

# SOCIAL AND RELIGIOUS DIMENSIONS OF CHILDREN'S INHERITANCE IN TURKEY, SAUDI ARABIA AND INDONESIA

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**Abstract:** This paper explores the framework of inheritance provisions for biological children and adopted children in three different countries, namely Turkey, Saudi Arabia, and Indonesia. The reinterpretation of children's inheritance rights in society today demonstrates the increasing response to social context vis a vis religious text. Turkey and Indonesia share an emphasis on social dimension in reinterpreting children's inheritance rights for men and women portions. Saudi Arabia, however, is remained to adopt conservative approach in interpreting the religious texts wherein men's share twice as much as women. This research is a normative (doctrinal) approach in comparing legal issues on inheritance exercised in three countries. The data are based on literature such as regulation, books, journals, and related articles. This paper argues that socio-cultural conditions, political dynamics and ideological mainstream shape the nature of law in each country.

**Abstrak:** Tulisan ini menggali pengembangan ketentuan kewarisan anak kandung dan anak angkat di tiga negara yaitu Turki, Saudi Arabia dan Indonesia. Reinterpretasi hak waris anak dari negara-negara yang menjadi objek riset ini menunjukkan bahwa aspek sosial dan keagamaan menjadi bagian poin dalam menempatkan hak anak yang diambil dari teks keagamaan. Turki dan Indonesia cenderung melihat aspek sosial menjadi penafsiran ulang terhadap hak waris anak, di mana laki-laki dan perempuan di Turki mendapat porsi sama. Sedangkan di Indonesia, hak anak angkat diposisikan secara sosial dengan mendapat wasiat wajibah. Saudi Arabia, pada sisi lain, cenderung konservatif dengan menafsirkan ayat-ayat waris bagi anak laki-laki dan perempuan secara literal. Penelitian ini ialah penelitian normatif dengan pendekatan Perundang-Undangan dan pendekatan Komparatif. Sumber-sumber kajian riset ini yaitu berupa peraturan perundangan, buku, jurnal dan artikel terkait. Tulisan ini menyimpulkan bahwa perubahan hukum di tiap negara berhubungan erat dengan kondisi sosial budaya, dinamika politik dan ideologi yang berkembang.

**Keywords:** inheritance of biological children, adopted children, turkey, Saudi Arabia, Indonesia

## Introduction

One of the endless debates on Islamic inheritance law is on the equal portion between male and female. In classical *fiqh* (Islamic jurisprudence), it has long been claimed that male enjoys twice as much as female.<sup>1</sup> The nature of this portion is deemed related to the strong rooted tradition held in the Arab, whose man is superior over woman. In other words, men is also entrusted to take over all needs and responsibility in family affairs.

Among Muslim lawyers this issue has been debated and the conflicting arguments are until recently unreconciled. Sheikh Ali Jum'ah, Ali al-Shabuni, and Yusuf al-Qardhawi, for instance, argued that inheritance issue is final and no room for interpretation. Some other Muslim scholars, such as Khalid Abou el-Fadl, Muhammad Syahrur, Tahir al-Haddad, saw this issue included as social matters and therefore interpretable that may change following social conditions of the community.

Sheikh Ali Jum'ah, the former Grand Mufti of Egypt, considers that the verse elucidating the inheritance of males and females is *qath'i* (clear, definite and final).<sup>2</sup> According to Ali Jum'ah, as quoted by Ahmad Musabiq Habibie,<sup>3</sup> large and small differences in inheritance are not determined by gender. However, social context as defined with the level of kinship of the heirs, the position of the generation level, and the responsibility within the family influenced this matter. It would be rationale that the family factor bear this nature. Therefore, male and female portions may be conditional in nature following the system of family.<sup>4</sup>

Similar opinion is stated by Muhammad Ali al-Shabuni. For him, the half portion of inheritance obtained by women in Islamic law contains certain wisdom. Among of the

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<sup>1</sup> See Muhammad bin Ahmad al-Andalusi al-Qurthubi, *Bidâyah Al-Mujtahid Wa Nihâyah al-Muqtashid* (Jakarta: Dar al-Kutub al-Islamiyyah, 2012). juz.2, p.330. Tedi Supriyadi, "Reinterpretasi Kewarisan Islam Bagi Perempuan," *Jurnal Sosioreligi* 14, no. 2 (2016): 66-67.

<sup>2</sup> Etymologically, *qath'i* means clear/definite, Ahmad Warson Munawwir, *Kamus Al-Munawwir Arab-Indonesia* (Surabaya: Pustaka Progressif, 2020). H.1134. the meaning and the purpose of the verse is clear and definite. It cannot be interpreted differently.

<sup>3</sup> Ahmad Musabiq Habibie, "Pemikiran Hukum Islam 'Ali Jum'ah Studi Atas Wacana Kesetaraan Gender" (Master's Thesis, Jakarta, UIN Syarif Hidayatullah, 2020), 166-67.

<sup>4</sup> For example, if someone dies and leave behind him some heirs including father, mother, children. In this instance, both father and mother obtain a 1/6 share of the inheritance. As an example, if someone dies and leave behind two groups of heirs. The first group consists of husband, father, mother, and two daughters. The second group consists of husband, father, mother, and two sons. If a similar way of dividing the inheritance is employed, the two daughters in the first group will have bigger shares than the two sons in the second group. As an example, if someone dies and leave behind two groups of heirs. The first group consists of husband, father, mother, a daughter, a granddaughter from a son. The second group consists of husband, father, mother, a daughter, and a grandson from a son. If a similar way of dividing the inheritance is employed, the granddaughter from the first group will have a 1/6 share of the inheritance. While the grandson, which has a status of *ashabah* (someone who obtain the remaining share), will have no share at all. Ahmad Musabiq Habibie, 166-75.

wisdom are as follow:<sup>5</sup> a). All needs and living expenses of women are borne by men; b) Women are not obliged to feed the family; c) Men are required to pay some dowries for their future wives; d) men are obliged to provide clothing, food and shelter for their wives and children and all family affairs. All these categories, for him, aimed to honor women. Women's inheritance rights are not followed with burden for making a living and bearing the burden of life. Women can actually enjoy their own inheritance's rights as well as enjoying the inheritance of their spouses. He then shows the indicants stated in the Quran 2: 233;

...وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ... ﴿٢٣٣﴾

"And the duty of the father to feed and clothe the mothers in a dignified manner"

In contrast, Tahir al-Haddad's believed that Islamic law is implemented gradually (*al-tadarruj*) and revealed to honor women and recognize their rights including the inheritance, even though the provisions were not equal between males and females. According to al-Haddad, this provision is an intermediate effort because previously women did receive nothing. Furthermore, he also shows that in some conditions women can receive equal share with men, or even more in some occasions. Al-Haddad, in contrast, also rejects the view of half portion for women as a definite and final provisions. The reason of providing more provisions for men in light of their obligation to bear the family including the wife is not unchangeable. Islam has given women freedom to work and develop their wealth through different means, such as trading. Nowadays, women have worked in various sectors such as industry, agricultural enterprises, trading, and so on.<sup>6</sup>

Similarly, Khaled Abou el-Fadl stated that a higher provision for men is no longer relevant for today's time. According to him, Islamic law respects the dynamics of law motives. This suggests that the changes of the law might be required following the changes of times and places as well.<sup>7</sup>

A similar view was also expressed by Muhammad Syahrur. As quoted by M Ali Murtadho, Syahrur uses his limit theory in interpreting the verse of inheritance. In this notion, he believed that the provisions described in the Qur'an is the maximum limit. It is not an absolute decree that should be followed.<sup>8</sup>

Such arguments also held by Indonesian scholar, especially Munawir Syazali who

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<sup>5</sup> Muhammad Ali al-Shabuni, *Al-Mawarits Fî al-Syari'ah al-Islamiyyah* (Kairo: Dar al-Haris, t.t), 17-19.

<sup>6</sup> Tahir al-Haddad, *Imraatunâ Fî Al-Syari'ah Wa al-Mujtama'* (Kairo: Dar al-Kitab al-Masri, 1930), 30-35.

<sup>7</sup> <https://www.searchforbeauty.org/2017/03/15/fatwa-why-would-allah-give-men-inheritance-rights-that-are-superior-to-women/> diakses 25 April 2021.

<sup>8</sup> Muhammad Ali Murtadho, "Keadilan Gender Dalam Hukum Pembagian Waris Islam Perspektif The Theory of Limit Muhammad Syahrur," *Tafaqquh; Jurnal Penelitian dan Kajian Keislaman* 6, no. 1 (2018): 81-83.

proposed similar argument. Syazali is known for his idea of *ijtihad* of humanity. As quoted by Terry Ana Fauziah and YUSDANI, Munawir Syazali argued that the inheritance verse as unfinished settlement and adjustable in its implementation. Some of the arguments raised by Munawir Syadzili include the existence of substitute law (*nasikh wa al-mansukh*) in the sacred texts (hadith/al-Qur'an). Further, he quoted some prominent Muslim scholars such as al-Maraghi who stated that certain laws can be altered if it does not support the needs of the Muslim community. Syadzali then added that Rashid Ridha also believed the changes of laws due to time differences, place, and situation.<sup>9</sup>

According to Zaiunuddin Sardar, as quoted by Suaidin Naim, a 2:1 ratio is not a definite provision and can still be adjusted. In Sardar's view, the formulation of law in the Qur'an and hadith consists of two elements, namely normative element and *hudud* (boundary) element. The normative element is an eternal and universal side of law which should not be changed at all. On the other hand, the elements of *hudud* are elastic. It can change according to the development of place and time. In the matter of inheritance, the normative element is the equal right to inherit from both men (males) and women (females). While the element of *hudud* is the share obtained by the heirs, both men and women which are equal. Therefore, the 2:1 inheritance ratio between males and females is not a definite provision. Instead, the provision can be flexed or changed.<sup>10</sup>

Regarding the matter of adopted children, in the *jahiliyyah* era (pre-Islamic era) they were fully entitled to inherit the property of the adoptive father. Provided that it must be an adult man (in the *jahiliyyah* era, women and children were not entitled to inherit any property).<sup>11</sup> However, after the advent of Islam, based on surah al-Ahzab verses 4-5,<sup>12</sup> Islam forbids the

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<sup>9</sup> Terry Ana Fauziah and YUSDANI, "Pemikiran Munawir Sjadzali Tentang Kedudukan Ahli Waris Laki-Laki Dan Perempuan Ditinjau Dari Kompilasi Hukum Islam Dan Fikih Indonesia," *Universitas Islam Indonesia* (naskah publikasi), n.d., 30: 15-16.

<sup>10</sup> Suaidin Naim, "Penerapan Asas Proporsionalitas Dalam Pembagian Warisan Dalam Hukum Adat," *al-Ittihad Jurnal Pemikiran dan Hukum Islam* 2, no. 2 (2015): 47-48.

<sup>11</sup> Mahkamah Agung RI, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Serta Pengertian dalam Pembahasannya* (Jakarta: Mahkamah Agung RI, 2011), 422.

<sup>12</sup> The text of the Qur'anic verses mentioned are as follow:

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِّن قَلْبَيْنِ فِي جَوْفِهِ وَمَا جَعَلَ أَزْوَاجَكُمْ أَلْيَاءَ لَكُمْ مِنْهُنَّ أُمَّهَاتِكُمْ وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ذَلِكَ قَوْلُكُمْ بِأَفْوَاهِكُمْ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ (٤)

"Allah has not made for any man two hearts in his chest cavity, nor did he make your wives whom you subjected to Zihâr, your mothers, nor did he make your adopted sons your (real) sons. That is (merely) a word uttered by your mouths. And Allah says the truth and He shows the (right)-way." (Q.S. Al-Ahzab [33]: 4).

أُدْعُوهُمْ لِأَبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ فَإِن لَّمْ تَعْلَمُوا آبَاءَهُمْ فَاخْوَانُكُمْ فِي الدِّينِ وَمَوَالِيكُمْ وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِن مَّا تَعَمَّدَتْ قُلُوبُكُمْ وَكَانَ اللَّهُ غَفُورًا رَّحِيمًا (٥)

"Call them by (the name of) their (real) fathers; It is more equitable in the sight of Allah. And if you

attribution of adopted children to their adoptive parents. Instead, the adopted child should be attributed to his biological parents. This includes the civil right of the adopted child. This new law of provision abolishes the previously absolute right obtained by the adopted children.

Adopted children are not related by blood. However, they are entitled to education, livelihood, and necessities of life from their adoptive parents. Although the formal law of inheritance provides no share for adopted children, practically they are graced with inheritance rights from the adoptive parents in several areas. This is in light of fulfilling the element of justice and anticipating inheritance disputes in the future.<sup>13</sup>

Apart from the theoretical debate on children's inheritance rights, the social conditions continue to change. In line with this, Islamic countries, or those with Muslim populations, continue to carry out family law reforms including inheritance. According to Tahir Mahmood, there are at least three models of change in practice: traditional legal form's proponents, certain substantial reform's advocates, and secular law's proponents. Saudi Arabia is a country that is close to the first model, Indonesia is close to the second model, while Turkey is the right prototype for the third model.<sup>14</sup>

The research of Kiki Adnan Muzaki et al. entitled *Reform of the Law of Inheritance in Turkey and Tunisia*, portrays the conflict between secular and conservative groups in dealing with Islamic law. The pole conflicting arguments are on the issue of interpretation of text, which still opposing one another. The role of school of law plays greatly in influencing this issue.<sup>15</sup>

Ihsan Yilmaz in his work *Secular Law and the Emergence of Unofficial Turkish Islamic Law* shows that the legal changes aimed at changing the socio-cultural background of Turkish society, as part of the secularization agenda, are not fully accepted and implemented. On the other hand, some people remain to do things legalized by Islamic law without considering the new civil law adopted from Switzerland. This study concludes that sociologically and legally legal pluralism in Turkey still remain exists.<sup>16</sup> The work of Mary Lou O'Neil and Sule Toktas entitled *Woman's Property Rights in Turkey* also shows gender equality manifested in the regulation of women's property rights in Turkey, including inheritance issues. Customary

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*do not know their fathers, then they are your brothers in faith and your friends. There is no sin on you in the mistake you make, but in that which you do with intention of your heart; and Allah is Most-Forgiving, Very-Merciful.*" (Q.S. Al-Ahzab [33]: 5).

<sup>13</sup> Gunawan Gunawan and Muhammad Rizqullah Dany Putranto, "Kedudukan Anak Angkat Terhadap Harta Warisan Berdasarkan Hukum Waris di Indonesia," *Media Iuris* 3, no. 2 (July 23, 2020): 161, <https://doi.org/10.20473/mi.v3i2.18688:169-70>.

<sup>14</sup> Tahir Mahmood, *Family Law Reform In The Muslim World* (New Delhi: The New India Press, 1972), 5-7.

<sup>15</sup> Kiki Adnan Muzaki, Asep Saepudin Jahar, and Muhammad Amin Suma, "Reform of The Law of Inheritance in Turkey and Tunisia" 17 (2020): 20.

<sup>16</sup> Ihsan Yilmaz, "Secular Law and the Emergence of Unofficial Turkish Islamic Law," *Middle East Journal* 56, no. 1 (2002): 113-31.

law, however, is exercised hand in hand with Turkish civil law. In some areas of Turkey, women are still prevented from obtaining inheritance and the right to own property such as land.<sup>17</sup>

Ibnu<sup>18</sup>, Sakirman<sup>19</sup> and Sugiri<sup>20</sup> highlighted the role of customs in inheritance in Indonesia as well the role of reinterpretation of Islamic law by following the local culture. These studies generally illustrated the nature of Islamic law in Indonesia which adopted local culture to be blended with shariah in interpreting the inheritance law.

In contrast to the previous research, this paper examines the social, political, and religious aspects of reinterpreting religious texts on family law, especially the inheritance rights of biological and adopted children in three Muslim countries namely Turkey, Indonesia, and Saudi Arabia.

## Methodology

This study employs a textual philosophical and social historical approaches in discussing and analysing the issue relevant to the data. A textual philosophical approach is used in understanding the sources, theological foundation held in each country and the way of religious texts were treated differently. Through legal analysis as commonly used by Muslim lawyers, this essay searches the characteristics of school of law applied in each country. In terms of social history, this study investigates the position of state in dealing with politics and religion as well as their role of political and religious figure. The use of normative-philosophical and social history approaches shows us clearly how law, religious texts and political system in each country have strongly shaped the running law in each country.

## Results and Discussion

### *Turkish Socio-Political Background*

Modernization in Turkey has occurred since the Ottoman Empire, particularly during the reign of King Salim III (1789-1807) where a reformed rule (*Nizahm Jedid*) was implemented. The reformation covered tax increase, new military models and modern schools. His successor, Mahmud II (1807-1839), sustained the modernization effort by implementing 'school liberalization'.

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<sup>17</sup> Mary Lou O'Neil and Sule Toktas, "Women's Property Rights in Turkey," *Turkish Studies* 15, no. 1 (January 2, 2014): 29–44, <https://doi.org/10.1080/14683849.2014.891350>.

<sup>18</sup> Ibnu, "Politik Hukum Waris Islam; Studi Perbandingan Hukum Kewarisan Indonesia dan Arab Saudi," *Bimas Islam* 10, no. 4 (2017).

<sup>19</sup> Sakirman, "Konvergensi Pembagian Harta Waris dalam Hukum Islam," *Al-Adalah* 8, no. 2 (2016).

<sup>20</sup> Sugiri Permana, "Kesetaraan Gender dalam Ijtihad Hukum Waris di Indonesia," *Asy-Syari'ah* 20, no. 2 (December 21, 2018): 117–32, <https://doi.org/10.15575/as.v20i2.3210>.

Until in 1839, a reorganization (*tanzimat*) was implemented which included changes to civil, territorial, commercial, judicial, and criminal law.<sup>21</sup>

On the 23<sup>rd</sup> of April 1920, the Turkish National Assembly (Turkish Grand National Assembly/Türkiye Büyük Millet Meclisi, TBMM) held its first assembly in Ankara. This assembly has marked the beginning of a new era of the Turkish state, namely the Secular Republic. The basic policy of the Turkish state is Laicism. This new regime does not mean destroying Islam. Rather, it aims to uproot its political authority. The power of religion in political, social, and cultural affairs will be limited only to matters of worship and belief. For example, in the same year, TBMM enacted an anti-treason law against the state. This law aims to prevent the misuse of religion for political purposes.

Kemal's government began with the 1921 constitution which stipulates that the ultimate sovereignty rests in the Turkey's citizen. In 1923, the Republican People's Party (Cumhuriyet Halk Partisi, CHP) was formed with Mustafa Kemal as the leader. Following that, Kemal was elected as the president of the Republic of Turkey. In 1924, the caliphate system was abolished. The Sultan was sent to exile. The new state echoed a new slogan of "Sovereignty belongs to the nation". The abolition of the caliphate signified the end of religious institutions as the top authority of the state. This was signalled as an important step towards secularization. The concept of submission to God was then replaced with the concept of loyalty to the nation, which at the same time promoted the identity of a secular nation.<sup>22</sup>

In 1924, madrasas were abolished and replaced with an integrated education system. In 1925, the Sufi groups and the use of hijab were banned. In 1928, Arabic script was replaced with Latin alphabet. At the same year, Islam no longer became the state's religion. In 1934, the new state provided full political rights to women. In 1937, secularism was introduced as the constitutional principle. Following that, in 1938, the state banned the formation of religious based parties. The afore-mentioned efforts were undergone as the requirement for developing country with contemporary civilization, creating a secular society, and keeping religion under the state's control.<sup>23</sup>

The new government system, to some extent, has divided the Turkish into three groups namely the Islamists, Westernists, and Nationalists. The Islamist group adopts Islamic values as their moral-spiritual standard, not the west principles. Some of the important figures from this circle are Mehmed Akif, Mustafa Sabri, Riza Pasha, Namik Kemal, Midhat Pasha, Sahabuddin, and Said Nursi.

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<sup>21</sup> Mustafa Kocak, *Islam and national law in Turkey* dalam Jahn Michiel Otto, ed., *Sharia Incorporated; A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and Present* (Amsterdam: Leiden University Press, 2010), 234-36.

<sup>22</sup> Mustafa Kocak, *Islam and national law in Turkey* dalam Otto, 241-42.

<sup>23</sup> M Hakan Yunus, 158.

Said Nursi is one of leading Muslim activists who vehemently opposed Mustafa Kemal's secularization idea. Nursi spent nearly 30 years in exile and prison for opposing the government. Nursi experienced at least three times of exile in a remote place and three times in prison between 1927-1950.

In line with Nursi's ideas, some Muslim communities in Turkey considered secularism, promoted by the government, as contrary to Islamic principles. Therefore, at the community level, a lot of rejection occurred towards the rules created by the government. The supporters of this group usually originating from elite groups such as schoolteachers, university lecturers, lawyers, and journalists.<sup>24</sup> In the 1980s, a wave of democratization spread throughout the world. It triggered the political awareness of civil society. This momentum was used as an opportunity for Turkish 'Islamists' to establish an Islamic party. One of the most prominent characters in this group is Necmetin Erbakan.

Erbakan won the 1996 election through the support of Refah Islamic party. However, his government, which tended to develop Islamist views, only lasted for one year before it was finally dissolved by the military. His struggle was continued by his student Recep Tayyip Erdogan and Abdullah Gul. In 2002 and 2007 they won the general election through the support of the AKP party. During the time of Abdullah Gul as the president and Erdogan as the prime minister, the old policies were restored. Among the restored rules were teaching the Qur'an and Hadith in Turkish state schools, allowing hijab to be worn in all sectors, and banning alcohol consumption.<sup>25</sup>

Westernist groups, moreover, sought to completely transform Turkey into western country, including its culture, world view, and civilization. Important figures in this group are Tawfik Fikret and Abdullah Jewdat. Meanwhile, nationalist groups are trying to find a meeting point between Islamists and Westernists. This group aspires a separation between religion and state, where Islamic law is not employed as the basis law of the state. The pioneers of this group are Yusuf Akcura, Ziya Gokalp and Mustafa Kemal.<sup>26</sup>

After revolution, Turkey became a secular republic. The authority of Islamic law in Turkey was developed by the religious department (*Diyanet*) as well as several influential figures such as Yasar Nuri Oztruk and Fethullah Gulen. *Diyanet* does not have a specific method of issuing laws, but the legal opinion of this organization refers to the Qur'an, hadith, and Hanafi's *fiqh* (Islamic jurisprudence). However, Hanafi's *fiqh* is not the main reference because the *Diyanet* has appointed two women as mufti's representatives who

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<sup>24</sup> Faiz, 33.

<sup>25</sup> Arrasyidin Akmal Domo, Nuhasanah Bachtiar, and Z Zarkasih, "Revolusi Sosial masyarakat turki: Dari Sekularisme Attatur Menuju Islamisme Erdogan," *Sosial Budaya* 15, no. 2 (December 30, 2018): 83, <https://doi.org/10.24014/sb.v15i2.6696>: 88-90.

<sup>26</sup> Muhammad Faiz, "Risalah Nur dan Gerakan Tarekat di Turki: Peran Said Nursi pada Awal Pemerintahan Republik," *Al-Araf/ : Jurnal Pemikiran Islam dan Filsafat* 14, no. 1 (June 27, 2017): 23, <https://doi.org/10.22515/ajpif.v14i1.588>: 31-32.



are not known in the Hanafi school of thought. This institution tends to create a harmony between religion and Turkish republican and secular principles in providing advice to its citizens.<sup>27</sup>

The most influential Muslim scholar in reconciling Islam and secularism in Turkey is Yasar Nuri Ozturk. According to Oztruk, Turkish secularism and nationalism are in accordance with Islamic teachings. Oztruk tends to be a modernist. He does not literally follow the classical *fiqh*. His views are similar with those of Rashid Rida who proposed a new *ijtihad*.<sup>28</sup>

Another scholar who is quite influential in Turkey is Fethullah Gulen. Gulen has inspired the establishment of the *Hizmet* (service) movement which claims to have millions of sympathizers in Turkey. Gulen also has various sympathizers from various ideological, national, and ethnic backgrounds. These sympathizers follow the *hizmet* movement because they are driven by Islamic and social values such as philanthropy and peace.<sup>29</sup>

In the legal view, Gulen was influenced by Sufi movements such as Naqshbandi and Mevlvei as well as some prominent figures such as Jalal al-Din Rumi and Said Nursi. In some cases, Gulen refers to the views of classical jurisprudence such as the Hanafi school of thought. However, he does some re-interpretation in certain aspects. Structurally, Gulen legitimizes the secular state and believes that democracy is in line with the principles of *ijma* (consensus) and *shura* (deliberation) in Islam.<sup>30</sup>

The Kemalists assume that cultural transformation must start from the smallest sphere, which is family. To realize this, radical changes are needed in family law matters. Therefore, the modernization of family law is crucial and should be carried out.<sup>31</sup>

Under al-Tatruk's leadership, Turkey eventually adopted Swiss family law with some adjustments. However, the new Family law is not entirely adhered by the community. For example, the provisions on the minimum age limit for marriage could not be implemented comprehensively. In some rural communities, marriages below the civil law age limit were still carried out in light of the traditional Islamic legal marriage age limit, which is the puberty.

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<sup>27</sup> Russell Powell, "Evolving Views of Islamic Law In Turkey," *Journal of Law and Religion* 28, no. 2 (2013): 21, <https://doi.org/10.1017/S0748081400000114>:480-81.

<sup>28</sup> Powell.: 481-82.

<sup>29</sup> Jamel Rambo Cayamodin and Abdulhamit Durakoglu, "The Predicaments of Muslims in the Philippines: An Exposition of Said Nursi's Hypothesis Vis-a-Vis Hizmet Movement Approach," *Studi Islamika; Indonesian Journal For Islamic Studies* 28, no. 1 (2021), <https://doi.org/10.36712/sdi.v28i1.11339>:103.

<sup>30</sup> Powell, "Evolving Views of Islamic Law In Turkey." : 484-86.

<sup>31</sup> Ihsan Yilmaz, "Semi-Official Turkish Muslim Legal Pluralism: Encounters Between Secular Official Law and Unofficial Shari'a," in *The Sociology of Shari'a: Case Studies from around the World*, ed. Adam Possamai, James T Richardson, and Bryan S. Turner, vol. 1, *Boundaries of Religious Freedom: Regulating Religion in Diverse Societies* (Cham: Springer International Publishing, 2015), 51-65, [https://doi.org/10.1007/978-3-319-09605-6\\_4](https://doi.org/10.1007/978-3-319-09605-6_4). : 3

Administratively, the married couple will be registered to the state when their ages have reached the minimum age limit for marriage in legal family law.<sup>32</sup>

However, the results of Paul J Magnarella's study show that along with the social, cultural, and economic changes of Turkish society, the acceptance of this new civil law has increased and in turn triggered social change in the next period.<sup>33</sup> In more detail, the development of Turkish family law will be described in the following discussion.

### ***The Development of Turkish Family Law***

Islamic civil law (called *Majallat al-Ahkam al-Adliyyah*) derived from the Hanafi school of thought was codified in 1876 when the Ottoman empire was in power. However, this set of law does not cover family law and inheritance. New rules on marriage and divorce were formulated in 1915 and codified in 1917. In 1926, along with the political revolution that led to the collapse of the Ottoman empire and the abolition of the caliphate system, a comprehensive civil law was formed replacing the former civil laws of 1876, 1915<sup>34</sup>, 1917 and the inheritance laws, which was derived from the uncodified Hanafi model of jurisprudence.<sup>35</sup>

In 1917, using the principle of *takhayyur* (choosing from various schools of thought) and substantial consideration, the codification of Islamic family law was formulated. This rule was named as the Ottoman Law of Family Right (Qânun al-Huqûq al-Âilu). This rule was not only applied in Turkey, but also other Ottoman territories. In 1919, however, the rule was then declared as invalid.

After the Lausanne peace treaty in 1923, the Turkish government formed a committee of jurists to formulate a comprehensive code of civil law. This rule is expected to be based on Islamic law. However, in the formulation process, the committee board could not agree upon certain Islamic jurisprudence model that should be used. Therefore, the Turkish government dissolved the committee and chose to adopt and adjust the Swiss civil law of 1912. The law was then formally implemented in 1926.

Turkish Civil Code of 1926 (Turkish Civil Code of 1926) covers various comprehensive aspects of family law, such as marriage, divorce, family relations, and inheritance matters. To some extent, this civil law is different from the classical Islamic law/jurisprudence

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<sup>32</sup> Yilmaz., 9.

<sup>33</sup> Paul J. Magnarella, "The Reception of Swiss Family Law in Turkey," *Anthropological Quarterly* 46, no. 2 (April 1973): 100, <https://doi.org/10.2307/3316746>.: 114.

<sup>34</sup> According to Tahir Mahmood, the civil law related to individual issues, family relations and inheritance, which was applied until 1915, came from the Hanafi school adopted by the government. another legal rules outside of the school were also chosen. One the examples is the right of married women to file a divorce through courts.

<sup>35</sup> Mahmood, *Family Law Reform In The Muslim World.*, 15.

such as in the case of inheritance. The enactment of this civil law has certain impact on the separation between religion and law in Turkey. In the same year, Turkey adopted a criminal law from Italy, namely the Italian Criminal Code of 1889. This rule was also adapted and adjusted to the conditions of Turkish society.<sup>36</sup>

According to Ahmet Temel, the influence of Islamic family law is also contained in the new Turkish civil law. For example, article 92 stated that milk-siblings are one of the obstacles to marriage. Ironically, even though this regulation has been approved by the Turkish National Assembly, the government removed it without asking approval confirmation from the Turkish National Assembly. The government stated that it was to correct the grammar and improve the writing's quality of the bill.<sup>37</sup>

Temel also noted that some of the 1926 Turkish civil law regulations were derived from Islamic law, albeit the source of the rules (Swiss civil law) was Western culture. Some of the examples are as follows:

1. The separation of marital property is regulated in the Turkish Civil Law of 1926, while the Swiss civil law of marital property is subject to the rules of joint acquisition unless other provisions in the marriage agreement exist.
2. In Turkish civil law, the reasons for divorce are adultery, life-threatening or psychological behaviour, criminal behaviour, negligence, mental illness, and other unsolvable matters in marriage. Meanwhile, according to Swiss civil law, the reasons for divorce are living apart for two years and unsolvable matters in marriage.
3. The authority of the family in Turkish civil law is given to men. Whereas in Swiss civil law, although the head of the family is mentioned, gender is not mentioned
4. In Turkish civil law, women are not allowed to re-marry before 300 days after the previous divorce. Whereas in Swiss civil law, the 300-day period is only mentioned in the matter of determining the father.<sup>38</sup>

According to Mahmood,<sup>39</sup> the adoption of non-Turkey civil law is a form of Mustafa Kamal's desperation towards the committee he has formed. His efforts to formulate a civil law originating from Islamic law failed because the committee was not able to find the

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<sup>36</sup> Mahmood., 16-18.

<sup>37</sup> Ahmet Temel, "Between State Law and Religious Law; Islamic Family Law in Turkey," *Electronic Journal of Islamic and Middle Eastern Law* 8, no. 1 (2020), 72

<sup>38</sup> In this instance, the condition is as follow: *if the defendant had sexual intercourse with the mother during the period between the 300th day and the 180th day before the child's birth, his paternity is presumed.* The English translation of the Swiss family law can be accessed on the following link: [https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/24/233\\_245\\_233/20210101/en/pdf-a/fedlex-data-admin-ch-eli-cc-24-233\\_245\\_233-20210101-en-pdf-a.pdf](https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/24/233_245_233/20210101/en/pdf-a/fedlex-data-admin-ch-eli-cc-24-233_245_233-20210101-en-pdf-a.pdf).

<sup>39</sup> Tahir Mahmood, *Personal Law In Islamic Countries; History, Text and Comparative Analysis* (New Delhi: New Delhi For the Academy of Law and Religion, 1987), 265-67.

common ground to base their views. The Turkish civil code of 1926 has also undergone several amendments. According to Mahmood's records, amendments were made in 1933, 1938, 1945, 1950, 1956 and 1965. These amendments aim at conforming the traditions of the Turkish Muslim community.

In the period of 1926-1965, several provisions were updated, including:

- Compensation for breaking up a promise to marry
- Increasing the age of marriage for men and women. In addition, courts are also empowered to allow marriages under the specified age in some exceptional cases.
- The recognition of foster children as one of the prohibitions of marriage. However, this disallowance is not as strict as the prohibition on incest marriage.
- Strengthening the prohibition and punishment of undergoing a bigamy. However, revoking a bigamous marriage is not obligatory if the first marriage has ended.
- Provisions to revoke a marriage if one of the spouses feels the absence of freedom to provide marriage consent.
- Acknowledging the legitimacy of all children whether they were born from a lawful or forbidden marriage.
- Acknowledging the need to improve relations after divorce, eliminating all forms of outside-court divorce, and giving an authority for both wife and husband to file a divorce through courts.
- Payment of compensation due to divorce, if supported by strong facts and circumstances.
- Introduction of core family norms and equal rights between men and women in the matter of inheritance.

Later, amendments also occurred in the period of 1988-1992. Amendments towards divorce by mutual consent, wife support and provisional arrangements in the process of divorce were adopted in 1988. In 1990, amendments related to engagement, post-divorce and adoption also occurred. In this period, the updated divorce materials include the possibility of a party to file a divorce in light of inharmonious family life. The disheartened and aggrieved party has the right to file a divorce and ask for compensation. In addition, they can also file a divorce and demand a year's support.<sup>40</sup>

In 2001, a massive campaign of feminists and women's defenders was carried out. As a result of this movement, family law was amended to form a New Civil Code (Bill No. 4721) which has been in effect since January 1, 2002.<sup>41</sup> This amendment emphasizes gender equality. Based on this rule, the 18 years old minimum marriage age limit is applied for

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<sup>40</sup> Ahmad Zayyadi, "Kontribusi Turki dan Mesir Terhadap Sejarah Pembaruan Hukum Keluarga Islam di Indonesia," *Al-Manhaj: Journal of Indonesian Islamic Family Law* 2, no. 1 (June 1, 2020): 47, <https://doi.org/10.19105/al-manhaj.v2i1.3115>: 53.

<sup>41</sup> O'Neil and Toktas, "Women's Property Rights in Turkey.", 31.

boys and girls. Several rules based on gender equality in this Civil Code include husbands are no longer the head of the family but a complementary equal partner. The wives have full rights to the property and the freedom of a married couple to choose a property ownership system that can protect them in case of divorce.<sup>42</sup>

## ***The Provisions of Inheritance in Turkish Family Law***

### **a) The Inheritance of Biological Children**

As Islamic law reforms become the main issue in Turkey, inheritance has also been put as the main concern. Turkish family law regulating the inheritance of biological children are as follows:

According to Turkish civil law, men and women have equal rights to inheritance at a ratio of 1:1, particularly after the secularization was formalized.

In the division of inheritance, Turkish civil law divides it into three groups. 1. Descendants of the deceased, 2. Parents and their children (relatives of the deceased), 3. Grandparents and children (uncles and aunts of the deceased). If the first group exists, then the other groups will not get a share. This applies if the deceased did not make a will prior to his/her death.<sup>43</sup>

The Turkish civil law also explained that all assets acquired during the marriage are joint properties. If a husband or a wife dies, he/she has the right to demand the liquidation of his/her property prior to the distribution. This model is similar with Indonesian law of *gono gini* (referring to the assets that are acquired during a marriage). Assets generated during marriage are like *syirkah* (fellowship), so that if one party dies, the other party has the right to take it before distributing it to the heirs.<sup>44</sup>

### **b) The Inheritance of Adopted Children**

In Turkish civil law, someone who wants to adopt a child must meet certain criteria. Based on articles 305-320 of Turkish civil law. Several provisions regarding adoption include:<sup>45</sup>

- The person wishing to adopt must have taken care of the child for at least one year
- Couples who already have offspring, should not adopt another child if it has a negative impact on their children.

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<sup>42</sup> Seval Yildirim, "Aftermath of A Revolution: A Case Study of Turkish Family Law," *Pace International Law Review* 16, no. 347 (2005): 11.

<sup>43</sup> Muzaki, Jahar, and Suma, "Reform of The Law of Inheritance in Turkey and Tunisia," 261.

<sup>44</sup> Muzaki, Jahar, and Suma, 262.

<sup>45</sup>[https://uk.practicallaw.thomsonreuters.com/6-616-4228?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co\\_anchor\\_a488300](https://uk.practicallaw.thomsonreuters.com/6-616-4228?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a488300).

- Couples who wish to adopt must have been married for at least 5 years. In addition, both must be at least 30 years old.
- Unmarried people who are willing to adopt, should be at least 30 years old.
- Unmarried couples (legally) and same-sex couples cannot adopt.
- There must be an age difference of 18 years between the adopter and the adopted child.

As for the inheritance of the adopted children, Turkey held a legal reform in 1958 on the rights and status of adopted children. The law equates the rights and obligations between an adopted child and a biological child. In addition, the adoptive parents should be able to meet the child's financial needs.<sup>46</sup>

### ***Socio-Political Background of Saudi Arabia***

Saudi Arabia is generally a Sunni group faithing in the Wahhabi theology. However, there are also Shiites whose exact number is unknown. *Shiite Imamiyah* are the largest Shiite group in Saudi Arabia. In addition, there are also Shiite Ismailiyah and Shiite Zaidiyah.

The name of 'Saudi Arabia' comes from the Saud family name, Abdul Aziz al-Saud or Ibn Saud who was a tribal chief. In 1932, Saud was able to establish a state by uniting various local tribes. The country has no parliament, no supreme court, no president, and no elections. Since the enactment of the constitution in 1992, Saudi Arabia has been a monarchical system with rulers who can only come from the descendants of Ibn Saud.<sup>47</sup>

According to Harper, Saudi Arabia is one of the strictest Muslim countries considered as fundamentalist and traditionalist group. For the Saudis, there is no separation between religion and state.<sup>48</sup> Saudi Arabia often makes extreme public policies such as restricting women to engage in public life and the obligation of having a mahram (a blood relative company) for women.<sup>49</sup> The king has a prerogative right in political decisions. However, the king may consult the royal family and Wahhabi clerics. The Government's Basic Law (*Nizam al-Asasi li al-Hukm*) issued by King Fahd in 1992 emphasized the king's position as the head of the state as well as the head of government. This also means that the king has the executive, legislative and judicial authority. In carrying out his government, the king is assisted by an assembly of ministers (*Majelis al-Wuzara*). In addition, Saudi Arabia

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<sup>46</sup> Doli Witro et al., "Turkish State Family Law: History Reform, Legislation, and Legal Materials," *Politica: Jurnal Hukum Tata Negara dan Politik Islam* 7, no. 1 (December 30, 2020): 31–42, <https://doi.org/10.32505/politica.v7i1.1621>: 41.

<sup>47</sup> Robert A Harper, *Saudi Arabia*, 2nd ed. (New York: Chelsea House Publisher, 2007), 11.

<sup>48</sup> Harper, 13.

<sup>49</sup> Nostalgiawan Wayhudhi, *Problematika Kekuatan Politik Islam di Arab Saudi*, 27-29.

also has a kind of legislative body (*Shura Council*) that can submit a draft of laws but does not have legislative authority.<sup>50</sup>

Saudi politics began to be more transparent and inclusive in the era of King Faisal and King Abdullah. Despite the pressure from the royal family and Wahhabi clerics, women were provided with more rights in public sphere. These rights include rights to vote and be elected, rights to work and pursue a career, and rights to drive a vehicle. In 2011, King Abdullah announced that women would be allowed to participate in the Shura Council. In addition, women were also given the right to vote and be elected in the 2015 local elections.<sup>51</sup>

### ***Saudi Family Law Developments***

Historically, Saudi authorities initially followed the Ottoman empire's law. Later, the Saudi government discovered a conflict between the interpretation of the Ottoman law and the Islamic law adopted in various areas of the kingdom. In the early eighteenth century, the alliance of Muhammad bin Saud and Ibn Abd al-Wahhab promoted a religious authority under the will of ulema (Islamic clergy). Following that, as approved by religious advisors, the Saudi authorities chose the *fiqh* of Hanbali school of thought as the main basis of *sharia*'s interpretation.

In 1928, the Saudi government issued a decree for judges to use the jurisprudence of Hanbali school in adjudicating cases. In the case of differences in adhering a school of thought occurred, evidence and documents are required. Some of the source of Hanbali school of thought used in the judicial system include *Syarh Muntaha al-Iradat*, *Syarh al-Iqna*, *al-Rawd al-Murbi*, *Sharh Manar*, *al-Mughni* and *Syarh al-Kabir*.<sup>52</sup>

### ***The Provisions of Inheritance in Saudi Arabia***

#### **a) The Inheritance of Biological Children**

As explained in the previous sub-chapter, Saudi Arabian family law is not codified in any form of legislation. Cases related to family law such as marriage, divorce, heirs, child status are under the authority of sharia courts. In adjudicating cases, the judges refer to the jurisprudence of the Hanbali school of thought. However, in some cases, judges are allowed to refer to other school of thought.<sup>53</sup>

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<sup>50</sup> Nostalgawan Wayhudhi, 30-32.

<sup>51</sup> Nostalgawan Wayhudhi, 33.

<sup>52</sup> Awad Ali Alanzi, "Exploring the Legal System in Saudi Arabia," *International Journal of Innovation* 11, no. 2 (2020): 120.

<sup>53</sup> Esther Van Eijk, *Sharia and National Law in Saudi Arabia* dalam John Michiel Otto, ed., *Sharia Incorporated; A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and Present* (Amsterdam: Leiden University Press, 2010), 163.

According to Coulson, Islamic law is the only formal law applied in Saudi Arabia. Moreover, the Islamic inheritance system is derived from the customary law of the pre-Islamic Arab tribes which has been modified by the Qur'an. The Qur'an provides a detail portion for each of the heirs.

In general, female heirs are entitled to a half share of the male heirs. Technically, the inherited property will be distributed to those who have been determined by the Qur'an.<sup>54</sup> Following that, the remaining property will be distributed to the male relatives of the male heirs.<sup>55</sup> Islamic inheritance system allows the deceased to give a maximum of 1/3 of the property to others who are not specified in the Qur'an.<sup>56</sup>

Referring to the provisions of Hanbali school of thought, which has been the legal references in the Saudi Arabian Court, the 1:2 provision between female and male includes the provision of daughters and sons. This provision is not only guided by the Hanbali school of thought, but also the agreement of major Islamic scholars.<sup>57</sup>

Based on the study of sharia court decisions in Saudi Arabia conducted by Chibli Mallat,<sup>58</sup> inheritance cases are not as common as other family law cases. This is because the issue of inheritance has a clear foundation, both derived from the Qur'an and Hadith. Nevertheless, some 'outlier' issues related to inheritance still arise.

Mallat noted an interesting matter on the decision of Saudi Arabian sharia court in 1426 H/2000 AD concerning the will of a deceased who gave *waqf* to his descendants. The issue became complicated because 5 years have passed since the will was issued, as contained in the will on 8 Zulhijah 1361 H/ 16 December 1942. The will was then confirmed by the judge on 11 Ramadhan 1425 H/ 20 December 2004. Some heirs held the will, while other heirs change over time. However, the problem arises due to the demands of the children of the deceased's daughter (testator's grandchildren) to distribute the *waqf* property in the form of inheritance and provide equal benefits between the heir's son and daughter.

According to Mallat, the first demand is not a serious issue because the position of the granddaughter of the deceased has been clearly stated in the inheritance law.<sup>59</sup> However,

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<sup>54</sup> In Islamic inheritance law, people whose shares are predestined in the Qur'an and hadiths are called as *dzawil Furud/ashhabul furudh*. See, Suherman Mukhtar, *Al-Farid Fi Ikhtishar 'Ilm al-Faraid* (Jakarta: Pustaka al-Isyraq, 2019), 16, Syarifuddin, *Hukum Kewarisan Islam*, 41.

<sup>55</sup> In Islamic inheritance law, this matter is called as *ashobah*, which means people who receive the remaining share after all heirs with predestined shares (*dzawil furudh/ashhabul furudh*) have obtained their shares. See, Suherman Mukhtar, *Al-Farid Fi Ikhtishar 'Ilm al-Faraid*, 16.

<sup>56</sup> Esther Van Eijk, *Sharia and National Law in Saudi Arabia*, 165.

<sup>57</sup> *Bidâyah Al-Mujtahid Wa Nihâyah al-Muqtashid*. Juz. 2, 330.

<sup>58</sup> Chibli Mallat, "The Normalization of Saudi Family Law," *Electronic Journal of Islamic and Middle Eastern Law* 5 (2017), 23.

<sup>59</sup> Cucu perempuan dari anak perempuan dapat terhalang dengan adanya anak laki-laki dan anak perempuan pewaris.



a more serious issue is the demand for equal rights between the son and the daughter toward the use of the bequeathed property. Further, Mallat cited the judge's decision as follow:

“I decide as follows; *first*, I explain to the granddaughters who attended the trial that they were not entitled to the principal. *Second*, as in the will of the deceased, the defendant must provide equal property benefits between the son and daughter but not to the granddaughter. *Third*, I provide information to the daughters of the testator that they are entitled to sue for inequality that they have obtained from their siblings because it violated the provisions stated by the testator. I consider it as the truth, and I decide this matter this way.”

Substantially, the decision paves the way to base the division of inheritance through ‘trust’<sup>60</sup> which allows the heirs to be free from the rule of 2:1 portion between sons and daughters as indicated in the Qur’an Surah 4 verse 11. According to Mallat, this decision is an enlightening decision that focuses on the willingness of the property owner.<sup>61</sup>

## **b) The Inheritance of Adopted Children**

Saudi Arabian authorities, especially the Ministry of Labor and Human Development, allow the adoption of children under certain conditions. Some of the conditions are as follows:<sup>62</sup>

- The adopting family must be from Saudi Arabia
- Wives who apply for adoption must be less than 50 years old at the time of application.
- Families who carry out the adoption must be economically well-established. Having an income of no less than 8000 rials proved by a monthly income slip
- The adopting families must be healthy and are not suffering from chronic diseases.
- The adopting families are eligible to educate children.
- The adopting mother nurses the child with love and sincerity
- A three people testimony which verifies that the couple has a good life history.

Regarding the inheritance of adopted children, referring to the concept of inheritance in Hanbali school of thought, there are three reasons to obtain a right to inherit namely descent (lineage), marriage, and slavery (currently no longer exists). In this instance, the adopted children do not fall into one of three categories. Therefore, they would not have any share.

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<sup>60</sup> *Trust* in instance is a type of will. In this case, the deceased wrote a will for his/her family to divide the inheritance equally between males and females' heirs.

<sup>61</sup> Mallat, “The Normalization of Saudi Family Law,” 25-26.

<sup>62</sup> <https://www.zyadda.com/conditions-for-adoption-in-saudi-arabia-and-steps-for-making-application-for-adoption/>, accessed on Juni 6, 2021.

However, the Hanbali school of *fiqh* doctrine also recognizes the existence of spending assets other than inheritance-based rights. Grants and wills are some of the examples. Therefore, as an alternative, even if the adopted child does not obtain inheritance rights, he/she can obtain a grant or a will through his/her adoptive parents. However, it is important to note that it is not based on the right to inherit.

### ***Indonesian Socio-Political Background***

Indonesia is home for the most populous Muslim countries in the world. Syafi'i school of thought is predominantly held as the main reference for legal judgment. Islamic legal thinking in Indonesia is greatly influenced by the Syafi'i school.<sup>63</sup>

In the New Order era, political stability, bureaucratization system, and the cultivation of Pancasila's values were strongly imprinted in Indonesian community. During this time, the Ministry of Religion oversaw political and administrative matters of Islamic organizations, Islamic education and the administration of Islamic justice. In the 1970s, Indonesia made two important laws emphasizing the position of sharia, namely Law No. 14 of 1970 on Judiciary, and Law No. 1 of 1975 on Marriage.<sup>64</sup>

### ***The Development of Indonesian Family Law***

For Muslims in Indonesia, the existence of Islamic family law arose after the recognition of the Religious Court (PA) as one of the executors of "judicial power" through Article 10 of Law No. 14 of 1970. Based on Article 49 of Law No. 3 of 2006 which amended the Law no.7 of 1989 on Religious Courts, the PAs (religious courts) are entitled to adjudicate matters of marriage, inheritance, wills, grants, waqf, zakat, *infaq*, *shadaqah* and sharia economy.

In the next stage, the material law which has become the jurisdiction of the religious courts, especially on marriage matters, was codified in Law No. 1 of 1974 and Government Regulation No. 9 of 1975. However, these statutory regulations only covered the basic principles. Therefore, judges often referred to the doctrine of Islamic jurisprudence (*fiqh*). This has been one of the causes in which the Religious Courts produced different decision upon similar cases.<sup>65</sup>

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<sup>63</sup> Anny Nailatur Rohmah and Ashif Az Zafi, "Jejak Eksistensi Mazhab Syafi'i di Indonesia," *Jurnal Tamaddun/ : Jurnal Sejarah dan Kebudayaan Islam* 8, no. 1 (May 12, 2020), <https://doi.org/10.24235/tamaddun.v8i1.6325>: 183-186. Jan Michiel Otto, *Sharia and National Law in Indonesia* dalam Otto, *Sharia Incorporated; A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and Present*, 443.

<sup>64</sup> Jan Michiel Otto, *Sharia and National Law in Indonesia*, 446.

<sup>65</sup> Eko Setiawan, "Dinamika Pembaharuan Hukum Keluarga Islam di Indonesia," *Journal de Jure* 6, no. 2 (December 30, 2014), <https://doi.org/10.18860/j-fsh.v6i2.3207>: 141.

The absence of a unified law of *fiqh*, prompted the government to compile a reference law, which was later called the compilation of Islamic law (KHI), for Religious Courts throughout Indonesia. To do so, the government formed a special committee to compile. The methods used by the committee include reviewing *fiqh* books, interviewing Islamic scholars, PA Jurisprudence, conducting law comparative studies with other countries, and workshops.

The sources used as reference to compile the KHI are some legislations on marriage (such as Law No.32 of 1954, Law No.1 of 1974, PP No.9 of 1975 and PP No.7 of 1989), books of jurisprudence from various Islamic school of thoughts (mainly of Shafi'i schools), and customary law in Indonesia. The process of compiling the KHI was through workshops of various national ulema groups, the KHI could be considered as the consensus (*ijma'*) of Indonesian scholars. Therefore, the state formally legitimized the KHI.<sup>66</sup>

After going through a long process of discussion and deliberation, KHI was finally approved at the plenary meeting. This compilation consists of three books. The first book is about marriage, the second book is about inheritance, and the third book is about endowment. As an effort to disseminate KHI, the president issued Presidential Instruction (INPRES) on June 10, 1991 followed by the decree of the Minister of Religion No. 154 of 1991 on the implementation of Presidential Instruction No.1 of 1991.<sup>67</sup>

Today, KHI is the legitimate reference for the judges in religious courts. Apart from that, KHI also plays an important role as a reference for the community.<sup>68</sup> Meanwhile, Law No. 1 of 1974 underwent some changes with the promulgation of Indonesian law No. 16 of 2019 on the amendments of Law No. 1 of 1974 on Marriage. The central issue is the change of the minimum age of marriage which is 19 years old for both men and women.

## ***Inheritance provisions in Indonesia***

### **a) The Inheritance of Biological Children**

The inheritance reference for Indonesian Muslims is the compilation of Islamic law (KHI), especially the second book. According to article 171 KHI, the law of inheritance is:<sup>69</sup>

The law that governs the transfer of property ownership (*tirkah*) of the deceased and determines who is entitled to be the heir and how much is the provision for each heir.

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<sup>66</sup> Hikmatullah Hikmatullah, "Selayang Pandang Sejarah Penyusunan Kompilasi Hukum Islam di Indonesia," *Ajudikasi : Jurnal Ilmu Hukum* 1, no. 2 (January 4, 2018), <https://doi.org/10.30656/ajudikasi.v1i2.496>: 44-45.

<sup>67</sup> fatah Hidayat, "Dinamika Perkembangan Hukum Keluarga di Indonesia," *An-Nisa'a* 9, no. 2 (2014): 19-20.

<sup>68</sup> J.M. Muslimin, "Model Studi Hukum Keluarga Islam; Mencari Pijakan, Merespon Tantangan, Zaman," *Indo-Islamika* 7, no. 2 (2017), <https://doi.org/10.15408/idi.v7i2.14821:88>.

<sup>69</sup> Lihat Kompilasi Hukum Islam.

Prior to the distribution of the inheritance, as mentioned in article 175 KHI, the heirs have certain obligations to the deceased. Some of the obligations are as follows:

- Managing and taking care of the funeral of the deceased
- Taking care of the debts of the deceased, which could be in the form of treatment or care from other parties
- Fulfilling the will of the deceased

The provisional right of children, both boys and girls, is stated in the Article 176 of the KHI. It is stated that:

A daughter, if she is the only one, will get a half share. If there are two or more daughters, they will get two-thirds. If there is a girl and a boy, then the boy's share is two compared to one for the girl.

The heirs have the opportunity to divide their inherited property equally, as described in article 183:

The heirs can agree to make peace in the distribution of inheritance. In light of each heir realizes his/her share.

All heirs, including the children of the deceased will inherit the property as long as nothing prevents it. As per article 173 KHI, a person can be prevented from obtaining the inheritance if the decision has been made by a judge but fail to comply with the decision and tend to be:

- Accused of killing or attempting to kill or severely maltreating other heirs
- Convicted of slanderously filing a complaint that the heir has committed a crime punishable by 5 years in prison or a heavier sentence.

## **b) The Inheritance of Adopted Children**

In Indonesia, the adoption of children is regulated in the Government Regulation no. 54 of 2007 concerning the Implementation of Child Adoption.<sup>70</sup> Based on Article 1 of the PP (government regulation), adopted children are defined as follows:

a child whose rights are transferred from the parents, legal guardians, or other people who are responsible for the care, education, and rearing of the child, into the family of the adoptive parents based on a decision or court order.

Based on article 12, the conditions for a child to be adopted include:

- Less than 18 years old
- Not well taken cared or abandoned child

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<sup>70</sup> See, the Indonesian government rule No.54 year of 2007 on the child's adoption procedure.

- Being in a family care or in a childcare institution; and
- Requires special protection<sup>71</sup>

Adopted children are also formulated in KHI. In article 171, adopted children are defined as follows:

Children whose care for the daily life, education costs, and so on, shifted from their original parents to their adoptive parents based on a court decision.

The inheritance of an adopted child is regulated in article 209 verse 2 which stated that:

An adopted child who does not receive a will is given a mandatory will as much as 1/3 of the inheritance of his adoptive parents.

### ***Comparative Analysis of Child Inheritance in Turkey, Saudi Arabia, and Indonesia***

Based on the previous description, the inheritance of biological children and adopted children in the three countries can be seen in the following table:

Subject Matters	Turkey	Saudi Arabia	Indonesia
Main Legal Source	Turkish Civil Code	Fiqh of the Hambali School	Compilation of Islamic Law (KHI)
Inheritance of Children	1:1 provision is applied for boys and girls	2:1 provision is applied for boys and girls	2:1 provision is applied for boys and girls
Likelihood of Using 1:1 provision for Boys and Girls	1:1 provision for Boys and Girls has been implemented	Applied through a <i>wakaf</i> will, considering the record of the deceased to distribute the property equally.	In accordance with the willingness of all heirs, and all heirs have understood their respective rights.
Inheritance of Adopted Children	Same with the biological child	Cannot inherit, except in other ways such as grants, etc.	Given a mandatory will with a maximum of 1/3 of the inheritance.

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<sup>71</sup> The adoptive parents' matter is stated in article 13. The adoptive parents should fulfil the following conditions: physically and mentally healthy, minimum of 30 years old and maximum of 55 years old, having a similar religion with the future adopted children, showing good behaviour and have never been convicted of a crime, have been married for at least 5 years, not a same-sex couple, do not or have not had children or have only one child, economically and socially capable, obtain the consent of the child and written permission from parents or guardians of the child, providing a written statement that the adoption is in the best interests of the child, child welfare and protection, has taken care of the prospective adopted child for a minimum of 6 months since the parenting permit is granted, obtaining permission from the minister and/or head of social agency.

In terms of the formation of the legislation, Indonesia and Turkey have formed a codification of family law. Conversely, Saudi Arabia refers to the classical *fiqh* books without codifying the legislation. One of the reasons to respond to this matter is that the power of law-making (legislation) has always been the prerogative right of the law-maker (*al-syari'*), which is Allah SWT.

Regarding the inheritance rights of biological sons and daughters, Indonesia and Saudi Arabia provide a 2:1 ratio respectively (2: 1 provision for boys and daughters respectively). This refers to the textual interpretation of the Qur'an surah an-Nisa verse 11, which stated that:

يُوصِيكُمُ اللَّهُ فِي أَوْلَادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثَيَيْنِ... ١

"Allah prescribes for you about (the distribution of inheritance of) your children. That is: the share of a son is equal to the share of two daughters."

The above Qur'anic text, in *ushul fiqh's* context, is categorized as the form of *qath'i dilalah* (definite signifier). According to Abdul Karim Zaidan, a *Qath'i dilalah* applies to certain Qur'anic texts in which the *lafazh/nash* (text) only contains one meaning: not eligible to other interpretation. In this case, Zaidan gives two examples: 1) the verse of inheritance in Surah an-Nisa verse 12; and 2) the punishment limit for adultery in surah al-Rum verse 2. According to him, the wording of the *nash* (Qur'anic text), which shows the expression of 1/2 (half), 1/4 (quarter), or 100 (hundred) are very clear in meaning. It cannot possibly be diverted to another meaning.<sup>72</sup>

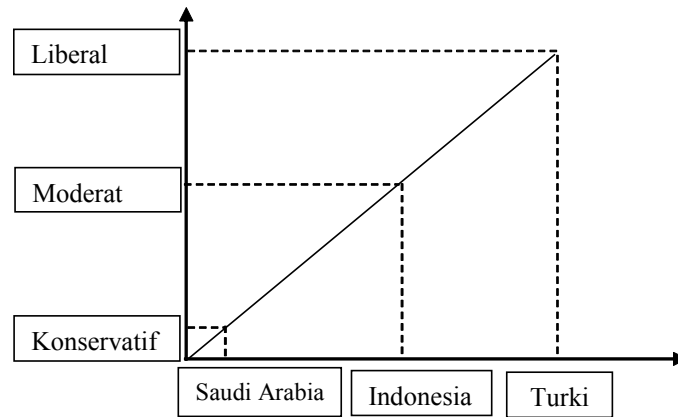
Meanwhile, Turkey provides inheritance rights for males and females with a proportion of 1:1. In religious texts, Turkey tends to interpret the above verse based on the social and cultural context of the community. It is stated that prior to the revelation of the above verse, women was released from the inheritance rights. The half provision given for females was a form of legal mediation adjusting to the conditions of the society at that time. The recent social development and the emancipation movement have proven the opposite reality. Women also have capacity to make living and they in some cases become the backbone of the family.

Concerning the rights of adopted children, Turkey tends to move away from the *nash* (Qur'anic text) and turn into sociological consideration by granting equal rights between adopted children and biological children. On the other hand, Indonesia chooses to interpret the *nash* and adjust it to the sociological context by giving the right for adopted children to inherit through a *wasiat wajibath* (mandatory will). Saudi Arabia, however, adheres to the textual interpretation of the *nash* by providing no right for adopted children.

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<sup>72</sup> Abdul Karim Zaidan, *Al-Wajîz Fî Ushûl al-Fiqh* (Beirut: Muassasah al-Risalah, 2006), 260-61.

The comparison between the three countries (horizontally, vertically, and diagonally) in perceiving the *nash* and *fiqh* concerning the inheritance of children can be illustrated in the following diagram:



Based on the description of the previous chapter, it can be revealed that the three countries have certain dominant factors in the formulation of the inheritance provisions for children, as well as the family law in general. In addition to theological factors, in Saudi Arabia, the alliance between King Ibn Saud and Abdul Wahab tends to adhere the conservative legal view. In Indonesia, the *ijtihad* of local ulema and the plural sociological factors in the society play a dominant role in the formulation of law. Thus, Indonesian family law can be categorized as moderate, whereas Turkey, due to the secularization and imitating a modern approach of western worldview, its family law tends to be more liberal.

## Conclusion

The development of Muslim family law in each country is closely tied with socio-political system, ideological foundation and religious school of laws. Democratic countries tend to accept the more appropriate school of law with social context, whereas authoritarian countries provide merely monolithic option in adhering to religious ideology and understanding. Turkey, Indonesia and Saudi Arabia are a profound example for this issue relating with inheritance law for children, men and women. Unlike Turkey and Indonesia, Saudi Arabia employs the Quran and the Sunna literally as the main source of law, whereas the former have modified religious norms with substantial approaches through incorporating the laws into the state system.

In regards with the right of biological children to inheritance, male and female in Saudi Arabia receive differently in which female gets half of the male. Turkey and Indonesia share its equal position against the children right, even though the later emphasized the condition might be applied by the approval of all heirs. Saudi's jurisprudence, however, also allows an equal share between male and female on the condition of the deceased's will.

In the case of children's inheritance, Turkish family law applies equal share between biological and adopted children. In contrast, Saudi Arabia's family law, referring to the Hanbali's school of law, rejected the inheritance portion for the adopted children. Indonesia, through the Compilation of Islamic Law (KHI), provides a share for the adopted children through a mandatory will with a maximum amount of 1/3 of the inherited property.

Based on this elaboration, we come to conclusion on the issue of family law of inheritance in three countries: Saudi Arabia, Indonesia and Turkey. Saudi Arabia's school of law remains to be strongly conservative in exercising its religious teachings. Indonesia, moreover, consistently adopts a moderate way leaning generally on the public interests and sound customs as commonly justified by the four schools of law such as Hanafite, Maliki, Shafi'ite and Hanbalite. Turkey, commonly claimed to use Hanafite school, is seen more liberal using humanity as the basis of legal reasoning. Secularization, among others, is deemed as the country's approach in managing religious norms in order to maintain modernity.

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