond the nuclear family without their knowing the hardship the family has gone through. Thus, this research suggests that the concept of marital properties based on a *shirkah* approach from the perspective of *adat* law should be introduced.

Conclusion

Uṣūliyyīn agree that '*urf*' can serve as the legal basis or '*urf al-ṣaḥīḥ*', which is defined as a tradition that is congruent with the intention of *naṣ* in the Quran and the Sunnah of the Prophet and for the merit for all people. In Islamic principles, it is mentioned الثَّابِتُ بِالْعُرْفِ كَالثَّابِتِ بِالنَّصِّ (what is determined according to '*urf*' has an equal value to what is determined according to *naṣ*). Inappropriate traditions that contravene *naṣ* in the Quran and the Sunnah of the Prophet are defined as the proscribed '*urf*/*urf fāsid*. Before delivering a verdict, a *mujtahid* must understand certain traditions living in society to ensure that the decision made does not contravene the traditions in society.

³⁵ Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: Raja Grafindo Persada, 1995), 200-201.

Several articles in the KHI accommodate 'urf in Indonesia, among them, is the bilateral principle set forth in Article 171 part c and Article 174. Article 183 concerning inheritance distribution, however, requires a prior calculation of the inheritance before distribution. Following this calculation, inheritors could make a peaceful agreement to further share the inheritance, and Article 190 deals with the distribution of marital or shared properties that have been the tradition of Javanese people in general.

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