The Contribution of ‘Urf to the Reform of Islamic Inheritance Law in Indonesia

by Ismail Ismail

Submission date: 04-Apr-2022 09:53AM (UTC+0700)
Submission ID: 1800845404
File name: Urf_English.docx.docx.docx (91.05K)
Word count: 7358
Character count: 37577

The Contribution of *'Urf* to the Reform of Islamic Inheritance Law in Indonesia

Ismail, Busyro, Nofiardi, Endri Yenti, Hanif Aidhil Alwana

Institut Agama Islam Negeri Bukittinggi
E-mail:ismailnawel68@gmail.com,busyro.pro18@gmail.com,
nofiardi.drz@gmail.com, endriyenti22@gmail.com hanif.alwana18@gmail.com.

This study explain the position of *'urf* as the basis for reforming Islamic law and the way it contributes to the renewal of Islamic inheritance law in Indonesia. In doing so, this library research uses content analysis method. Conclusions are drawn inductive- and deductively. This research shows that *'urf* is of higher importance in the renewal of Islamic law and plays a very important role in reforming Islamic inheritance law in Indonesia. There are many provisions in book II of the KHI which are based on *'urf,* including the inheritance of adopted children and adoptive parents, substitute heirs, inheritance of *żawul arḥām*, *radd*, *walad*, and inheritance of joint property.
Keywords: *'Urf, renewal, and Islamic inheritance law.*

Introduction

Islamic inheritance law is very important in Islam. According to Coulson, there are at least two reasons for this, *firstly,* the establishment of Islamic legal provisions which are highly individual and firm in character, and, *secondly*, the status of the inheritance as inseparable from family law; from a certain point of view one can even see it as its central point. This understanding emerges on the ground that the inheritance law has assigned priority system and quantitative values to each of legal heirs considering the level of kinship they are in, a certain scheme defined by the *shari'a*, and the basic teaching that inheritance is of family responsibilities. Rights to inheritance is embeddedly awarded to the legal heirs, even when the deceased was still alive. Therefore, the system reflects the Islamic concept of social values and family structure (Coulson, 2001, pp. 9–10).

Anderson sees that in Islamic inheritance law there is still a paradigmatic debate between conservative and progressive forces. According to conservative circles (in this case the *jumhūr*/majority of ulama) inheritance law is the *qaṭ'iyyāt* and thus cannot be changed. Meanwhile, according to progressive scholars, inheritance law might undergo changes whenever the *maṣlaha* (public good) requires (Anderson, 1994, p. 47).

M. Atho' Mudzhar, professor of Islamic law at UIN Syarif Hidayatullah Jakarta, stated that inheritance law, at least its application, can be changed by social structure,

even for such a lesser reason as the structure of a family. For example, '*Aul*. An heir, for example, 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 (Mudzhar, 1998, p. 161).

The changes referred to by Atho' can be seen in the Indonesian context, including ones contained in the laws and regulations (in this case KHI). In this regard, as the author of the book *Fiqh Mawaris Hukum Kewarisan Islam* (*Fiqh Mawaris* Islamic Inheritance Law), Suparman Usman and Yusuf Somawinata, stated, there are several provisions on inheritance law in the KHI which are exceptions to the opinion of the *jumhūr* contained in *fiqh* books and later interpreted differently by KHI as the prevailing legal provisions in Indonesia (Aripin, 2016, p. 213). These legal provisions include the issue of adoptive children or parents, father's share, the *żawul arḥām*, the *radd*, substitute heirs, and the definition of *walad* (Usman & Somawinata, 1997, p. 197).

These changes have as their basis a list of solid and strong supporting arguments (Kudhori, 2018, pp. 49–50). On top of this list is the '*urf*. Therefore, this paper tries to study 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. In doing so, this library research uses content analysis method. Conclusions are drawn inductive- and deductively.

Method

The approach in this discussion is qualitative in nature with data sources based on literature studies. Scientific research such as journals, theses or dissertations, books are the basic study materials in this discussion. This paper makes use of the method of content analysis and draws conclusion using inductive and deductive thinking methods. Thus, this discussion unveils relevant theories on the issue and the relations of each.

'Urf as the basis for Islamic law reform

Linguistically or etymologically, 'urf means good, that is something human beings are used to and have implemented in various aspects of their life (Khayyat, 1977, p. 24). The scholars in the field of *uṣūl al-fiqh* explore and differentiate the concept of '*ādat* and '*urf* and their position as one of the bases for establishing *syara'* law. They often explain '*ādat* as something that is observed repeatedly without any rational relationship. In other words, '*ādat* only looks at the repetitive 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 (Sirajuddin M, 2015, pp. 17–18).

Mustafa Ahmad al-Zarqa, a professor of Islamic law at Amman University Jordan, argues that '*urf* is part of the concept of '*ādat*, for the latter is more general and thus covers the *'urf*. According to him, the concept of *'urf* applies to most people in certain areas, not to certain individuals or groups. He further states that '*urf* is not a natural habit, as so far understood and has been applied in most customs, but emerges from the dynamics of humans' thought and experience (Ramli, 2006, pp. 253–254). He makes an example from the case in which the majority of people in certain areas make the dowries given by their husbands as business capital to meet household needs in a marriage (al-Zarqa, 1968, p. 840). The case will not be subject for scholars of *uṣūl* unless it uses '*urf*, not '*ādat*, as part of the arguments.

Basically, the concept of '*urf* is used by all *fiqh* scholars, especially the Hanafites and Malikites. The Hanafites call it *istiḥsān* and use it in ijtihad, where one form of *istiḥsān* is *istiḥsān al-'urf* (the *istiḥsān* based on '*urf*). For the Hanafites, '*urf* is preferred over *qiyās khafī* and general *naṣṣ* (Quranic or hadith text). In other words, 'urf can specify the general-implying *naṣṣ* (Syarifuddin, 1999, p. 375).

Meanwhile, the Malikite circle makes '*urf* or traditions observed by Medinans as the basis for determining the law. They even prioritize it over single hadith. The Shafi'ites share the same stance on this. They use '*urf* when they do not find the shari'a's definite statement on the matter in question. For example, in determining the criteria of the "safe place" in case of theft, the time and duration of menstruation, and the meaning of separation in *khiyār majlis*. In addition, the Shafi'ite have the *qaul qadīm* of Shafi'i in Iraq and his *qaul jadīd* in Egypt, the change of which can also be used as a reason to say that Shafi'i really considers '*urf* in his *ijtihād* (Syarifuddin, 1999, p. 375).

Looking at the practice of ijtihad that prevails among the majority of scholars of *uṣūl*, as stated earlier, one may understand that '*urf* can be used as a legal basis in an *ijtihād* (Azizi & Ahmadii, 2016, pp. 17–20). In fact, this '*urf* argument is actually very effective in producing laws that fit the nuance of the society in which the law is enacted (Hamzawi, 2018, p. 10). It was also practiced by Arab *mujtahid*s; compiling preceding *fiqh* to produce new ones with a high level of Arabic nuance. Fiqh with an Arabic style is sometimes only suitable for Islamic communities from Arabia and not always suitable for people outside the area.

In terms of pioneering and using the '*urf* argument well, the Arab *mujtahid*s are good examples. Taking them as example simply means borrowing their paradigm and

the process, rather than taking over their results for they might be irrelevant to us. For example, it can be stated the way the Arab *mujtahid*s specified the meaning of *walad* to cover only boys. They do not include girls in the definition of *walad*, because their '*urf* wants so. However, it is irrelevant for our community whose '*urf* is quite different from that of patrilineal Arab society. Therefore, we are not obliged to transfer the laws established under or influenced by the Arabic '*urf*. What we need to do is transferring the methodology, not the product (Sibawaihi & Baharun, 2017, p. 173).

In other words, we are actually required to also use the '*urf* argument in understanding the *shara'*, that is by considering our '*urf* (customs), to the furthest point it is relevant. By doing so, our ulama could produce laws that fit Indonesians.

In the repertoire of Islamic *fiqh* itself, there are actually quite a lot of laws that come from the customary approach ('*urf*) that applies among Arabs. In accordance with the facts in the history of Islam, it is stated that this religion was brought by the Prophet Muhammad into the structure of a cultured society, to let the Arabs at that time live their customs.

Only 'bad' traditions in the eye of Islam that then in turn banned; drinking alcohol, gambling, doing contracts that are usurious and so on. If their customs are considered good by Islam, they may carry it out forever; the *ijārah*, *salām*, and *muḍārabah* contract. According to *fiqh* experts, the *muzāra'ah* (half-sharing of the rice field), the *salām*, *wafā'*, and *istithnā'* contract are of examples of Islamic law that originates from traditional customs (Rizal, 2019, p. 171).

Given the above explanation, the '*urf* argument is highly effective yet seems to have not been used properly, even though the *mujtahid*s of the preceding generation had provided examples of how to function this argument (Hasan & Khairuddin, 2021, pp. 185–186). If this '*urf* argument can be used properly by Islamic jurists in Indonesia, their fatwas must fit the social life of the Indonesians.

Hasbi Ash-Shiddieqy said that there has not been an ulama who have produced a set of *fiqh* laws that fits the characteristics and personality of Indonesians. Thus, under certain conditions Indonesians are forced to use Hijazi, Misri, and/or Iraqi *fiqh*. It must be admitted that in fact the fiqh existing and prevailing in Indonesia is partly Hijazi, as it was formed on the basis of conformity with customs and habits of Hijaz. It is also partly Misri and Hindi, for it was established in such a way to conform the traditions of Egypt and India respectively (Ash-Shiddieqy, 1966, p. 45).

From Hasbi's argument, we might take that as long as we do not try to perform *ijtihād* and taking the '*urf* method to its farthest level, we will always live the law established by custom and '*urf* in other regions. Although in certain laws it does not cause problems or difficulties, but in certain other cases it will be difficult.

'*Urf* which in turn can be used as a legal argument is not only limited to Hijazi, Iraqiy, or Misri—all of them is Arab in origin, but also the *'urf* of regions outside of Arabia, so long as it fits certain conditions to be the basis for a proposition. The conditions for the validity of the '*urf* according to scholars of *uṣūl* are: 1) the '*urf* or '*ādat* has the element of *maṣlaḥah* (public good) and rationality; 2) the '*urf* or '*ādat* applies generally and evenly among the people or the majority of them; 3) the '*urf* or '*ādat* has been prevailing, to exclude the '*urf* which appears in response to the problem in question; 4) the '*urf* or '*ādat* is not contradictory to or ignores the existing *shara'* arguments or definite principles (Syarifuddin, 1999, pp. 376–377).

The use of '*urf* as a functional argument will accelerate the development of Islamic law. In addition, the use of the '*urf* argument in determining the law will make Islamic law more fitting and relevant to the society in which the law is used (Maimun, 2017, p. 34). Accordingly, Islamic law will always be relevant and functional.

Islamic Law Reform: A Theoretical Framework

Islamic inheritance law is actually God's law, determined by His revelation. Therefore, the Islamic inheritance law is absolute (*qaṭ'ī*). However, NJ Coulson puts it in the *Conflict and Tension*, especially in the discussion of stability and change, that sociologically speaking, the establishment or legitimacy of the law can change due to legal social changes, including time, place, and circumstances. In fact, he further argues, this change can also occur in the substance of the law, provided that legal needs require so. The ideal that the law wants to achieve and the reality of time is not a paradigmatic dichotomy in law (Nisa, Disemadi & Purwanti, 2020, p. 157), but rather has a tendency more towards aspects of stability and legal change to ensure the application of law in a social structure of society (Coulson, pp. 96–98).

Accordingly, Muhammad Siraj and Atho' Mudzhar also put forward the same theory. According to Siraj, the success of law enforcement is shown by its ability to balance and compromise various social interests on the one hand with the demands of fiqh thought on the other (Siraj, 1993, p. 105). Atho' Mudzhar, as the above quote suggests that, at least in its implementation, Islamic inheritance law can also change

from the original (as it is said by the Scripture), for any possible cause in larger social structure or even the smaller one as the family structure (Mudzhar, 1998, p. 161).

The theories above are basically based on the theory built by Ibn Qayyim al-Jauziyah, a student of Ibn Taimiyah, who said that changes in laws or fatwas were due to changes in times, places, circumstances, and habits (al-Jauziyah, 1973, p. 25). From these theories, one can also conclude that there is a strong relationship between law and the social conditions of society. Thus, Islamic inheritance law which is part of Islamic law will undergo changes or updates to fit the context of the times, places, circumstances, or local customs (Yenti *et al.* , 2020, p. 20). These various changes to Islamic inheritance law in Indonesia can be found, among others, in the articles on the compilation of Islamic law in Indonesia (KHI) (Hakim, 2017, pp. 60–61).

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 articles regarding adopted children in the KHI, namely article 171 (h) and article 209. In article 171 (h) it is stated that an adopted child is a child for whom the financial obligation covering the basic living expenses is handed over from the biological parents to the adoptive parents by a court decision. In article 209 paragraphs (1) and (2), it is stated that:

(1) The inheritance of the adopted child is divided based on articles 176 to 193 mentioned above (Abdurrahman, 1995, pp. 157–160), while adoptive parents who do not receive a will are given a mandatory will of up to 1/3 of the inheritance of their adopted child.

(2) Adopted children (Abdurrahman, 1995, p. 156) who do not receive a will are given a mandatory will of up to 1/3 of the inheritance of their adoptive parents (Abdurrahman, 1995, p. 164).

In terms of inheritance, the legal approach of KHI is the same as the classical *fiqh* books, in that they explain that adopted children and their adoptive parents cannot inherit from each other. However, KHI provides a legal institution called a mandatory will, namely an obligation based on the provisions of the legislation intended for adopted children or vice versa, where previously both were not given a will by the adoptive parents or adopted children, with a maximum amount 1/3 of the estate.

The clause on mandatory will in the KHI supposedly appears in response to the phenomenon of child adoption that occurs 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 the practice commonly referred to as "*tabannī*" which is commonly known. *Tabannī* means the transfer of lineage from the biological parents to the adoptive parents, while the adoption of a child is only limited to maintenance, fulfillment of living expenses, education, and affectionate relationships as befits a child and his parents, while maintaining the kinship of the biological parents.

The practice of inheritance as mentioned above is very different from the practice of *tabannī* inheritance, an area that is out of the reach of the existing *tabannī* concept. People need certain legal provisions that meet their need in accordance with the value of justice the society is living. KHI's acknowledgment of the institution of child adoption is sort of legal respond to social realities. The permissibility of adopting a child, as stated above, is contained in Article 171 (h) of the KHI. Italso acknowledges the existence of a legal relationship between the two, which it regulates in Article 209 paragraphs (1) and (2).

Al-Yasa Abu Bakar has provided us with a deep discussion of the issue in "Wasiat Wajibah dan Anak Angkat." Adoption of children confirmed by customary law (before the issuance of KHI) often generates difficulties. More often than not, the adopted child does not get anything from the inheritance of his adoptive parents, because his adoptive parents did not have a will during his/her life or did not know that in fact their adopted child was not entitled to inherit from them (according to *fiqh*). In addition, other methods, such as grants, sometimes don't work well; in some cases the two parties have personal issues after the grant contract (Abubakar, 1996, p. 96).

On the quite same line, Muhammad Daud Ali argues that the granting of rights through mandatory wills to adopted children determined by KHI is carried out with an adaptive approach, so that the values of customary law are partly conformed to Islamic law (Fahimah, 2018, p. 14), to be more specific to transfer of shift of financial obligation from the biological parents to the adoptive parents regarding the basic living expenses based on court decisions as stated in letter (h) of Article 171, concerning General Provisions for Inheritance (Ali, 1997, p. 137).

Yahya Harahap puts it that according to the provisions of Islamic law, adopted children cannot receive inheritance from their adoptive parents, and vice versa. This kind of legal provision, among others, is implied in God's Word: 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. 33:4).

The above verse denies the *nasab* relationship between adopted children and adoptive parents, as is practiced before Islam. Accordingly, an adopted child and his/her adoptive parents are not entitled to inherit from each other. However, the juridical fact in customary law prevailing among Indonesians (Bachelor & Suratman, 2017, p. 288) stated that adopted children have the same rights and positions as biological children in various respects, including in terms of inheritance (Harahap, 1993, p. 93). Furthermore, Yahya Harahap concludes that the legal basis used in KHI when determining the existence of a mandatory will for adopted children was to compromise between Islamic law and customary law.

Considering the above arguments, Abdullah Kelip states that Indonesian ulama had carried out an *ijtihād* in compiling KHI, by modifying the rights and obligations between adopted children and adoptive parents through mandatory wills. They observed so to keep the inheritance law applied in Indonesia in line with the sense of justice and legal awareness community (Kelip, 1993, p. 138).

The conformity of Islamic law with the value of justice, as stated above, is referred to as *siyāsah al-shar'iyyah* (Coulson, 1964, p. 68). However, the legal drafters of the KHI use the *siyāsah* quite in quite a strict way by giving a mandatory will to an adopted child a maximum of 1/3 if he/she does not receive an ordinary will. This is a strategic way to ensure that the adopted child enjoy their right in the estate of their adoptive parents, who have shared love, help, feelings, and protect each other (Sularno, 1997, p. 73). The authorities and relevant stakeholders seem to realize that the strict rules of *farā'iḍ* are not the area of *ijtihād* for it is eternal and *ta'abbudī*. In this exact point, the *siyāsah* should help create good conditions for the enactment of the shari'a. According to Al-Yasa Abu Bakr, the ulama build this renewal upon the principle of *al-maṣāliḥ al-mursalah*.

2. *'Urf* in Substitute Heirs

In the books of *fiqh* the heirs or people who are entitled to receiving the inheritance has been regulated directly by Allah by *ijbāriyyah* (forcing). This means that there is no Muslim individuals who have the right to determine or appoint who will later become his/her heirs. The heirs can be divided into several categories, namely, *furūḍ* heirs, *aṣābah* heirs, and *żawul arḥām*. All of them have their own 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), because his uncle had a stronger relationship than him to his late grandfather.

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

The same is true in Muslim communities in various regions and other nations (Mujib, 2019, pp. 77–80). Meanwhile, letting orphaned grandchildren not get the rights as heirs of their grandfathers is not appropriate—not to say 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 the books of *fiqh* (Putri, 2020, p. 18).

Indonesian government through KHI establish a legal institution called substitute heirs. Provisions regarding the issue is contained in Article 185 paragraph 1 of the KHI. The article states that an heir who dies before the deceased can be replaced by his/her child, except for those mentioned in article 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.

The principle of replacement as contained in article 185, has never existed in any literature of the four schools of *fiqh* and other classical *fiqh* schools (Usman & Somawinata, 1997, p. 199). In fact the classical *fiqh* books relate that scholars agree that grandchildren whose parents have died first are veiled by their father's brothers (Syarifuddin, 1999, p. 34). This is in accordance 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, tribal elders are obligated to take care of their destitute tribal members, including the orphaned nephews. Accordingly, the nephew did not receive inheritance rights from his grandfather (Mas'adi, 1997, p. 179).

This substitute heir's institution was first popularized by Hazairin (w. 1975). According to him, grandchildren can occupy the position of heir as a substitute of his

father who died before. Therefore, he is no longer veiled by his uncle because his position is already at the same level as his uncle(s). Hazairin seems to have adopted this substitute inheritance concept from customary law which recognizes substitute heirs as people whose relationship with the deceased is interspersed with other heirs who passed away before the deceased. A great example for this is the relationship between grandfather and grandchildren that is interspersed with children. Grandchildren thus will become substitute heirs if the child dies before the grandfather (Hazairin, 1982, p. 22). In principle, the substitute (the grandchild in this example) takes over the shares that should be the rights of the person he/she replaces (the child). Hence, the substitute heir does not inherit as and because of him-/herself; but rather as the substitute that takes over the rights of another heir connecting him/her to the deceased (Abubakar, 1998, p. 51).

Hazairin comes this opinion through reinterpreting the issue of "*mawali*" as regulated by Q. 4:33. This opinion is completely different from the classical interpretations, be it the Ahl al-Sunnah or the Shi'ites. According to their (classical ulama) interpretation, a son veils the grandson and granddaughter, whether the child is the father of the grandchildren or not. On that basis, a grandson whose father had died earlier, even though he (the father) was very instrumental to the life of the grandfather, is still not entitled to receive a share because of a single surviving son of the grandfather, even though the surviving son has never done any service to the grandfather.

On this basis, one can conclude that according to Indonesian Islamic inheritance law, as contained in the KHI, a grandson can replace his father's position when his father passed away before the deceased. Such legal provisions are not found in *fiqh* books, especially the classical ones (Rofam, 2018, p. 17). In this exact case, the issue of the inheritance of orphaned grandchildren, '*urf* has contributed to make a shift from the provisions related by the classical books of *fiqh* to the new provisions stipulated by the law.

3. '*Urf* in *Żawul Arḥām*

Żawul arḥām is a group of heirs outside of the category of *aṣābah* and *ahlul furūḍ*. They become heirs because they have biological relationship with the deceased. Yet the relationship is not as strong or close as the relationship of the deceased and the *aṣābah* and/or *ahlul furūḍ*. *Żawul arḥām* consists of two words in Arabic; *żawu* and *arḥām*. The term *żawul arḥām* originally had a broad meaning that includes all family structures that have kinship relations with the deceased. This breadth comes from the

meaning of *arḥām* mentioned in Q. 8:75 "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 have 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 *aṣḥāb al-furūḍ* is also excluded from the *'aṣābah* category (Sabiq, 1972, p. 446). The *żawul arḥām* thus includes: 1) son-side granddaughter (*bint al-ibn*); 2) daughter-side grandson (*ibn al-bint*); 3) daughter of full brother; 4) daughter of paternal (consanguine) brother or her descendant. 5) son of full sister or his descendant. 6) son of full sister or his descendant. 7) son of paternal (consanguine) sister or his descendant. 8) maternal grandfather and up the line (Usman & Somawinata, 1997, p. 115). However, there are ulama who argue that *żawul arḥām* does not receive any inheritance at all; Zaid bin Thābit, Ibn 'Abbās, Sa'īd bin Musayyab, Sufyān al-Thaurī, Imām Mālik, Imam Shafi'i and Ibn Ḥazm (Musa, 1959, p. 277).

Imam Malik and Imam Shafi'i are of the opinion that there is no inheritance right for *żawul arḥām*. The inheritance for which there is no recipient, be it from the *aṣḥāb al-furūḍ* and *'aṣābah*, were given to Baitul Mal. This opinion is also the opinion of Abū Bakr, 'Umar, 'Uthmān, Zaid, al-Zuhrī, Auza'ī, and Daud (Sabiq, 1972, p. 446). 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 (Sabiq, 1972, p. 446).

The articles regulating inheritance do not mention the existence neither defined share *żawul arḥām* will receive. Article 174 of the KHI states (1) the groups of heirs consist of a. according to blood relations, the male group consists of father, son, brother, uncle, and grandfather; the women group consists of mother, daughter, sister and grandmother; (1) according to the marital relationship consists of a widower or a widow; (2) if all the heirs are present, only children, father, mother, widow or widower are entitled to inherit. If the deceased does not leave heirs at all, or if 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 public good, as explained in Article 191.

If we stick to the opinions of *fiqh* scholars, as stated earlier, it appears that KHI tends to follow the opinion of the majority of *fiqh* scholars. 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 the KHI might

consider today's reality in which the *żawul arḥām* rarely exists or, if it does, does not in line with the basic idea mentioned in classical Islamic inheritance law (Usman & Somawinata, 1997, p. 198).

Suparman Usman considers that KHI seems to be more focused on problems occuring in reality. Meanwhile, *żawul arḥām* rarely raises problem. Thus, there is no need for renewing legal provisions on the issue. In addition, according to Usman, the basic idea of inheritance is to give rights to the closest heirs. Thus, the current public '*urf* shows that the existence of *żawul arḥām* is very rare and to include it as part of the KHI is no longer relevant (Harisudin, 2016, p. 75).

4. '*Urf* in *Radd* System

Radd can be interpreted by the assets remaining in the calculation, when the heirs could not exhaust the estate, and it is returned to the *żawul furūḍ nasab* (excluding husband/wife) in accordance with the share of each (al-Zuhayli, 2011, p. 435). The *radd* occurs in the distribution of the inheritance when the estate remains even after the heirs of *żawul furūḍ* have obtained their respective rights and shares (Rahman, 1975, p. 423). The *radd* method is carried out to redistribute the remaining assets to the *żawul furūḍ* heirs proportionally, that is according to the share assigned for each before the *radd* is carried out. This *radd* division is done by reducing the base number so as to be equal to the number of shares assigned for *żawul furūḍ*. The goal of applying this method is to divide the estate evenly between the heirs in such ways that there will be no remainder from the division (Rahman, 1975, p. 423).

In the classical *fiqh* literature, *radd* is one of the heatedly disputed issues. To some scholars, there is no such thing as *radd*, for there is no *naṣṣ* for it. Among scholars of this opinion are Zayd bin Thābit, Imām Mālik and Imām Shāfi'i. They stated that the rest of the assets that had been divided were given to the Baitul Mal. To make it more sound, they use Q. 4:13-14 as basic legitimation, that Allah has determined the share for each of *żawul furūḍ* in such a definite way (*qaṭ'ī*) that no one may add or subtract. Even adding a share for them means 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 sent down; Indeed, Allah has given rights to everyone who is entitled to receive and there is no will for heirs (al-Nasā'ī).

On the other camps, the majority of scholars tend to justify the existence of this *radd*. However, they disagree about individuals who could receive the residue or the

rest of the estate. Most of them 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 (Abubakar, 2012, p. 231). Another basis for this argument 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 because people who are related by blood have more rights than foreigners according to the Qur'an, there is no doubt that the person with closest blood relation to the deceased is neither husband nor wife (Syarifuddin, 2004, pp. 106–107). According to Fathurrahman, 'Uthmān bin 'Affān is the only one who did not give an exception to any of the heirs for the *radd* case. 'Uthmān did not mention the Q. 8:75 for he thinks there is no difference between a husband or wife and other heirs (Rahman, 1975, p. 426).

In the KHI the provisions regarding *radd* correspond 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 is no '*aṣābah* heirs, the KHI applies *radd*, as regulated in Article 193. However, the KHI does not set any criteria or limitation the *ahl al-furūḍ* for receiving the *radd*. In this exact point, it clearly differs from the majority of classical *fiqh* scholars. As stated above, it was only 'Uthmān bin 'Affān who holds the opinion that *radd* can be given to all *żawul furūḍ*, including the wife or husband (Murlisa, 2015, p. 284). The KHI articles indicate a tendency to concern the '*urf* of the Indonesian Muslims regarding equality of rights, especially between fellow heirs.

5. *'Urf* in the Inheritance of the *Walad*

Regarding the meaning of the term walad words, one may consult Article 182 of the KHI. According Suparman Usman and Yusuf Somawinata, the KHI takes the opinion of Ibn 'Abbās to interpret the word *walad* in Q. 4:176, that the word includes boys and girls. Therefore, as long as there are children, of any gender, the inheritance rights of those who are related by blood to the deceased, except parents, husband or wife, are excluded (*ḥijāb*) (Usman & Somawinata, 1997, p. 200).

Amir Syarifuddin, a contemporary Islamic jurist, has the same view as Ibn 'Abbās that there is actually not a strong enough reason to limit the meaning of *walad* to only boys, not girls. According to him, the *jumhūr* has a bias in interpreting Q.4:176 (the kalāla verse) (al-Asfahani, p. 455) as only referring only to boys, not girls. With such a view, many scholars are of the opinion that *kalāla* is a person who passes away

without leaving surviving father and son (al-Shafi'i, 1983, p. 416). They seem, Amir argues, to be influenced by Arabic '*urf* in interpreting the word. According to Arabic rules, the word *walad* is defined as a boy, not a girl. Whereas the word walad in its plural form, *aulād*, means children, covering boys and girls. Arabic however has special word for boys (*ibn*) and girls (*bint*). This is how the essential use of the word *walad* looks like. The validity of the word for boys and girls is also proven by the absence of the *muannath* (female) form of the word (Syarifuddin, 1999, p. 121). According to Amir, this *ḥaqīqī* (true) way of interpreting the word *walad* is valid legally (*shar'i*). Within this frame, whenever one finds the word *walad*, one can understand it as referring to both a boy and a girl. This applies in a number of verses, especially regarding inheritance. There are at least eight times the word *walad* and one time the word *aulād* appear in inheritance-related verses. In all these appearances, the word means girls and boys (Syarifuddin, 1999, p. 121).

Taking the above opinions of Ibn 'Abbās and Amir Syarifuddin into account, KHI seems to have a strong legal basis for not discriminating boys and girls in the case of *kalāla*, as stated in Article 182. In fact, such legal provisions are very relevant to today's reality, for modern society no longer discriminates between men and women in any aspects 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. Thus, there is a tendency for Amir Syarifuddin to consider '*urf* in the opinion he put forward; in this case the '*urf* that applies in modern society.

6. '*Urf* in the Inheritance of Joint Property

Classical *fiqh* books do not recognize the joint property of husband and wife. Even though the two of them are bound by marital bonds, the property remains belonging to the property of each. Accordingly, if one of them dies, his or her estate is subject to devolution and can be divided among the heirs in accordance with the provisions. It however could not be applied in the exact same way in Indonesia. According to the prevailing '*urf*, marriage bounds husband and wife in the ownership of property.

Articles 35, 36, and 37 (Chapter VII) of Law number 1 of 1974 explain regulations about the joint property. Article 35 paragraph 1 (one) states that all assets obtained during marriage become joint property. Whereas paragraph 2 (two) states that the innate property of each husband and wife and the property obtained by each as a

gift or inheritance is under the supervision of each as long as the parties do not specify otherwise.

In regard to inheritance of joint assets, the KHI regulates in Article 171 (e) that if one of the parties passes away, the first thing the heirs must do is dividing the property into two—the half of which then becomes the subject for inheritance, or sorting the wife's property out from that of the husband. It is due to the principle, as explained by KHI, that the subject of inheritance is only the property of the deceased and his/her part of joint property.

The fundamental basis for determining the joint property and its share is none other than the prevailing '*urf* in Indonesians. They have been living the '*urf* saying that there is no separation of property between husband and wife in domestic life. Their income simply becomes the family property. Living this way, the marriage contract bounds together a husband and wife and further makes them partner in fostering a household. Hence, any property or income each of them has earned will be considered as joint property, regardless of the amount or size it may be. The same system also applies in the spending of the joint property. There '*urf* would not question whose money should be spent on.

Conclusion

Having all the above discussions on the table, I argue that '*urf* is one of the sources of law that is quite important in the renewal of Islamic law. In Indonesian context, '*urf* has a very large contribution. Most of the reforms in inheritance law applying in Indonesia are determined by the '*urf*. The application of '*urf* to the provisions regarding the inheritance of adopted children and their adoptive parents, substitute heirs, *zawul arḥām*, *walad*, *radd*, and inheritance of joint assets—all of which are determined based on '*urf*—proves the argument.

References

Abdurrahman (1995) *Kompilasi Hukum Islam Di Indonesia*. Jakarta: Akademi Pressindo.

Abubakar, A. (1998) *Ahli Waris Sepertalian Darah; Kajian Perbandingan Terhadap Penalaran Hazairin Dan Penalaran Fiqh Mazhab*. Jakarta: INIS.

Abubakar, A.-Y. (1996) 'Wasiat Wajibah Dan Anak Angkat', *Mimbar Hukum*, 96.

Abubakar, A.-Y. (2012) *Rekonstruksi Fikih Kewarisan: Reposisi Hak Kewarisan*. Banda Aceh: LKAS.

Ali, M.D. (1997) *Hukum Islam Dan Peradilan Agama (Kumpulan Tulisan)*. Jakarta: Rajawali Press.

Anderson, J.N.D. (1994) *Islamic Law In Modern World, Hukum Islam Di Dunia Modern*. Translated By M. Hussein. Yogyakarta: PT. Tiara Wacana Yogya.

Aripin, M. (2016) 'Eksistensi Urf Dalam Kompilasi Hukum Islam', *Al-Maqasid*, 2(1), 210–215.

Al-Asfahani, R. (-) *Mu'jam Mufradat Alfazh Al-Quran*. Beirut: Dar Al-Fikr.

Al-Syafi'i, M. Bin I. (1983) *Al-Um*. Beirut: Dar Al-Fikr (V).

Al-Jauziyah, I.Q. (1973) *I'lam Al-Muwaqqi'in 'An Rabbi Al-'Alamin*. Beirut: Dar Al-Jalil (III).

Al-Zarqa, M. (1968) *Al-Madkhal' Ala Al-Fiqh Al-'Am*. Beirut: Dar Al-Fikr.

Al-Zuhayli, W. (2011) *Al-Fiqh Al-Islami Wa Adillatuh: Hak-Hak Anak, Wasiat, Wakaf, Warisan, Terj. Abdul Hayyie Al-Kattani, dkk*. Jakarta: Gema Insani.

Ash-Shiddieqy, H. (1966) *Syari'at Islam Menjawab Tantangan Zaman*. Jakarta: Bulan Bintang.

Azizi, S.A. & Ahmadii, R. (2016) 'Peranan Maqasid Shariah Dalam Falsafah Epistemologi Ijtihad Semasa', *Al-Qanatir International Journal Of Islamic Studies*, 4(2), 17–20.

Coulson, N.J. (1964) *Conflics And Tentions In Islamic Yurisprudence*. Edinburg: Edinburg University Press.

Coulson, N.J. (2001) *Konflik Dalam Yurisprudensi Islam, Terj. H. Fuad*. Yogjakarta: Navilla.

Coulson, N.J. (-) *Conflicts And Tansions In Islamic Yurisprudence*. Chicago: The Unversity Of Chicago Press.

Fahimah, I. (2018) 'Akomodasi Budaya Lokal (`Urf) Dalam Pemahaman Fikih Ulama Mujtahidin', *Mizani: Wacana Hukum, Ekonomi Dan Keagamaan*, 5(1), 9–15.

Hakim, N. (2017) 'Konflik Antara Al-'Urf (Hukum Adat) Dan Hukum Islam Di Indonesia', *Jurnal Edutech*, 3(2), 54–61.

Hamzawi, M.A. (2018) ''Urf Dalam Kompilasi Hukum Islam Indonesia', *Inovatif*, 4(1), 1–10.

Harahab, M.Y. (1993) *Materi Kompilasi Hukum Islam*. Yogyakarta: UII Press.

Harisudin, M.N. (2016) ''Urf Sebagai Sumber Hukum Islam (Fiqh) Nusantara', *Al-Fikr*, 20(1), 70–75.

Hasan, A. & Khairuddin (2021) ‘Pandangan ‘Urf Terhadap Uang Pekhanjangan Dalam Perkawinan Melangkahi Kakak Kandung’, *Istinbath Jurnal Hukum Dan Ekonomi Islam*, 20(1), 176–185.

Hazairin (1982) *Hukum Kewarisan Bilateral Menurut Al-Quran Dan Hadis*. Jakarta: Tintamas.

Kelip, A. (1993) *Beberapa Catatan Efektifitas Hukum Islam, Dalam Mahfud Md, Dkk, Peradilan Agama Dan KHI Dalam Tata Hukum Indonesia*. Yogyakarta: UII Press.

Khayyat, A.A. (1977) *Nazhariyah Al-‘Urf*. Amman: Maktabah Al-Aqsa.

Kudhori, M. (2018) ‘Kontroversi Hukum Cadar Dalam Perspektif Dialektika Syariat Dan Adat’, *Ijtihad, Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 18(1), 33–56. doi: 10.18326/Ijtihad.V18i1.

Maimun, Ach. (2017) ‘Memperkuat ’Urf Dalam Pengembangan Hukum Islam’, *Al-Ihkam*, 12(1), 25–37.

Mas’adi, G.A. (1997) *Pemikiran Fazlur Rahman Tentang Metodologi Pembaharuan Hukum Islam*. Jakarta: PT. Grafindo Persada.

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

Mujib, L.S.B. (2019) ‘Revitalisasi Hukum Waris Islam Dalam Penyelesaian Kasus Sengketa Tanah Waris Pada Masyarakat Sasak’, *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 19(1), 67–87. doi: 10.18326/Ijtihad.V19i1.

Murlisa, L. (2015) ‘Ahli Waris Penerima Radd Menurut Kompilasi Hukum Islam Dan Relevansinya Dengan Sosial Kemasyarakatan’, *Jurnal Islam Futura*, 14(2), 284.

Musa, M.Y. (1959) *Al-Tirkah Wa Al-Mirats Fi Al-Islam*. Mesir: Daar Al-Kitab Al-Araby.

Nisa, C.U., Disemadi, H.S. & Purwanti, A. (2020) ‘Adat Kejawen Ngalor-Ngetan Sebagai Alasan Adhalnya Wali Ditinjau Dari Perspektif ‘Urf Dalam Hukum Islam’, *Jurnal Magister Hukum Udayana*, 9(1), 153–160.

Putri, D. (2020) ‘Konsep ‘Urf Sebagai Sumber Hukum Dalam Islam’, *El-Mashlahah*, 10(2), 14–18.

Rahman, F. (1975) *Ilmu Waris*. Bandung: PT. Al-Ma’arif.

Ramli, M.A. (2006) ‘Instrumen ’Urf Dan Adat Melayu Sebagai Asas Penetapan Hukum Semasa Di Malaysia’, *Jurnal Pengajian Melayu*, 253–256.

Rizal, F. (2019) 'Penerapan 'Urf Sebagai Metode Dan Sumber Hukum Ekonomi Islam', *Al-Manhaj: Jurnal Hukum Dan Pranata Sosial Islam*, 1(2), 155–176.

Rofam, G.N.K.M. (2018) 'Penerapan Konsep 'Urf Dalam Kitab Sabilal Muhtadin (Kajian Terhadap Pemikiran Muhammad Arsyad Al-Banjari)', *Al-Iqtishadiyah Jurnal Ekonomi Syariah Dan Hukum Ekonomi Syariah*, Iv(1), 1–19.Sabiq, S. (1972) *Fiqh Al-Sunnah*. Semarang: Toha Putera.

Sarjana, S.A. & Suratman, I.K. (2017) 'Konsep 'Urf Dalam Penetapan Hukum Islam', *Jurnal Tsaqafah*, 13(2), 279–283. doi:https://Dx.Org/10.21111/Tsaqafah.V13i2.1509.

Sibawaihi, M. & Baharun, M. (2017) 'Adat Pernikahan Melayu Jambi Perspektif 'Urf Dalam Ilmu Ushul Fiqh', *Istidlal*, 1(2), 167–173.

Siraj, M. (1993) *Hukum Keluarga Di Mesir Dan Pakistan, Dalam Johannes Dan Syamsul Anwar, Islam Negara Dan Hukum*. Jakarta: INIS.

Sirajuddin M (2015) 'Eksistensi 'Urf Sebagai Sumber Pelembagaan Hukum Nasional', *Madania*, 19(1), 15–18.

Sularno (1997) 'Siyasah Syar'iyah Dalam KHI (Tela'ah Terhadap Hukum Kewarisan)', *Jurnal Hukum Islam Al-Mawarid*, 73.

Syarifuddin, A. (1999) *Permasalahan Pelaksanaan Faraid*. Padang: IAIN Imam Bonjol Press.

Syarifuddin, A. (1999) *Ushul Fiqh*. 1st Edn. Jakarta: Logos Wacana Ilmu (2).

Syarifuddin, A. (2004) *Hukum Kewarisan Islam*. Jakarta: Prenada Media.

Usman, S. & Somawinata, Y. (1997) *Fiqh Mawaris Hukum Kewarisan Islam*. Jakarta: Gaya Media Pratama.

Yenti, E. *Et Al*. (2020) 'A Set Of Prayer Outfits As A Mahar? Discrimination Against Women In The 'urf Reality Of The Archipelago's Fiqh', *Al-Risalah*, 20(1), 19.

The Contribution of ‘Urf to the Reform of Islamic Inheritance Law in Indonesia

ORIGINALITY REPORT

11%	5%	10%	2%
SIMILARITY INDEX	INTERNET SOURCES	PUBLICATIONS	STUDENT PAPERS

PRIMARY SOURCES

1	Ismail -. "Wills of ‘Wajibah’ and Renewal Thoughts of Islamic Inheritance Law in Indonesia", INNOVATIO: Journal for Religious Innovation Studies, 2021 Publication	6%
2	Aalia Gulzar, Faiza Safdar. "Experiences of Mothers Who Relinquished Their Child for Adoption in Pakistan: A Qualitative Study", Culture, Medicine, and Psychiatry, 2022 Publication	1%
3	ejurnal.pps.ung.ac.id Internet Source	1%
4	ejournal.kopertais4.or.id Internet Source	1%
5	Submitted to Universitas Brawijaya Student Paper	<1%
6	jurnal.radenfatah.ac.id Internet Source	<1%

7	Submitted to Universitas 17 Agustus 1945 Semarang Student Paper	<1 %
8	Abd. Rasyid Sidiq, Rusli Rusli, Syahabuddin Syahabuddin. "Gender Analysis of Marriage Guardians in the Compilation of Islamic Law", INTERNATIONAL JOURNAL OF CONTEMPORARY ISLAMIC LAW AND SOCIETY, 2021 Publication	<1 %
9	www.slideshare.net Internet Source	<1 %
10	Submitted to Universitas Islam Indonesia Student Paper	<1 %
11	B. Busyro, Hanif Aidhil Alwana, I. Ismail. "Publikasi Mimpi Bernuansa Politis di Tengah Antisipasi Radikalisme dalam Kajian Sadd al-Dzari`ah", Al-Istinbath : Jurnal Hukum Islam, 2021 Publication	<1 %
12	"Women and Property Rights in Indonesian Islamic Legal Contexts", Brill, 2019 Publication	<1 %
13	Dariusch Atighetchi. "Islamic Bioethics: Problems and Perspectives", Springer Science and Business Media LLC, 2007 Publication	<1 %

14	docobook.com Internet Source	<1%
15	ejournal.iainbengkulu.ac.id Internet Source	<1%
16	www.scilit.net Internet Source	<1%
17	Moh. Thariq Godal, Syarif Hasyim, Musyahidah Musyahidah. "Method of Sharing Marriage Properties in the Religious Court, Palu", INTERNATIONAL JOURNAL OF CONTEMPORARY ISLAMIC LAW AND SOCIETY, 2020 Publication	<1%
18	Zakiul Fuady Muhammad Daud, Raihanah Azahari. " The will: alternative wealth transition for individuals who are prevented from attaining their inheritance ", International Journal of Ethics and Systems, 2019 Publication	<1%

Exclude quotes	On	Exclude matches	Off
Exclude bibliography	On		