THE DEBATE ON MUSLIM FAMILY LAW REFORMS IN INDONESIA:
The Case of 'Representation of Heirs and Obligatory Bequest'

Euis Nurlaelawati

Lecturer of UIN Syarif Hidayatullah Jakarta and a Ph.D. student at Leiden University

ملخص

إن الحاجة إلى تجديد دستور الأسرة الإسلامية في إندونيسيا بدأت تلحّ منذ الأربعينات ولكن التجديد لم يتحقق إلا بعد أن يتم جمع الشريعة الإسلامية عن طريق القرار الجمهوري في عام ١٩٩١. وقد حظي هذا القرارالذي هو نتيجة التعاون بين وزارة الشؤون الدينية وبين المحكمة العليا بترحيب جيد من قِبل أوساط المسلمين حيث اعتبروه تقدما كبيرا في تاريخ تطور الشريعة الإسلاميَة في إندونيسيا وأنه ثمرة الاجتهاد الجماعي من العلماء الإندونيسيين. ومع ذلك، فقد أثار بعض النقط منه النقاش لبعض العلماء المسلمين الإندونيسيين وهو ما يخص بالحل الوسط بين العرف المحلي والشريعة الإسلامية فيما يتعلق بالولد المتبنى حيث إن العرف يبيح أن يتوارث أحد مع ولده المتبنى بينما الشريعة الإسلامية تمنع ذلك. تحاول هذه المقالة مناقشة هذه المسألة والبحث عن نقطة الالتقاء منها.

Abstrak

Kebutuhan terhadap pembaharuan hukum keluarga Islam di Indonesia sudah mulai diartikulasikan sejak sekitar tahun 1940-an. Namun, realisasi dari kebutuhan tersebut baru tercapai ketika Kompilasi Hukum Islam melalui Instruksi Presiden disahkan pada tahun 1991. Hasil dari kerjasama antara Departemen Agama dan Mahkamah Agung yang kemudian diklaim sebagai ijtihad kolektif 'ulama Indonesia itu disambut dengan baik oleh berbagai kalangan dan dianggap sebagai suatu langkah besar dalam sejarah perkembangan hukum Islam di Indonesia. Walaupun demikian, beberapa

aturan yang termuat dalam kompilasi masih dipertanyakan oleh sejumlah tokoh Islam. Aturan yang dipakai untuk menengahi aturan atau adat dan hukum Islam mengenai status anak angkat dalam warisan, di mana adat menganggap anak angkat dan juga orangtua angkat sebagai anak dan orang tua asli, sehingga mereka berhak saling mewarisi, sementara hukum Islam menentang praktek kewarisan tersebut, juga diperdebatkan. Aturan ini dianggap berlebihan dan tidak mempunyai dasar yang kuat dalam teks al-Qur'an dan telah menyimpang dari prinsip kewarisan Islam. Artikel ini akan mencoba mendiskusikan perdebatan kedua aturan tersebut dan mencari titik masalah dari perdebatan tersebut.

Keywords: islamic law, fiqh, compilation, inheritance, tradition.

A. Introduction

Muslim family law (*al-akhwāl al-shakhsiyya*) constitutes the most widely applied element of Islamic law in the Muslim world today. It becomes the sole area whose doctrines are still preserved among Muslim communities.[1] A number of Muslim countries sought to codify Islamic rules pertaining family law to be employed as a formal law among their Muslim citizens. Indonesia, the most populous Muslim country in the world, for an example, compiles Islamic rules scattered in various classical texts to manage Muslim familial affairs into what is called *Kompilasi Hukum Islam di Indonesia* (the Compilation of Islamic Law of Indonesia). The project of making of the Compilation was jointly commissioned by the Supreme Court and the Department of Religious Affairs and involved a number of Muslim leaders as well as Muslim scholars.[2]

The Compilation constitutes a substantive law of the Islamic courts in Indonesia. The main goal of the making of the Compilation was to reach a uniformity of laws to which the judges of the Islamic courts refer in solving cases put forward to them. It consists of three chapters,

[1] See Ziba Mir-Hosseini, *Marriage on Trial, A Study of Islamic Family Law: Iran and Morocco Compared,* (London: I.B. Touris & Co Ltd, 1993), p. 10.

[2] See Abdurrahman, *Kompilasi Hukum Islam,* (Jakarta: CV Akademika Presindo, 1992). pp. 39-41.

i.e., marriage, inheritance and endowment, in which novel Islamic family rules are proposed to meet both particular social needs of Indonesia and universal social current needs felt by all Muslim countries.

Nonetheless, despite the fact that the Compilation was made to meet the changing and current needs and was consulted to a number of *'ulama*, it has not been simply accepted by all groups of the Muslim community. Some rules introduced in the Compilation are highly debated among Indonesian Muslims. The regulations of representation of heirs to deal with the problem of orphan grandchildren and of the obligatory bequest to solve the problem of adoptive persons in regard with inheritance are the best examples.

The debate might result from the fact that rules of inheritance have been clearly described in the Qur'an. Given this fact, reforms made on this issue often arose debate. The reform proposed by Munawir Syadzali, the former Minister of Religious Affairs, in regard to equating the share of male and female was in fact highly debated among Indonesian Muslim scholars. It was accused of challenging the clear (*sārih*) texts of the Qur'an.[3] The representation of heirs, which is popularly called *'plaatsvervulling'*, was for a long time acknowledged and practiced among Indonesian Muslims. The practice of inheriting to each other among adoptive parties was likewise popular among Indonesian Muslims, particularly in Java. Both rules were principally adopted from the *adat* law. Nonetheless, although *adat* can be utilized to legitimize legal local practices to be Islamic, its acceptance as one of sources of Islamic law is not without any consideration.

I suggest that it is the lack of Islamic rationale that brings both rules mentioned above to the arena of debate in the discourse of Muslim family law reforms in Indonesia. The principle of representation of heirs was not presented in the Qur'an. It was neither dealt with in the classical *fiqh* texts. The application of the principle of representation of heirs to solve the problem of grandchildren is then indicted to be in

[3] See Iqbal Abdurrauf Saimima, *Polemik Reaktualisasi Ajaran Islam*, (Jakarta: Pustaka Panjimas, 1988), pp. 1-34.

contradiction with both Qur'anic and hadith texts. Likewise, although making a bequest is recommended in the Qur'an, the introduction of the institution of obligatory bequest to grant adoptive parties shares from each other's estates has not been made in the classical *fiqh* texts, and is thus claimed to oppose the principle that adoption cannot shape practice of inheritance among adoptive parties.

This paper examines the application of these two rules in the Compilation of Islamic Law. It will examine the opinions of those who supported and those who opposed the application of both rules. The description of debate is of importance as to demonstrate that the application of both rules has not been well accepted by all parties of Muslim community in Indonesia. It also examines the way of employing the methodology in applying the two rules. It then argues that the methodological approach in applying the two rules has not consistently employed a systematic Islamic rationale, and demonstrates that, despite that it was claimed to be a product of collective *ijtihād* of the Indonesian *'ulama*, the Compilation has not been fully regarded as an ultimate Muslim family law of Indonesia.

B. Representation of Heirs

According to the classical system of inheritance, the access of orphaned grandchildren to grandparents' estates is blocked by their uncles. All schools of Islamic law agree that an orphaned grandchild has no right to share from his grandparent's estate if there are other living sons. Following this rule, Muslim countries denied the predeceased heirs and their heirs or generations any share of inheritance as long as there were other living heirs. This rule was believed to have created problems for Muslims. Lucy Carroll, as cited by Rubya Mehdi, explains:

> In a tribal society where the surviving son took over responsibility for the children of his deceased brother in the extended family group, the traditional rules of succession may not have occasioned much hardship. But in a society where nuclear families are more common, the

total exclusion of one line of the deceased's descendants appears both unjust and unjustified.[4]

To deal with this problem, Muslims have proposed two solutions, i.e., obligatory bequest and system of inheritance by right or representation of heirs. The former has been adopted by Middle East countries and the latter by Pakistan.[5] Indonesia through the Compilation has also attempted to solve such a problem by adopting the system of representation of heirs.

Accordingly, after the Compilation took effect, the grandchildren who had been excluded from the estate of their grandparents have been granted shares of inheritance. The article 185 regulates this grant and states that the position in inheritance of the heirs that died before the '*pewaris*' or 'inheritor' could be replaced by his heirs or children.[6] From this article it is clear that regardless of their sexes and the sexes of their linking heirs grandchildren could get shares from the estate of their grandparents.

Nevertheless, as the Compilation reserves the established ratio of 2:1 of shares between male and female, it has been assumed that the practice of the concept of representation has brought about some problems among the heirs. The following example will show how the concept works and how it brings to the assumption that it works unjustly for some certain heirs.

(A) died leaving behind one daughter (B) and granddaughter (D) from his son (C). According to classical system of inheritance D get 1/6 of shares through his position as granddaughter and is not blocked by

---

[4] Rubya Mehdi, *The Islamization of the Law in Pakistan*, (United Kingdom: Curzon Press, 1994), p. 190.

[5] Rubya Mehdi records that the Pakistani solution, i.e., inheritance by right, was considered to be the more radical. The traditionalist *'ulama* opposed the system on the grounds that it ravages the spirit and the structure of the Islamic law of inheritance. They were however in accord with the opinion that the problem of orphaned grandchild should be disentangled and maintained that obligatory bequest has more valid legal base in the scripture. See Rubya Mehdi, *The Islamization of the Law in Pakistan*, p. 190.

[6] See *Kompilasi Hukum Islam*, Art. 185 (1).

aunt as it is only uncles that could block grandchildren, and B gets 1/2. According to the Compilation, D gets 2/3, the portion that should be accepted by his father (C) provided he is still alive, and B gets 1/3 with retaining the comparison of 2: 1 between male and female. From this kind of distribution, injustice emerges for the daughter (B) as she gets less than D, the grandchild, who is considered to have further link to A than the daughter.

The Compilation realized this valuation of injustice and therefore added a further rule, which is put in point 2 of article 185. This point administers that the portion of the substitutive heirs must not succeed the portion of the other heirs whose positions are equal with the substituted heirs.[7] Following this rule, the portion of D is thus not 2/3 but 1/3, the same portion as B. The remaining estate, which is 1/3, is distributed to both B and D. Thus, each of them gets 1/2. With this additional rule, the Compilation sought to overcome the problem of injustice resulting from the first rule among daughters.

The additional rule that limits the share of the substitutive heirs is viewed by Muslim scholars and Muslim judges differently. Within the groups who agreed the application of the system of representation of heirs two opinions have come up. The *first* is the opinion that explains that the limitation is another kind of reformation on the issue. The group that holds this opinion states that the limitation slipped in the Compilation was based on the assumption that it is valued unjust if an aunt is given less than her nephews. So, the limitation is to anticipate the emergence of injustice among the other heirs, namely, aunts, in this case. Some Muslim judges in a number of the Islamic courts considered that the limited portion of a representative heir is still bigger than nothing or even than that he or she would receive under his or her original position.

> With such kind of rules, it is more than enough for the grandchildren, who are according to the classical Islamic rule of inheritance basically excluded from the share, to receive the same as or less portion than that

[7] See *Kompilasi Hukum Islam*, Art. 185 (2).

> of their aunts. Compared to the portion that they could get on their own position as grandchildren, this portion is still bigger.[8]

The *second* is the opinion that holds that the limitation is a deviation from the principle of representation. The proponents of this opinion said that the Compilation should be consistent with the rule of representation. It thus should give all the portions that would be received by the predeceased heirs to their representatives. They argued that representation means taking over other position. Accordingly, substitutive heirs should get what the substituted would get without any limitation.

> I am in agreement with the application of representation of heirs to deal with the problem of grandchildren, as it can meet the principle of justice and equality. The system of the 'representation of heirs' is more appropriate than the concept of obligatory bequest (*wasiat wajiba*) to apply in this issue, as it is according to me only proper to be applied to those who are not having genetic relation or *nasab*, meanwhile grandchildren are still the generations of the deceased, i.e., grandparents. However, the limitation made in the following point of article 185 is to me a deviation or inconsistence of the application of the whole concept. If we want to apply the concept of representation we should be consistent by giving the whole portion of the represented heirs to their representatives.[9]

In this regard, Yahya Harahap, a former supreme judge, maintained that the application of representation of heirs was positively grounded on Islamic basis. The system of representation of heirs has been customarily practiced by Indonesian Muslims, particularly in Java. As local tradition (*adat* or *'urf*) constitutes one of the sources of Islamic law, he argued, local practice of representation of heirs could be then legalized through the theory of *al-'ada muhakkama*.[10] However, he notified that the adoption of this established local practice could not be

---

[8] Interview with Abdul Rasyid, a male judge of the Islamic court of Cibinong, on February 2003.

[9] Interview with M. Yusuf, a male judge of the Islamic court of Cianjur, on April 2003.

[10] See Yahya Harahap, "Informasi Materi Kompilasi Hukum Islam: Memfositifkan Abstraksi Hukum Islam", in Cik Hasan Basri, *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional*, (Jakarta: Logos Wacana Ilmu, 1999), p. 70.

entire, but is modified. A number of modifications were applied. The portion of the representative heirs is not to succeed the portion of the other heirs whose positions are equal to the substituted heirs. Therefore, if a deceased leaves two heirs including one daughter and one grandchild of a predeceased son, the estate is equally divided between them. Thus, each of them gets 1/2.[11]

Another Muslim scholar who is concerned with the re-actualization of Islamic law, Amir Syarifuddin, noted that the application of the principle of representation of heirs could not be wholly applied, if the ratio of 2:1 is still preserved. He wished that the system of representation of heirs be fully applied without having to be coupled with the regulation limiting the share of representative heirs. But due to the preservation of ratio 2:1 to male and female, limitation has become a necessity, as, unless it is limited, injustice would be left to aunts. To prevent the emergence of injustice, he argued, the rule of limitation is applied. He thus concluded that pertaining limitation to the portion of the representative heirs a fully application of the system of representation of heirs is not realized.[12]

Syarifuddin admitted that he was involved in making the additional clause that regulates the limitation of the share of the representative heirs. When the committee agreed to apply the concept of representation of heirs and to include it in one article in the Compilation, he confronted them and demonstrated some examples of cases, which show weirdness, one of which is a case that brings an aunt to get a less share than her nephews. Comprehending what he described and what he argued, the committee came to reach an agreement to make an additional rule limiting the share of the representative heirs. Thus, he confirmed that the clause that regulates limitation of the share of the representative of heirs was purposefully added to neutralize the emergence of injustice.[13] It seems that Syarifuddin was essentially in opposition to the application of the system of representation of heirs.

---

[11] *Ibid.*, p. 70.

[12] Interview with Prof. Amir Syarifuddin, February, 2003.

[13] *Ibid.*

In the same tone with Syarifuddin, Roihan Rasyid, an ex-director of the appellate Islamic court of Palembang (1982-1985) and of Padang (1985-1987), and former lecturer of the State Institute of Islamic Studies of Yogyakarta, clearly necessitated the limitation of the portion of the representative heirs in the application of the principle of representation of heirs. Besides, he proposed that the principle of representation of heirs not to be applied when a deceased leaves behind him heirs including a father, a mother, a husband or wife, and a sister(s) or a brother(s) whose shares will be less by the presence of a representative heir, unless they give their consent.[14]

For a number of Muslim scholars, like Minhajul Falah, a lecturer and an expert in the field of Islamic doctrine of inheritance, the phrase that limits the portion of the substitutive heirs is inevitably a consign where they could be more critical. Different from Syarifuddin and Harahap as well as Rasyid, who seemed to be in vague position on this issue as they accept the application of the principle but put a number of considerations, Falah strictly contested it. Falah claimed that the Compilation has ignored a more appropriate way of solving the problem of grandchildren, i.e., obligatory bequest, and but adopted a risky way, the concept of representation of heirs. Ironically, he added, it ran away from the risk.

Falah also viewed that the application of the system of representation of heirs covers some oddness. He blamed that it has destroyed the established classical Sunnite system of inheritance. At a glance, he said, the application of the concept seems not to bother the established Islamic system of inheritance, but in broader and more complex issues of inheritance, it would create some problems. Like Syarifuddin, Falah displayed some examples of inheritance cases that demonstrate that the principle of representation of heirs is not an appropriate solution for the problem of orphaned grandchildren.[15]

---

[14] See Roihan Rasyid, "Pengganti ahli Waris dan Wasiat Wajibah", in Cik Hasan Bisri, *Kompilasi Hukum Islam,* p. 93.

[15] Interview with Drs. Minhajul Falah, MAg, on February 2003. For the discussions of the examples relating to the issue, see Drs. Minhajul Falah, "Perbandingan

Falah even notified that Hazairin, who initiated the concept, might have solved one problem, i.e., problem of grandchildren, but he had ignored and failed to anticipate problems to come forward when the concept is applied. Therefore, to Falah, the adoption of the concept of representation to solve the problem of grandchildren was too scurry and tended to adopt the local tradition that gives right to grandchildren to inherit from their grandfather as found in the concept of *plaatsvervulling*.

To contest the application of the system of representation of heirs, Falah displayed several points. The *first* is that the application of the concept regulated in the Compilation is contradictory with the *hadith* of Ibn Mas'ud, which reads:

> "wa 'an ibn Mas'ud radiya Allahu 'anhu fi bint wa binti ibn wa ukhtin qadla al-Nabiyyu salla Allahu 'alaihi wa sallam li ibnati al-nisf wa libnati al-ibn al-sudus takammulata al-tsulutsaini wa ma baqiya faila al-ukht, (rawahu al-Bukhari)".
>
> "From Ibnu Mas'ud RA in the case of heirs including a daughter, a daughter of a son, and a sister. (Ibnu Mas'ud said) that the Prophet Muhammad SAW decided that for the daughter is a half of the share, for the daughter of a son is one sixth as to complete two third, and the remaining share is awarded to the sister". (Transmitted by Bukhari).[16]

Meanwhile, the Compilation would give the daughter 1/3 and the daughter of a son 2/3 as the latter represented her father. The sister would be awarded with nothing. With this rule, the Compilation, according to Falah, had challenged the ruling that was resolved by the four schools of Islamic law with an accurate basis, namely, the *hadith sahīh* (valid Prophet's saying) above.[17] The *second* is that the Qur'anic text employed to provide for an Islamic rationale for the application of the concept is irrelevant. The majority of interpreters of the Qur'anic texts uphold that the word *mawali* cannot be interpreted as representative of *'al-walidani* (parent) (mother and father) nor of *al-aqrabūn* (relatives) in regard with

---

Hukum Kewarisan antara KHI dan Fiqh Mazhab Empat dalam Ketentuan Ahli Waris Beserta Bahagiannya", Faculty of Shari'a, IAIN, Jakarta, 1993.

[16] See Minhajul Falah, "Perbandingan Hukum Kewarisan antara KHI dan Fiqh Mazhab Empat dalam Ketentuan Ahli Waris Beserta Bahagiannya", p. 78.

[17] *Ibid.*

inheritance, or in other word, as representative heirs. Instead, according to them, the word *mawali* is referred to the words *al-walidani* and *al-aqrabūn* themselves, or in other word, is interpreted as 'heirs' and not as 'representative heirs'.[18]

To eliminate disputes resulted from the different interpretation of word *mawali* above and of the verse in a whole, Falah recommended that the Muslim scholars of Islamic law turn to the Prophetic traditions that discuss about the rules of inheritance. The mentioned *hadith* above was one of the *hadiths* that points that the interpretation of Hazairin is not positively true. If such an interpretation is kept by the Indonesian Muslim scholars, Falah indicted that they merely want to legitimize a direct adoption of *plaatsvervulling* or 'representation of heirs' which had been for long time practiced by the Indonesian community. Indeed, Falah noticed that Hazairin was strongly influenced by his knowledge about *adat* law and attempted to find basic rationale for his adoption of the traditional system of inheritance in the Qur'anic text.[19]

In this regard, Falah is also concerned with the context when the concept is principally to be applied. In his view, in a case that a person died before the estate is distributed the application of the concept of representation of heirs could be logically accepted. However, he assumed that in the application of the concept, the Compilation tends to focus on the situation in which a person has died before the inheritor dies. This regulation is anomalous. He argued that terminologically the term '*ahli waris pengganti*' (representative heirs) used in the Compilation is not reasonable. It is not logical that someone no longer alive could be considered as an heir person and then substituted. He or she is, instead, to be declared as inheritor rather than an heir.[20]

---

[18] *Ibid.*, pp. 100-108. See also the discussion and debate about the verse in Al-Yasa Abu Bakar, *Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin dan Penalaran Fiqh Mazhab*, (Jakarta: INIS, 1998), pp. 53-65.

[19] Interview with Drs. Minhajul Falah, on February 19, 2003.

[20] *Ibid.* See also his articles on the issue, "Pengaruh Pasal 185 Kompilasi Hukum Islam Terhadap Hukum Kewarisan Islam", a Research Report, Faculty of Shari'a, 1994, pp. 63-88.

Falah had actually demonstrated his objection about the application of the concept of representation of heirs at the time the Compilation was drafted, and proposed the concept of obligatory bequest, instead.[21] To his opinion, the concept of obligatory bequest is more relevant and has more ground for solving the problem of grandchildren. However, he said that he could not revise what has been decided among the committee and thus the concept appears in one of the articles of the Compilation to solve the problem of grandchildren.

In the same tone with Falah, another Muslim scholar, Thoha Abdurrahman, in his article criticizes the application of the system of representation of heirs. He viewed that the solution adopted by Egypt to deal with the problem of orphaned grandchildren is more reliable and secured in the eye of Islamic law. He spotted that the adoption of the system of representation of heirs is too scurry and has neglected the lack of Islamic rationale in both the Qur'an and Prophetic tradition.[22]

Amrullah Ahmad is another Muslim scholar that objected the employment of the system of representation of heirs. The application of the system of representation of heirs was merely motivated by emergent conditions and thus is casuistic in nature. Therefore, according to him, not all problems of orphaned grandchildren must be solved by the system of representation of heirs.[23]

C. Obligatory Bequest (*wasiat wajiba*)

Islam allows one to adopt a child to make him or her under his protection, guidance and maintenance. However, it does not allow an adopted child to relate himself or herself to his or her adopting parent, let alone they inherit to each other.[24] On the contrary, the *adat* law of

---

[21] Interview with Drs. Minhajul Falah, February 19, 2003.

[22] See Thaha Abdurrahman, "Tinjauan terhadap Hukum Kewarisan KHI di Indonesia", (Yogyakarta: Sekretariat IAIN Sunan Kalijaga, 1992), pp. 8-9.

[23] See Amrullah Ahmad, *Mimbar Hukum*, VI, No. 23, p. 57.

[24] See Ahmad Muhyi al-Din al-'Ajuz, *Al-Mīrath al-'Adl fī al-Islām: baina al-Mawārith al-Qadīmah wal-Jadīdah wa Muqaranatuhu ma'a ash-Shara'i al-Ukhra*, (Beirut: Mu'assasat al-Ma'arif, 1406/1986), p. 54.

Indonesia does not only allow the practice of adoption but also accede to the practice of inheriting to each other.[25] To bridge these two contradictory rules, the Compilation adopted the institution of obligatory bequest or *wasiat wajiba* through which an adopted child and adopting parent could take and give the share of their estates.

If we refer to the Qur'an, we could find that the Qur'an (al-Baqara: 180) commands a Muslim to bequeath part of his or her estate to his or her relatives. Although some of Muslim jurists agreed that the verse was abrogated by the verse of inheritance, (al-Nisa: 7), some others maintained that the abrogation is only to be applied for the relatives that had been entitled to definite shares elucidated in the Qur'an.[26] Accordingly, they viewed that making bequest is still recommended for those not entitled to definite shares of deceased estates. Ibn Hazm even considered that once one failed to make a bequest during his life, a religious court obliges itself to make a testament on behalf of the deceased.[27]

It is from this point of view that some Muslim countries have employed the regulation of bequeathing to solve the problem of orphaned grandchildren whose shares to their grandparent estates were, according to classical system of inheritance, blocked by their uncles. Egypt was the first Muslim country to draw on the regulation of bequeathing and ruled that orphan grandchildren could receive shares of their grandparent estates to a maximum limit of one third. This way of

---

[25] For a good information about the practice of adoption in Indonesia, see, for examples, B. Bastian Tafal, Pengangkatan Anak Menurut Hukum Adat, (Jakarta: C.V. Rajawali, 1983), pp. 37-143; M.Yahya Harahap, *Kedudukan Janda, Duda, dan Anak Angkat dalam Hukum Adat*, (Bandung: P.T. Citra Aditya Bakti, 1993), pp. 100-115; Faculty of Law of the University 'Sebelas Maret", "Laporan Penelitian Studi tentang Pengangkatan Anak di Daerah Kecamatan Jatisrono Kabupaten Wonogiri, (Surakarta: Fakultas Hukum Sebelas Maret, 1985), pp. 23-48, and Sri Soedewi Masjchun Sofwan, "Hak Mewaris Bagi Janda dan Anak dan atau Anak Angkat", *Hukum Nasional*, No. 24, 1974, pp. 72-83.

[26] Abdul Aziz Mohammed Zaid, *The Islamic Law of Bequest*, (London: Scorpion Publishing Ltd., 1986), pp. 11-13.

[27] N.J. Coulson, *Succession in the Muslim Family Law*, (Cambridge: The University Press, 1971), p. 146.

solving orphaned grandchildren was followed by other Muslim countries like Syria, Tunisia, and Morocco.[28] Regardless of the inclusion of the different specifications of each rule regarding this issue, those Muslim countries had agreed that orphaned grandchildren should be given shares of their grandparent estates. As the consequence of employing the principle of bequeathing, the shares of orphaned grandchildren should be limited to one third.

The Muslim jurists' sight that *wasiat* could still be applied to relatives not entitled to definite shares of deceased estate and Ibn Hazm's further view that making a *wasiat* is obligatory and deceased's failure to do it obliges court to perform it was utilized by the Compilation to deal with a different problem. Facing a particular local problem of adoption whose practice is popular in Indonesia, particularly in Java, and whose practice is contradictory to Islamic doctrine, the drafters of the Compilation sensed that a new rule should be developed. In this case, they preferred to retain the established practice of adoption in Indonesia, rather than to abolish it. Nonetheless, they firmly objected to challenge the Qur'anic doctrine, which clearly harms full attribution of an adopted child to his or her adopting parent or vice versa. The practice of giving and receiving each other part of their estates in the manner of pure practice of inheritance is then thought to be also put to an end. It is in the institution of obligatory bequest that they found out an Islamic legitimacy for maintaining the practice of inheritance among adoptive parties. Article 209 (1 and 2) administers that if they receive no will, both adopted child and adopting parent will be granted an obligatory bequest as much as one third of each other's estate.[29] Applying the regulation of obligatory bequest to adoptive parties, the Compilation saw that the relation between an adopted child and his or her adopting parent is so intimate that it interpreted adoptive parties as close relatives (*al-aqrabūn*).

---

[28] John L. Esposito, *Women in Muslim Family Law*, (Syracuse University Press, 1982), p. 88. See also Tahir Mahmoud, *Personal Law in Islamic Countries*, (New Delhi: Academy of Law and Religion, 1987), pp. 46-47, 136-137,162-163.

[29] See *Kompilasi Hukum Islam*, Art. 209.

Like the application of the principle of representation of heirs, the application of the institution of obligatory bequest to legitimize adoptive parties share their estates has also arisen debate among Muslim scholars of Islamic law and judges. Some of them viewed that abolishment of established practice of full adoption which effect the adoptive parties inherit to each other in the Muslim community could not be fully attempted. Yahya Harahap, for an example, holds that, although full attribution of adopted children to their adopting parent or vice versa needs to be banned as it contradicts the Qur'anic text, the tradition of inheriting to each other should be retained as it would not be fair if each of the parties would be left with nothing when another party dies. However, the system by which they could give and receive each other's estate must not position both parties as real children or parents. For this purpose, Harahap saw that the institution of *wasiat wajiba* is the best way to prefer in doing away with false practice of inheriting between the adoptive parties and but to grant them a share from each other.

Another Muslim scholar, Ichtiyanto, an ex-director of the Development of the Islamic Judicial Institutions (Ditbinbapera) (1977-1982), states that introduction of the institution of *wasiat wajiba* to cope with the problem of adoption is a great achievement in the Compilation. He enlightens that adoptive parties are to be considered as 'close friends or relatives' that can inherit to and from each other. In this case he refers to the concept developed by Hazairin that 'pertaulanan' or 'friendship' constitutes one of principles that can make parties concerned inherit to each other.[30]

Some others, however, view that the institution of obligatory bequest has been misapplied in Indonesia. In line with his inclination to employ the institution of obligatory bequest to solve the problem of grandchildren, Falah states his disagreement with the application of the institution to deal with adoptive problem in regard with inheritance. According to him, the introduction of the institution of obligatory bequest to the problem of adoption is not relevant. Adoption, he main-

[30] Interview with Ichtiyanto, on 7 August 2003.

tained, could not affect that an adopted child inherit from his or her adopting parent though in the means of the institution of obligatory bequest. The adopted children have spent a lot of money of his or her adopting parent and they are not to be granted shares from the deceased's (adopting parent) estates by Islamic court. If it is claimed that an adopted child had a significant role in developing his or her adopting parent's estates during their lives and thus considered to deserve a share from his or her adopting parent's estate, the division of the estate must be done under the concept of '*musharaka*', as regulated in *fiqh*.[31]

Roihan Rasyid strongly condemns the utilization of the institution of *wasiat wajiba* to grant both adoptive parties shares from each other's estates. In his article, he states that although it uses the institution of obligatory bequest to grant both adoptive parties shares from each other's estate, the Compilation has departed from the Qur'anic text that clearly verdicts that the status of both adopting parent and adopted child is not to be shifted as real parent and child, and therefore they do not inherit to and from each other. According to him, the Prophet's marriage to the divorced wife of Zaid Ibn Tsabit, his adopted child, clearly described that adoption did not result in prohibition of marriage between the Prophet (the adopting parent) and the ex-wife of his adopted child, as she was not considered as his daughter in-law during her marriage with Zaid Ibn Tsabit. He also said that no classical *fiqh* text discussed about the case. Neither did the *jurisprudence* of Indonesia nor the *jurisprudence* of other Muslim countries had dealt with the case. Therefore, he concluded that if the Qur'anic injunctions, Prophet's traditions, and the verdicts of the Companions and practice of the society (*umma*) easily establish the conclusion that the application of the institution of *wasiat wajiba* to deal with the adoption problem in regard with inheritance in the Compilation is contrary to the collective viewpoint of the community, there is no critical reason to maintain the article of 209 of the Compilation.[32]

---

[31] Interview with Drs. Minhajul Falah, on February 2003.

[32] See Roihan A Rasyid, "Pengganti Ahli Waris dan Wasiat Wajiba" in Cik Hasan Basri, *Kompilasi Hukum Islam*, p. 96.

A number of Muslim judges also maintain that the institution of obligatory bequest should be applied to the problem of grandchildren. They also considered that it is too exaggerating if the practice of adoption results in applying *wasiat wajiba* to both an adopted child and adopting parent. One of the Muslim judges questioned the sincerity of the adopting parents in this case. He said: "If the adopting parent did not orally or in written form bequeath to their adopted child, why must the court oblige itself to give the portion from the grandparent's estate to him or her (adopted child). How if the adopting parents would not intend to do so, but then the court does it."[33] However, by saying this he did not want to leave the adopted child with nothing. In fact, he proposed that the Compilation plainly recommends adopting parent give or bequeath to his adopted child during their lives and vice versa. According to him, the direct instruction of the Compilation to the Islamic court to give one third to one of the adoptive parties when another one dies is too scurry.

In the same tone, a female judge said, "I do not think that the Islamic courts need to involve the institution of obligatory bequest (*wasiat wajiba)* to deal with the problem of adoption".[34] However, she saw the possibility of applying the concept to grant adopting parents a share from their adopted child, considering that it is they who had spent much money to bring up the adopted child. According to her, if the adopting parent made no *wasiat* (testament) to their adopted child, then no act of *wasiat* should be accomplished. Likewise, the Islamic courts do not need to oblige themselves to distribute a part of the deceased adopting parent's estates to their adopted child. Nonetheless, the adopting parent who gets no *wasiat* from his adopted child might be granted a share from the deceased adopted child's estates by the court. It seems that she saw the practice of adoption is merely a kindness act of the adopting party doing which he or she deserves a reward from the adopted child.

The rise of debate on the issue is essentially not surprising. It is reported that almost none of the *'ulama* involved in the making of the

---

[33] Interview with M. Yusuf, a male judge of the Islamic court of Cianjur.

[34] Interview with Rohimah, female judge of the Islamic court of Tasikmalaya.

Compilation agreed with the proposal of the inclusion of the *adat* law of adoption that adopting parent and their adopted child can inherit to and from each other- as what had been for long time practiced in some regions of Indonesia. But the necessity of bridging the contradictory rules of adoption between *adat* law and Islamic law had led the Compilation to ignore the objection of the *'ulama* and thus introduced the institution of *wasiat wajiba*.[35]

From the discussion of both cases above, it is clear that, although considered to be one of the sources of Islamic law,[36] *adat* or *'urf* could not easily arrive at the status of fifth basis of the law. Once clear text has been established about a certain legal question, Muslim scholars would not at all accept *'urf* to legitimize that certain legal question to enter into Islamic law. Accordingly, although Indonesian Muslim community had customarily applied the representation of heirs and practiced inheritance among adoptive parties, these established legal practices cannot be easily regarded by Muslim scholars as Islamic legal practices, when they found that the Qur'anic or hadith text have clearly established their rules. In this regard, what Ibn Abidin noted is worth quoting here:

> As to questions where the *'urf* contradicts the prevalent opinion of the school we say: know that legal questions are established either by clear text or are established by *ijtihād* and personal opinion, and many of these legal questions are established by the *mujtahid* according to the custom of his time, so that if he lived at the time when another custom prevailed, he would have said something different from what he had said in the first place and this is why they said that one of the preconditions of *ijtihād* is that there is no escape from knowledge of the custom of the people, for many of the rules change with the change of time.[37]

From this, it is clear that Ibn 'Abidin distinguished between two types of texts: *shari'a* and jurist law. In the connection of the two types of texts with the custom, Ibn 'Abidin rejected the customs when they

---

[35] See Yahya Harahap, "Informasi Materi Kompilasi Hukum Islam: Mempositifkan Abstarksi Hukum Islam", in Cik Hasan Basri, *Kompilasi Hukum Islam,* p. 67.

[36] See Haim Gerber, *Islamic Law and Culture*, (Leiden: E.J. Brill, 1999), p. 105.

[37] As cited by Haim Gerber, *Islamic Law and Culture*, p. 110.

were absolutely contradictory to the *sharī'a* texts, and but considered them as principles when they were in conflict with jurist law texts.

It is from this precept that the opponent group regards that the application of both rules, i.e., the principle of representation of heirs and the institution of obligatory bequest, is not religiously valid. The lack of Islamic rationale and even the contradiction of both rules in and with both the Qur'anic and hadith texts has led them to assume that both rules are perceptibly relied on local tradition or *adat* law. Thus, they doubted whether both rules are inspired by Islamic or *adat* law.

D. The Methodology of Reforms

In regard with legal reforms on Muslim family law represented in the Compilation, a basic difference between regulations of marriage and those of inheritance and endowment (*waqf*) could clearly be deduced. It is that pure *sharī'a* is restricted to inheritance and endowment, and that in marriage and divorce it is accommodated to secular legislation and strictly controlled by the religious courts.

Indeed, looking carefully at the contents of Book I on Marriage, one could see that, according to Hooker, they "fall into three categories: a. straight-out reproduction of *fiqh*, though in a much simplified form, b. *fiqh* rules, the operation of which are contingent (dependent) on the completion of bureaucratic procedures, and c. rule of *fiqh* as amended and controlled by the judicial process in the religious courts".[38]

In regard with the first category, Hooker noted that, "the Compilation's rules are very simple statements- they are obviously drafted to be understood by the judges with only a limited knowledge of *fiqh*".[39] It seems that these simple versions are implied to mediate the hardship of understanding the complex language used in *fiqh* and the lack of understanding of Arabic language among the Islamic courts' judges.

---

[38] MB Hooker, "The State and Syari'ah in Indonesia, 1945-1995", in Timothy Lindsey, *Indonesia: Law and Society*, (Melbourne: The Federation Press), p. 107.

[39] *Ibid.*, p. 107.

Also, he described further, the rules of *fiqh* have been put into bureaucratic formula. Indeed, that the Compilation regulates that a husband who wishes to declare divorce must submit an oral and written request to the Islamic court proves to be the case. Due to this requirement, divorce can only be affected if the judges permit it through the trial after which copies of declaration are made and registered as 'evidence of the divorce'. Applying these restrictions, the state wants to control personal status and has a vested interest because divorced wives and fatherless children throw a burden onto state agencies. Although the *'ulama* still avoid, grasping the goal of its intervention, the state decided to formulate a bureaucratic obfuscation (confusion) which it sees a sensible (rational) response to the complexity of life without having to ignore divine permission of divorce. Besides, the rules of *fiqh* are also amended and controlled by judicial process, as *shari'a* alone is not sufficient.[40] The restriction of age at which people may marry and of a Muslim man's right to take more than one wife is examples of this point.

Nonetheless, despite that pure s*hari'a* is maintained to inheritance, a few new rules were launched in the Compilation. A regulation that grants an orphaned grandchild to receive a share from his grandparent' estate and a claim that adoptive persons could give and share each other's estate through the institution of obligatory bequest are the most relevant examples in this point. Then, what kind of methodology is employed to provide Islamic basis for such reforms?

A number of studies of modern Muslim family law reform in Indonesia reveal several methods employed to provide an Islamic basis of modification. Khairudin Nasution, who studied modern laws of marriage in Southeast Asia, noted that reforms on marital issues generally employed *siyasah syar'iyyah*, and reinterpretation of Qur'anic texts, *talfiq* and *takhayyur*.[41] Ratno Lukito saw that the adoption of local tradi-

[40] *Ibid.*, p. 108.

[41] See Khairuddin Nasution, *Status Wanita di Asia Tenggara: Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysis*, (Jakarta: INIS, 2002), p. 278. And for examples of reforms employing these methods, see Sofa, *Talfiq dalam Kompilasi Hukum Islam: Studi atas Buku I Tentang Hukum Perkawinan*, MA thesis, (Jakarta: IAIN Syarif Hidayatullah, 2001), pp. 76-99.

tion (*adat* or *'urf)* constitutes one of methods of reforms on marriage in Indonesia. He mentioned two regulations, i.e., *taklik talak* (hanging divorce), and joint property in marriage, whose inclusions in the Compilation are based on *adat* law.[42]

As there were no interpretations of earlier Muslim scholars on the issues of inheritance as they saw that Qur'an had totally and comprehensively regulated the issues, legal reforms on inheritance did not consider any opinion of earlier *'ulama* among which the Indonesian Muslim scholars could select the most relevant and strongest opinions through the means of *talfiq* or *takhayyur*. Likewise, they did not assume *siyasa syari'iyya* by which the Indonesian government provides religious justification about new rules on inheritance.

Instead, reforms on inheritance tended to utilize the principle of *al-'ada muhakkama*. If we trace our discussion back to the era of 1950s, we find that the principle of representation of heirs was initially proposed by Hazairin. He realizes that according to Indonesian *adat* rules of inheritance an orphaned grandchild has a share to the estate of his grandparent. Meanwhile, in the classical *fiqh* he or she could get a share only if he or she is not blocked by his or her uncle(s). This contradiction has of course resulted in a problem of injustice among orphaned grandchildren.[43]

Hazairin then sought to correct the classical system of inheritance, which he viewed as being inclined to have patriarchal bias. His colleagues commented that Hazairin had courageously corrected the classical system of inheritance, which, according to his analysis, is unjust as it tended to support men's interest. They also announced that Hazairin had made an innovative and original concept of inheritance as he proposed one group deserving a share from the deceased estate, i.e., *mawali*.[44] They argued that the application of the concept would be more

---

[42] See Ratno Lukito, *Pergumulan antara Hukum Islam dan Adat di Indonesia*, (Jakarta: INIS, 1998), pp. 70-85.

[43] See Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadith*, p. 26.

[44] One of his colleagues, Anwar Haryono, wrote a brief comment on Hazairin's concept of *mawāli*. Anwar Haryono said that the attempt of reformation by Hazairin

just than the application of the classical system particularly in regard with the issue of the emergence of injustice, which fall to grandchildren whose parents have died before his grandparents died.

By advocating the group of *mawali,* Hazairin indeed wished to cope not only with gender issues but also with justice issues in general. In his concept of *mawali*, which he interpreted from the Qur'an (al-Nisa: 33) and which reads '*wa likullin ja'alna mawaliya mimma taraka al-walidani wa al-aqrabūna....*'(that all people have their representatives (*mawali*)), Hazairin advocated that regardless of the sex of an orphaned grandchild whose parent had died before his or her grandparent dies, they should take over the heirship status of his or her predeceased parent. In this regard, Hazairin believed that if something was not fixed in the texts of the Qur'an and the Prophetic traditions, but was felt to be among the concerns of Muslim society today, a new line should be developed.[45] Hazairin was thus certain that the verse 33 of al-Nisa is an answer to the problem and that such an interpretation was in accordance with the concern.

Roihan Rasyid, however, doubted if the inclusion of the principle of representation of heirs in the Compilation was inspired by Hazairins' thought. His doubt is due to, at least, two reasons. Hazairin's interpretation was contested by a number of Indonesian Muslim scholars. Above all, there are no books of *tafsir* (exegesis) including that of the Department of Religious Affairs that interpreted the word *mawali* in al-Nisa: 33

---

on the Islamic inheritance system in Indonesia is a great advance in the Islamic legal system. To deal with the problem of grandchildren, Hazairin had proposed quite different system, i.e., representation of heirs, than that applied in other Muslim countries like Egypt, which adopted the institution of obligatory bequest. Above all, he had shown a very authoritative Qur'anic foundation. "Hazairin's interpretation is original, because, as far as I am concerned", says the writer, "none of the Qur'anic interpreters (*mufassirūn*) before has ever interpreted the word *mawali* in this verse as replacement of heirs'. But, he continued, with his sharp scientific analysis, Hazairin interpreted it as 'replacement of heirs', whereby, of course, he has addressed the questions of justice on the ground of the Qur'an. See Anwar Haryono, "Hukum Kewarisan Bilateral Menurut al-Qur'an: Komentar Singkat Atas Teori Prof. Hazairin", in Sayuti Talib, *Pembaharuan Hukum Islam di Indonesia*, (Jakarta: UI Press, 1981), pp. 64-65.

[45] *Ibid.*

as representative of heirs.[46] Realizing these two facts, he accordingly assumed that the espousal of the principle of representation of heirs was not alone or even at all underlined by al-Nisa: 33. He instead believed that it was more encapsulated from the theory of *maslaha* (human interest).[47]

Roihan also suggested that the adoption of the principle of representation of heirs rather than the institution of obligatory bequest was due to the existence of debate about whether or not *wasiat* could be still made to heirs after the verses of inheritance were revealed.[48] Although some Muslim jurists maintained that making bequest is still allowed for relatives whose shares are not entitled in the Qur'an, the Compilation avoided adopting the institution of *wasiat wajiba* to solve the problem of grandchildren. Regarding that grandchildren are heirs and that *wasiat* for heirs could be made only if other heirs give their consent, they instead offered another solution, i.e., the principle of representation of heirs, which they claimed as the most appropriate solution.

---

[46] *Tafsīr al-Manār*, for an example, interpreted the verse in the following words: "wa likullin min al-rijal al-ladzina lahum nasibun mimma iktasabu wa al-Nisa al-lawati lahunna nasibun mimma aktasabna mawali lahum haqq al-wilyat 'ala ma yatrkuna 'an kasbihim, wa haulai al-mawali hum (al-walidani, wa al-aqrabun wa al-ladzina 'aqadat `aimanukum) ay jami' al-waratsat min al-usul wa al-furu' wa al-hawashi wa al-ajwaz kama taqaddama al-tafsil fi awwal al-sura". (And for each of men and women who had reserves from what they had exerted is representatives for what they had left (in term of estates). Those representatives are parents, relatives and those who had a contract with them or all of descendants, ascendants, relative from side link, widows and widowers as has been clearly depicted in the beginning of the chapter (of the Qur'an)). See Rasyid Rida, *Tafsīr al-Manār*, (Egypt: Maktabat al-Qahira, t.t), Vol. 5, p. 64. Like, the translation of the Department of Religious Affairs of Indonesia interpreted the word mawali as 'heirs'. The translation goes as follows: 'Bagi tiap-tiap harta peninggalan yang ditinggalkan ibu bapak, dan karib kerabat kami jadikan pewaris-pewarisnya". What is meant by 'pewaris" in the translation is 'heirs'. (The word is further explained in the footnote in the following words 'see a group of people that are included to be heirs in al-Nisa: 11 &12). Although this translation reads *al-walidani* as '*marfu*' and thus '*fa'il*' (subject) of the word '*taraka*', its interpretation is indifferent from that of *al-Manār*.

[47] Roihan A. Rasyid, "Pengganti Ahli Waris dan Wasiat Wajibah", in Cik Hasan Basri, *Kompilasi Hukum Islam,* (Jakarta: Logos Wacana Ilmu, 1999), p. 94.

[48] See Roihan A. Rasyid, "Pengganti Ahli Waris and Wasiat Wajibah", p. 94.

It is however interesting to see why the drafters of the Compilation employed the institution of obligatory bequest to deal with the problem of adoptive parties who, according to Islamic doctrine, could not inherit to each other. Facing the problem of adoption whose practice in Indonesia allow both adopted children and adopting parent inherit to each other and realizing that Islamic doctrines harm such a practice, Indonesian Muslim scholars deemed it necessary to mediate the contradiction. It is within the institution of *wasiat wajiba* that they could find a way of answering the question. Taking the same argument held by the Muslim scholars of other Islamic countries, i.e., that the prohibition of making a *wasiat,* which resulted from the abrogation of the Qur'anic text of *wasiat* by the verses of inheritance, is limited to only heirs as notified in the Prophetic tradition which reads '*la wasiata li wāritsin*', in legitimizing their utilization of the institution of *wasiat wajiba* to solve the problem of grandchildren, Indonesian Muslim scholars understand that making a *wasiat* is still allowed to those who are not heirs. Therefore, they find out that *al-aqrabūn* (relatives) are still to be granted a *wasiat.*

Nonetheless, if other Muslim countries like Egypt interpreted relatives (*al-aqrabūn*) as those who have genetic relation like grandchildren, Indonesia freely interpreted relatives as those who not always have genetic relation and considered a close relationship as one of the necessary measure of being 'relatives'. In fact, considering that adoptive parties are supposed to have a close association, the drafters of the Compilation include them into the group of relatives, which deserve a *wasiat* and even a *wasiat wajiba,* unless a *wasiat* is made by and to one of them. It is thus visible that they adopted the view that maintained that the *wasiat* could still be exercised by Muslims and even evidently agreed with the view of Ibn Hazm that *wasiat* is an obligation for Muslims and that, if they failed to make it during their lives, the court could make on behalf of them a *wasiat* to their relatives.

From the discussion above, I conclude that Islamic law reforms on inheritance in Indonesia particularly on the regulations of the principle of representation of heirs and the institution of obligatory bequest employed the theory of *maṣlaḥa mursala.* The utilization of this

theory is to legitimize that the accommodation of local tradition or *adat* into the body of reforms is highly felt to be the concern of Muslim community. The act of *ijtihād* is also claimed to have been performed, as to provide Islamic rationale from the Qur'an.

E. Reasons to the Debate

If we compare to Pakistan, the Indonesian's introduction of the system of representation of heirs has the same fate. Indeed, being claimed to have no Islamic rationale in the primary sources, the Pakistani's application of the principle of representation of heirs to solve the problem of orphaned grandchildren was heatedly debated.[49] Although the Indonesian reformers had proclaimed that their adoption of representation of heirs has been grounded on an Islamic basis, i.e., on the Qur'anic text, which was proposed by Hazairin the inclusion of the principle in the Compilation has become also a disputable issue.

I suggested that a number of reasons are responsible for the growth of debate on this rule. The *first* is that although the spirit of the Indonesian reform on the problem of orphaned grandchildren is the same as that of the other Muslim countries like Egypt, Morocco, Syrian, and Tunisia, Indonesian reform clearly took on a different way from that used by those countries. Some of Muslim judges questioned why the Compilation adopted the solution taken by the Pakistani's reform and not that introduced by Egyptian's reform, meanwhile Pakistan was not included into the groups of the Muslim countries to which the committee of the project of the making of the Compilation carried out comparative studies.[50]

The *second* is that, different from reform in Egypt and other countries on the issue that attempts to justify itself by an interpretation of Qur'anic verses (II: 180), Indonesia tried to rationalize itself on the

---

[49] See Rubya Mehdi, *The Islamization of Law in Pakistan*, pp. 190-192.

[50] Interview with a number of Muslim judges in the Islamic court of Tasikmalaya, Bogor, and Rangkasbitung. The comparative study was conducted to Egypt, Morocco, and Turkey.

grounds of social desirability and on absence in classical rules of interpreting the Qur'anic and hadith reference or on a lack of any prohibition in the Qur'anic texts. This unsurprisingly has led a number of Muslim scholars to accuse the utilization of the principle of representation of heirs of being inspired not by Islamic law but by the *adat* law known as *plaatspervulling*. Some of its opponents even put very strict considerations for its application.

The *third* is that the debate has essentially taken place since Hazairin launched his concept of *mawali*. Using grammatical analysis, a number of Muslim scholars like Toha Yahya Omar and Mahmud Yunus contested what Hazairin interpreted about the text.[51] They condemned that Hazairin had made a false interpretation of the Qur'anic text. Moreover, there is no Qur'anic translation that supported Hazairin's interpretation. These two facts had undoubtedly contributed to the way the Muslim scholars and judges reacted to this reform.

Meanwhile the major reason to the debate on the Compilation's adoption of the institution of obligatory bequest to deal with adoption is, I assume, its contradiction with the Qur'anic text that elucidates that the practice of adoption does not bring about inheriting act among adoptive parties is the major reason for the debate. Although the Compilation did not adopt all the established customarily practices of adoption,[52] it keeps the crucial practice, i.e., inheriting among adoptive parties. By the means of court authority, the Compilation has in fact granted an absolute share to adoptive parties.

Considering that the debates had grown even before both rules were issued, is it surprising that the Compilation insisted on the application of the principle of representation of heirs to deal with the problem

---

[51] A good discussion on the debate can be obtained in Al-Yasa Abu Bakar, *Ahli Waris Sepertalian Darah*, (Jakarta: INIS, 1998), pp. 57-62. See also *Perdebatan dalam Seminar Hukum Nasional tentang Faraid*, (Jakarta: Tintamas, t.t), p. 21.

[52] The Compilation has abolished some practices. It did not equate the legal status of an adopted child to that of a natural child. It did not grant to an adopted child the share as if he or she is considered to be a natural child. It did not give him or her the share more than 1/3.

of grandchildren and on the application of obligatory bequest to solve the problem of adoption? I assume that the preference of the concept of representation of heirs rather than the institution of *wasiat wajiba* to solve the problem of grandchildren was because there is still another problem, namely, the problem of adoptive parties that needs a solution. Considering that the problem of adoptive parties could not be at all solved by the concept of representation of heirs, the Compilation preferred to employ the concept of representation of heirs to answer the problem of grandchildren. However, realizing that there are two well know applied solutions of the problem of grandchildren, i.e., representation of heirs and obligatory bequest among Muslim countries, it tended to employ one solution to one problem rather than employ one same solution to two problems at once; the employment of obligatory bequest to two problems of grandchildren and adoption.

Using such a way of thinking, they chose the institution of *wasiat wajiba* to solve the problem of adoption by adjusting the word '*al-aqrabūn*' in the Qur'an to adoptive parties. It ignores an established principle that blood relationship is the valid perquisite for the distribution of deceased's estate to his or her heirs. Furthermore, they insisted on the application of the principle of representation of heirs to deal with the problem of orphaned grandchildren, despite it lacked of rationale in the Qur'anic texts and resulted some debates among the Muslim scholars. I thus understand that Indonesian reformers of Muslim family law particularly on both issues have neglected the consistent employment of methodology.

The inconsistency occurs not only in the methodological reform but also in the formulation of the texts of the law. The term used in the issue of representation of heirs, for an example, is ambiguous. Different from the Law of Pakistan which clearly employs the direct words 'son and daughter' for denoting the substituted heirs, and 'children of both son and daughter' for implying the representative heirs, the Compilation vaguely used the broad term of '*ahli waris*' to indicate the substituted heirs and '*ahli waris pengganti*' to address 'substitutive heirs'. The ambiguity of the use of the term had resulted in various interpretations in judicial practice. While, the initial goal of the application of the principle of representation of heirs was to solve the problem of orphaned

grandchildren, the judicial practice had widened its application to other cases than those of grandchildren. Some judges realized that the inclusion of the principle of representation of heirs was at first to deal only with the problem of grandchildren, but "we sometimes found cases that according to our *ijtihād* needed to be solved by means of the same principle".[53]

This attitude was principally correct if we view it as an act of *ijtihād* as to meet certain needs or interests of the disputants. However, it is misleading if the attitude resulted from the ambiguous rule of the Compilation. Moreover, as, in deciding cases put forward to them, Indonesian Muslim judges have often easily taken a claim of *ijtihād* as an Islamic argument, such an ambiguity would be utilized as a good argument by them to perform *ijtihād*. Moreover, despite formally influenced by Continental system of law in which judges have to bend to made-law, judges of the Islamic court tend to comply with Anglo Saxon system and then freely interpret law to meet certain needs resulted from cases they deal.[54] This attitude marks that, although claimed to be a product of collective *ijtihād* of Indonesian *'ulama,* the Compilation has not yet succeeded to bring itself to be the sole systematic and legislated code of law.

The demand of a number of judges that the Compilation should revise the article concerning the representation of heirs by developing the scope to which the principle covers proves to be the case. They did not require the Compilation to narrow and clarify the term to denote only orphaned grandchildren. Instead, they require the position of the other predeceased heirs' ascendants, like orphaned nephews, be equated as that of orphan grandchildren and thus could replace their linking heirs who predeceased before the propositus (inheritor) dies. Such a demand is essentially proper to the developing law, like the Compilation. But, considering that the existing rule has fruitfully grown debate

[53] Interview with Daud Ali and his colleagues of the Islamic court of Jakarta Timur on Fabruary.

[54] See Noryamin Aini, "Budaya Hukum: Melintas Batas Formalisme-Yuridis, Sentralitas Kompilasi Hukum Islam dan Kitab Kuning dalam Putusan Pengadilan Agama", in *Era Hukum*, 2002, p. 16.

among the Muslim scholars as it is claimed to have no basis in traditional law, the demand is of course of arbitrary attitudes of judges, as it would bring to a more heated debate among the Muslim scholars.

F. Conclusion

This review of the debate on the family law reforms in Indonesia particularly on the inheritance issues- the application of representation of heirs and obligatory bequest-, demonstrates that the reforms have employed ad hoc, incoherent approach. It has employed the principle of *maslaha mursala* and a claim to *ijtihād* (reinterpretation) not positively rooted in Islamic values but negatively based on a lack of conflict with any Qur'anic injunction and has prioritized *adat* law. The lack of consistency in methodology can be seen from the law itself. For example, while the provision for orphaned grandchildren's inheritance rights met particular need, it disordered the established Islamic classical system of inheritance. Here regardless of the sex of an orphaned grandchild of the deceased, they now could deprive the collaterals (brothers and sisters) of the deceased of their shares and add those shares to his or her share.[55] However, the deceased's own daughter would not exclude these same collaterals.

Above all, having been debated among Muslim scholars as well as Muslim judges the two reforms face a basic problem. As Indonesia is a country whose Muslim community has strongly encouraged Islamic sources, the methodology employed must express Islamic rationale. Thus, as noted by John L. Esposito to review the Pakistani and Egyptian reforms, "if reform is to be truly accepted by the majority of Muslims in each country, and if it is to produce a rule that is both comprehensive and consistently developed, the reforms must be supported by a sys-

[55] Look at the example above in which the deceased leaves a daughter, a daughter of a son and sister and which grants each the daughter and the daughter of a son ½, while sister gets nothing. Meanwhile according to classical Islamic system of inheritance 1/2 goes to the daughter and 1/6 to the daughter of a son and the remaining (1/3) goes to sister.

tematic methodology whose Islamic roots can be demonstrated".[56] Although claimed to be grounded on the Qur'anic texts, both reforms had therefore failed to employ methodology that could expose their Islamic character.

Therefore, one might think that the reforms introduced through legislation and judicial decision in Indonesia had been needed. Nonetheless, one must realize that a reform cannot neglect the employment of a systematic Islamic rationale, as lacking it will create serious problems. *First*, it raises questions on the Islamic character of the laws and the relationship of the reforms to the body of traditional law. *Second*, continuous debate and discontent would always appear after reforms. Reforms would be often accused of being resulted from a misinterpretation of text and or an interpretation of text that is vehemently made as merely to meet the norm or the measure that has been designed before and has been subjectively settled on. *Third*, it brings Muslim judges deviate from the recognized rule and exercise arbitrary act of *ijtihād* from which uncertainty in the legal transaction among the Muslim community would reappear.

[56] John L. Esposito, *Women in Muslim Family Law*, p. 101.

Bibliography Books and Papers

Abdurrahman, *Kompilasi Hukum Islam*, Jakarta: CV Akademika Presindo, 1992.

Abdurrahman, Thaha, "Tinjauan terhadap Hukum Kewarisan KHI di Indonesia", Yogyakarta: Sekretariat IAIN Sunan Kalijaga, 1992.

Abu Bakar, Al-Yasa, *Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin dan Penalaran Fiqh Mazhab*, Jakarta: INIS, 1998.

Al-'Ajuz, Ahmad Muhyi al-Din, *Al-Mīrath al-'Adl fī al-Islām: baina al-Mawārith al-Qadīmah wal-Jadidah wa Muqaranatuhu ma'a ash-Shara'i al-Ukhra*, Beirut: Mu`assasat al-Ma'arif, 1406/1986.

Coulson, N.J., *Succession in the Muslim Family Law*, Cambridge: The University Press, 1971.

Department of Religious Affairs, *Kompilasi Hukum Islam di Indonesia*, Jakarta, 2000.

Esposito, John L., *Women in Muslim Family Law*, Syracuse University Press, 1982.

Falah, Minhajul, "Pengaruh Pasal 185 Kompilasi Hukum Islam Terhadap Hukum Kewarisan Islam", a Research Report, Faculty of Shari'a, IAIN, Jakarta, 1994.

————, "Perbandingan Hukum Kewarisan antara KHI dan Fiqh Mazhab Empat dalam Ketentuan Ahli Waris Beserta Bahagiannya", Faculty of Shari'a, IAIN, Jakarta, 1993.

Faculty of Law of the University 'Sebelas Maret", "Laporan Penelitian Studi tentang Pengangkatan Anak di Daerah Kecamatan Jatisrono Kabupaten Wonogiri", Surakarta: Fakultas Hukum Sebelas Maret, 1985.

Gerber, Haim, *Islamic Law and Culture*, Leiden: E.J. Brill, 1999.

Harahap, M.Yahya, *Kedudukan Janda, Duda, dan Anak Angkat dalam Hukum Adat*, Bandung: P.T. Citra Aditya Bakti, 1993.

————, " Informasi Materi Kompilasi Hukum Islam: Mempositifkan Abstarksi Hukum Islam", in Cik Hasan Basri, *Kompilasi Hukum Islam,* Jakarta: Logos Wacana Ilmu, 1999.

Haryono, Anwar, "Hukum Kewarisan Bilateral Menurut al-Qur'an: Komentar Singkat Atas Teori Prof. Hazairin", in Sayuti Talib, *Pembaharuan Hukum Islam di Indonesia*, Jakarta: UI Press, 1981.

Hooker, MB, "The State and Syari'ah in Indonesia, 1945-1995", in Timothy Lindsey, *Indonesia: Law and Society*, Melbourne: The Federation Press.

Hosseini, Ziba Mir, *Marriage on Trial, A Study of Islamic Family Law: Iran and Morocco Compared,* London: I.B. Touris & Co Ltd, 1993.

Lukito, Ratno, *Pergumulan antara Hukum Islam dan Adat di Indonesia*, Jakarta: INIS, 1998.

Mahmoud, Tahir, *Personal Law in Islamic Countries*, New Delhi: Academy of Law and Religion, 1987.

Mehdi, Rubya, *The Islamization of the Law in Pakistan*, United Kingdom: Curzon Press, 1994.

Nasution, Khairuddin, *Status Wanita di Asia Tenggara: Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysis*, Jakarta: INIS, 2002.

Rasyid, Roihan A, "Pengganti ahli Waris dan Waiat Wajibah", in Cik Hasan Bisri, *Kompilasi Hukum Islam,* Jakarta: Logos Wacana Ilmu, 1999.

Saimima, Iqbal Abdurrauf, *Polemik Reaktualisasi Ajaran Islam*, Jakarta: Pustaka Panjimas, 1988.

Sofa, *Talfiq dalam Kompilasi Hukum Islam: Studi atas Buku I Tentang Hukum Perkawinan*, MA thesis, IAIN Syarif Hidayatullah, Jakarta, 2001.

Sofwan, Sri Soedewi Masjchun, "Hak Mewaris Bagi Jandan dan Anak dan atau Anak Angkat", *Hukum Nasional*, No. 24, 1974.

Tafal, B. Bastian, *Pengangkatan Anak Menurut Hukum Adat*, Jakarta: C.V. Rajawali, 1983.

Zaid, Abdul Aziz Mohammed, *The Islamic Law of Bequest*, London: Scorpion Publishing Ltd., 1986.

Interviews

Interview with Prof. Amir Syarifuddin, February 2003.

Interview with Drs. Minhajul Falah, February 2003.

Interview with Daud Ali, a male judge of the Islamic court of Jakarta Timur.

Interview with M. Yusuf, a male judge of the Islamic court of Cianjur.

Interview with Rohimah, a female judge of the Islamic court of Tasikmalaya.

Interview with Prof. DR. Ichtiyanto, August 2003.

Interview with Abdul Rasyid, a male judge of the Islamic court of Cibinong.

Interview with Adib, a male judge of the Islamic court of Bogor.