

**Reform of Hijab Heirs and Substitutes
in the Islamic Inheritance Law System in Indonesia
(Analysis of the Ta'lili Method of Reasoning for Grant Wills
For Left Behind Heirs According to Syafi'iyah Fiqh)**

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Abstract: The fundamental provisions of inheritance distribution in Islam refer to QS. An-Nisa' verse 7, which guarantees inheritance rights for both men and women from the estates of parents and relatives. This is further clarified by a hadith narrated by Imam al-Bukhari regarding the position of grandchildren as substitutes for children in inheritance. However, there are differences in interpretation between Shafi'i jurisprudence (*fiqh*) and the Compilation of Islamic Law (KHI) regarding the implementation of these texts. This research employs a normative juridical method with a literature study and a descriptive-analytical approach to examine existing legal conceptions. The results indicate a classification of solutions for excluded (*terhalang*) heirs as follows: *First Group*: For grandchildren (orphans) of a son whose father predeceased the testator, the granting of a mandatory bequest (*hibah wasiat*) is obligatory. This is based on the *nas* (text) of the bequest verse, which remains applicable to them as close relatives who do not receive a direct share of the inheritance. *Second and Third Groups*: For siblings who are shielded (*terhijab*) and the *dzawil arham* group (other substitute heirs), the granting of a bequest is recommended (*sunnah*). In conclusion, reform through the instrument of *hibah wasiat* serves as a juridical solution to manifest justice for relatives who are normatively barred from receiving inheritance. This approach balances the legal certainty of the *nas* with social welfare for family members in need.

Keywords:
*Reformation,
Left Behind Heirs,
Grant Will*

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Abstrak: Ketentuan dasar pembagian warisan dalam Islam merujuk pada QS. An-Nisa' ayat 7, yang menjamin hak waris bagi laki-laki dan perempuan dari harta orang tua serta kerabat. Hal ini diperjelas melalui hadis riwayat Imam al-Bukhari mengenai posisi cucu sebagai pengganti anak dalam kewarisan. Namun, terdapat perbedaan penafsiran antara fikih Syafi'i dan Kompilasi Hukum Islam (KHI) terkait implementasi teks tersebut. Penelitian ini menggunakan metode yuridis normatif dengan studi kepustakaan dan pendekatan deskriptif analisis untuk mengkaji konsepsi hukum yang ada. Hasil penelitian menunjukkan klasifikasi solusi bagi ahli waris yang terhalang (*tertinggal*) sebagai berikut: Kelompok *Pertama*: Bagi cucu (anak yatim) dari anak laki-laki yang ayahnya wafat lebih dulu, pemberian hibah wasiat bersifat wajib. Hal ini didasarkan pada nas ayat wasiat yang tetap berlaku bagi mereka sebagai kerabat dekat yang tidak menerima bagian pusaka secara langsung. *Kedua dan Ketiga*: Bagi saudara yang terhibah serta golongan *dzawil arham* (ahli waris pengganti lainnya), pemberian hibah wasiat bersifat sunnah. Kesimpulannya, reformasi melalui instrumen hibah wasiat menjadi solusi yuridis untuk mewujudkan keadilan bagi kerabat yang secara normatif terhalang mendapat warisan. Pendekatan ini menyeimbangkan antara kepastian hukum nas dengan kemaslahatan sosial bagi anggota keluarga yang membutuhkan.

Kata Kunci:
 Reformasi, Ahli Waris Tertinggal, Wasiat Hibah

INTRODUCTION

Islamic provisions regarding the distribution of inheritance are already contained in the Qur'an¹, Surah An-Nisa' verse 7: as Allah says, which means: "For men there is a right to share in the inheritance of their parents and relatives, and for women there is also a right to share in the inheritance of their parents and relatives, whether a little or a lot according to the predetermined division"².

¹ Syadza Nida Nafisyah and Devika Rosa Guspita, "Hukum Waris Islam: Keadilan Dalam Pembagian Harta Dan Penerapannya," *Journal of Dual Legal Systems* 1, no. 2 (2024): 137–52, <https://doi.org/https://doi.org/10.58824/jdls.v1i2.233>.

² Departemen Agama, "Al-Qur'an dan Terjemahannya," *Bandung: Cordoba*, 2019.

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Meanwhile, in the hadith of Rasulullah Saw., which was narrated by Bukhari regarding the opinion of Zaid bin Thabit: "Zaid said: Sons of sons are equal to sons if there are no sons. Grandsons are the same as sons, granddaughters are the same as daughters. They inherit the same as sons and wear the hijab as children wear the hijab. Grandchildren have no right to inherit together with sons"³.

If we understand the two legal arguments regarding Islamic inheritance above with tafsili reasoning, basically the Qur'an gives inheritance rights to every son and daughter from the inheritance of their father/mother and relatives (grandfathers) based on the portions that have been determined for each of them.⁴ Then in the hadith of the Prophet Muhammad SAW, narrated by Imam al-Bukhari, a more detailed explanation (takhshish) is given regarding the position of children with grandchildren, both male and female, in terms of inheritance rights, where in the hadith it is explained that; 'Grandchildren are the same as sons, granddaughters are the same as daughters in terms of inheriting and veiling inheritance, with the condition that as long as they are not with them, they are sons and cannot be inherited by grandsons and daughters if they are together with sons or as long as there is one son'. Thus, from the results of the study of the understanding of the concept of Shafi'i fiqh, there is an acknowledgement of the replacement of children with grandchildren (male and female), as well as in the understanding of the concept of taqin KHI, it acknowledges the replacement of children with grandchildren (male and female).

³ M Nashiruddin Al-Albani, *Ringkasan Shahih Bukhari I* (Gema Insani, 2005).

⁴ Muhammad Ruslan, "Tinjauan Al-Qur'an Terhadap Kesetaraan Gender Dalam Pembagian Warisan (Studi Analisis Pada Surah Al-Nisa Ayat 11)," *AR ROSYAD: Jurnal Keislaman Dan Sosial Humaniora* 1, no. 2 (2023): 168–99, <https://doi.org/https://doi.org/10.55148/arosyad.v1i2.641>.

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There is a difference in the way of interpreting and understanding the law between Syafi'i jurisprudence and KHI taqin regarding the text and context of the above hadith based on their respective methods of legal reasoning (istinbath), resulting in different conclusions and legal decisions regarding the inheritance rights of grandchildren (male and female). For this reason, this is where the term hijab was born regarding the inheritance rights of grandchildren as long as there is a father's brother from the perspective of Shafi'i jurisprudence, but he does not hijab the father's brother and also the term substitute heir for grandchildren is born even though there is one of the father's brothers according to the KHI taqin view, and he hijab the father's brother⁵. So in this case, the statement contained in the hadith evidence is not accepted in the KHI taqin.

In Islamic jurisprudence, the term "substitute heir" is not accepted as long as there is a male heir. Instead, the term "mani" or "hijab" refers to a veil, a wall, or an obstacle. Hijab, in its literal sense, prevents or hinders someone from receiving their share of the inheritance or reduces their share⁶. As in the book *Haasyiyah Qulyubi wa 'Umairah* explains, that: 'Fathers, sons and husbands cannot be veiled by one of the other heirs and likewise the grandsons of sons, even if they are descended vertically downwards, cannot veil heirs in the category of ashabah', namely the father's brothers⁷.

The issue of veiled heirs is crucial in the science of Mawaris because it is based on the evidence of a definitive text. Some scholars prohibit faraid fatwas

⁵ Muhammad Ikbal, "Hijab Dalam Kewarisan," *At-Tafkir* 11, no. 1 (October 20, 2018): 132–53, <https://doi.org/10.32505/at.v11i1.533>.

⁶ Dianita Shabha Fitriana, "Studi Komparasi Konsep Hijab Dalam Sistem Kewarisan Madzhab Syiah Dan Kompilasi Hukum Islam," *Sakina: Journal of Family Studies* 8, no. 1 (March 1, 2024): 29–47, <https://doi.org/https://doi.org/10.18860/jfs.v8i1.6675>.

⁷Lihat Versi Maktabah Ahmad Salamah Qulyubi dan Ahmad Barlasi 'Umairah, *Haasyiyata Qulyubi wa 'Umairah Syarah Al-Mahalli 'Ala Al-Minhaj*, Juzu' 4, (Bairut: Dar al-Fikri, 1995), hlm. 142.

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for those who do not understand them. However, the existence of evidence that is not detailed (tafsili) often creates legal uncertainty, where those who are entitled to receive their share of the inheritance are not, or vice versa⁸. Ahli waris dekat dapat menghibab (menghalangi) ahli waris jauh, sehingga bagian mereka berkurang atau hilang. Contohnya, cucu terhalang mendapatkan warisan sebagai ashabah karena adanya anak laki-laki kandung pewaris.⁹

Sedangkan Pasal 185 KHI mengatur ahli waris pengganti bagi ahli waris yang terhibab dalam pewarisan Islam¹⁰;

Ayat (1) : “Ahli waris yang meninggal lebih dahulu dari pada si pewaris, maka kedudukannya dapat digantikan oleh anaknya, kecuali mereka yang tersebut dalam Pasal 173”.

Ayat (2) : “Bagian ahli waris pengganti tidak boleh melebihi dari bagian ahli waris yang sederajat dengan yang diganti”.

Article 185 paragraph (1) of the KHI recognizes substitute heirs as an innovation in Islamic inheritance law. The use of the word "can" indicates a non-imperative nature, so that its application depends on the element of situational benefit. Although the majority of the KHI material is rooted in the Shafi'i school of thought, this provision on substitute heirs is an exception resulting from ijtihad that is not specifically found in classical fiqh books. This reflects the flexibility of the KHI in accommodating justice outside of general provisions in order to

⁸ H A Kadir, *Memahami Ilmu Faraidh: Tanya Jawab Hukum Waris Islam* (Amzah, 2022).

⁹ Kadir.

¹⁰ Kementerian Agama Republik Indonesia, *Kompilasi Hukum Islam*, ed. Kementerian Agama Republik Indonesia, 2018. P. 95-96

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protect the rights of descendants whose parents died before the testator, without completely abandoning the original legal system¹¹.

The concept of substitute heirs and mandatory bequests is the result of ijtihad aimed at realizing the welfare and social protection of the family. The Quran and Sunnah emphasize the importance of maintaining family ties and being kind to relatives, while severing ties carries severe penalties. This ijtihad forms the basis for creating a system of justice that ensures the economic needs of the bereaved family while strengthening kinship ties, a value commanded by Allah SWT¹².

METHOD

This research uses normative legal methods (normative juridical) and correlative thematic methods by examining library materials as primary data¹³. This study uses a descriptive analytical approach to synchronize regulations with the legal theory of veiled heirs and substitutes. Its main foundation is the Istinbath al-Ahkam method, with a focus on causation reasoning (at-ta'lil) or ijtihad based on 'illat through analogy (qiyasi). This method is applied to new cases without legal texts through four obligatory pillars: al-ashl (original case), al-far' (new case), al-'illat (similarity of nature), and al-hukm (expansion of law) in order to formulate a just concept of a bequest¹⁴.

¹¹ Muhamad Sauki Alhabsyi and Syahrul Mubarak Subeitan, "Ahli Waris Pengganti Di Indonesia Dengan Historisitasnya," *Indonesian Journal of Shariah and Justice* 1, no. 1 (2021): 1–27, <https://doi.org/https://doi.org/10.46339/ijsh.v1i1.1>.

¹² Naili Fadhilah, "Pembaruan Hukum Waris Islam: Wasiat Wajibah Mesir Dan Relevansinya Dengan Konsep Waris Pengganti Indonesia," *Al-Mawarid Jurnal Syariah Dan Hukum (JSYH)* 3, no. 1 (December 10, 2021): 36–47, <https://doi.org/10.20885/mawarid.vol3.iss1.art4>.

¹³ Soerjono Soekanto, "Penelitian Hukum Normatif: Suatu Tinjauan Singkat," 2007.

¹⁴ Muhammad Mustafâ Al-Syalabi, "Ta'lil Al-Ahkâm," *Dar Al-Nahdah Al-'Arabiyyah, Beirut*, 1981.

RESULTS AND DISCUSSION

Reform of Hijab Heirs and Substitutes in the Indonesian Islamic Inheritance System

The advantages and disadvantages of Syafi'iyah and KHI inheritance are analyzed based on the principles of inheritance and gift relationships.

1. Mutual Inheritance Rights between Heirs

An-Nisa' 7 emphasizes the right of mutual inheritance between children, parents, and relatives without gender discrimination. This understanding is reinforced by An-Nisa' 11, 12, 176, Al-Ahzab 6, and Al-Anfal 75. The differences between the Shafi'i and Compilation of Islamic Law theories of inheritance are evident in the distribution of inheritance rights between siblings and relatives, thus demonstrating the strengths and weaknesses of each in inheritance practices.

The weakness of the Shafi'i inheritance system lies in its discrimination against relatives through the female line, as only the male line is considered entitled to inherit. This practice is considered contrary to the more inclusive spirit of An-Nisa', verses 7 and 33. The influence of patrilineal tradition often excludes female descendants from inheritance, thus creating inequality in the distribution of inheritance based on gender and lineage¹⁵.

Imam Syafi'i limits the inheritance of dzawil arham based on sharia texts, hadiths about certain relatives not inheriting, and the principle of public welfare through the transfer of assets to the Baitul Mal¹⁶. Therefore, Syafi'iyah

¹⁵ Al Yasa Abubakar, *Kajian UUPA Dan Essay Tentang Perempuan, Perkawinan Dan Perwalian Anak* (Aceh: Dinas Syariat Islam Aceh, 2011).

¹⁶ Sofia Adela, "Hak Kewarisan Zawil Arham (Perspektif Mazhab Hanafiyah Dan Syafi'iyah)," *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan, Ekonomi Islam* 10, no. 2 (June 28, 2019): 132–45, <https://doi.org/10.32505/jurisprudensi.v10i2.944>.

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emphasized the public interest and conformity with the Arab family structure at that time, which was seen as an advantage over the more individualistic approach of Hazairin and KHI.

The term "limited" indicates that the grandchildren are prevented from inheriting due to the testator's surviving sons. Consequently, the sons inherit all the property. However, if the grandchildren's father were still alive, they would have had the opportunity to inherit. Therefore, the grandchildren of a deceased child should still be able to inherit directly from their grandfather without being hindered by their uncle.

2. Daughters and Granddaughters Can Cover Siblings' Inheritance Rights

The difference in determining heirs in Shafi'i theory stems from the interpretation of the word *aulad* in An-Nisa' verse 11. Shafi'i scholars expand its meaning to *walad al-aulad* (grandchildren), but only through the patrilineal male line. As a result, grandchildren of sons have the right to inherit, while grandchildren of daughters are only considered relatives (*dzawil arham*) and do not receive inheritance rights.¹⁷

On the other hand, the theory of the Compilation of Islamic Law (Article 181) can be understood that daughters can veil their siblings, because in the KHI it is stated that the word *walad* is not only limited to sons, but also includes daughters as well as their descendants (grandchildren of daughters), this is in accordance with the fatwa of Zaid ibn Sabit which means: 'Grandchildren through sons occupy the position of children if there are no sons, grandsons are the same as sons, granddaughters are the same as daughters. They inherit the same as children and veil the same as children, grandsons do not have the right to inherit together when there are still sons'. As a consequence, grandchildren

¹⁷ Amir Syarifuddin, *Hukum Kewarisan Islam* (Prenada Media, 2015).

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who come from daughters can also cover inheritance rights for siblings (Article 185 paragraph 1) in conjunction with Article 181 or 182 of the KHI)¹⁸.

Al Yasa' Abubakar explains the differences in inheritance distribution between Islamic jurisprudence (fikih) and the Islamic Religious Law (KHI) through two cases. First, in the case of a granddaughter (from a son), a grandson (from a daughter), and a sister: Islamic jurisprudence only gives a share to the granddaughter and sister as *ashabah*. However, the Islamic Religious Law grants rights to both grandchildren as substitute heirs for their parents, thus veiling the sister. Second, in the case of a granddaughter and a brother: according to Islamic jurisprudence, both share the property. Conversely, the Islamic Religious Law allows the granddaughter to take the entire inheritance because she takes her father's place, which automatically veils the testator's biological brother. Thus, the Islamic Religious Law prioritizes the position of the granddaughter as a substitute heir over the brother¹⁹.

The advantage of this theory is that the inheritance rights of siblings are closed so that the share of daughters and grandchildren of daughters becomes larger. This is considered to provide more adequate economic security for the heirs, in line with the hadith of Sa'ad bin Abi Waqqash regarding the importance of leaving the family well-off. However, its weakness contradicts the hadith narrated by Abu Daud, Tirmidhi, Ibn Majah, and Ahmad regarding the case of the widow of Sa'ad bin Rabi and the widow of Abdurrahman. In Sa'ad's case, his brother took all his property until An-Nisa' verses 11 and 12 regulate the inheritance rights of women and the family left behind.

¹⁸ Kementerian Agama Republik Indonesia, *Kompilasi Hukum Islam*. p. 94-95

¹⁹ Al Yasa Abubakar, *Kajian UUPA Dan Essay Tentang Perempuan, Perkawinan Dan Perwalian Anak*. P. 33

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And in the Abdurrahman Hadith it is said that Abdurrahman died leaving behind a widow (Ummu Kuhhah) and 5 daughters, then her husband's family came to take her property, and Umm Kuhhah complained about this to the Prophet SAW, then an-Nisa verse 11 came down which confirmed the inheritance rights for the daughters, and verse 12 which confirmed the inheritance rights for the wife. In both Hadiths, the Prophet Muhammad SAW gave brothers a share of their inheritance, both male and female, if the heir had a daughter²⁰.

3. The Right to Mutually Inherit but Not to Inherit

As has been stated in the inheritance concept section of the Compilation of Islamic Law, Article 174 paragraph (1) of the Compilation of Islamic Law mentions in detail a number of people from the testator's relatives who are entitled to receive inheritance according to their priority, namely the male group consisting of father, son, widower, brother, uncle and grandfather. And the female group consisting of mother, daughter, widow, sister and grandmother²¹. In this case, it means that the aunt, namely the mother's sister and the father's sister, is not given the status of heir, even though she is a relative of the heir.

The inheritance law in the Indonesian Islamic Law (KHI) is considered to still contain horizontal and vertical discrimination. Horizontally, uncles are recognized as heirs, while aunts are not. Vertically, nephews can inherit from their aunts, but not vice versa. This discrimination arises because the details of heirs in Article 174 of the KHI explicitly exclude aunts. However, if we refer to the generality of Article 171 letter c concerning blood relations, aunts have the opportunity to become heirs. Due to the restrictions in Article 174, aunts'

²⁰ Sahril Sahril, "Pendapat Imam Syafi'i Tentang Mahar Hutang Karena Suami Meninggal Dunia" (IAIN Padangsidimpuan, 2016).

²¹ Kementerian Agama Republik Indonesia, *Kompilasi Hukum Islam*. p. 91

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inheritance rights are lost, and the Baitulmal (Article 191 of the KHI) is prioritized.²² This shows that the status of Baitul Mal is considered more important than that of the aunt, even though the aunt has a real kinship relationship with the heir.

Article 185 paragraph (1) of the Indonesian Criminal Code cannot be used as a basis for an aunt to inherit from a nephew, because Article 174 paragraph (1) only recognizes uncles as direct heirs. If an aunt becomes a substitute heir, there will be a legal inconsistency between siblings. Therefore, aunts are not included in the 41 groups of heirs according to the Indonesian Criminal Code²³, so that he is in the position of "inherited but not entitled to inherit." This condition is considered contrary to the principle of justice in Surah An-Nisa verse 7, which explicitly guarantees inheritance rights for both men and women over the inheritance of their parents and relatives²⁴.

4. Wills and Gifts

In Syafi'iyah inheritance, a will is a legal action regarding assets that takes effect after the testator dies and is basically carried out voluntarily in all circumstances²⁵. In al-Umm, Imam Syafi'i allows a will to an heir if it is approved by the other heirs as a form of obedience and fulfillment of a promise. Without approval, the judge cannot enforce it. Wills are also limited to a

²² Kementerian Agama Republik Indonesia. p.89-91

²³ Kementerian Agama Republik Indonesia.

²⁴ Arini Nur Fatimah, "Praktik Ahli Waris Pengganti Perspektif Kompilasi Hukum Islam," *Sakina: Journal of Family Studies* 8, no. 3 (September 8, 2024): 330–43, <https://doi.org/10.18860/jfs.v8i3.6631>.

²⁵ Nurul Adliyah, "Wasiat Dalam Sistem Pembagian Harta Peninggalan Menurut Hukum Islam," *Al-Amwal : Journal of Islamic Economic Law* 5, no. 1 (October 15, 2021): 85–95, <https://doi.org/10.24256/alw.v5i1.2063>.

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maximum of one third of assets, except according to the will of the testator, in order to maintain pleasure and prevent disputes between heirs²⁶.

Meanwhile, wills in the Compilation of Islamic Law (KHI) are regulated in Articles 194 to 209 in Chapter V Concerning Wills. Article 194 explains about²⁷: (1) People who are at least 21 years old, of sound mind and without any coercion can bequeath part of their assets to other people or institutions. (2) The assets bequeathed must be the rights of the testator. (3) Ownership of assets as intended in paragraph (1) can only be exercised after the testator dies. Article 195 explains; (1) A will is made orally in the presence of two witnesses, or in writing in the presence of two witnesses, or in front of a Notary. (2) Wills are only permitted up to a third of the inherited assets unless all the heirs agree. (3) A will to heirs is valid if it is approved by all heirs. (4) The statement of approval in paragraphs (2) and (3) of this article is made orally in the presence of two witnesses or in writing in the presence of two witnesses in front of a Notary.

Wills in KHI Articles 194-209²⁸ regulate that people aged at least 21 years, of sound mind, and without coercion can bequeath part of their assets to other parties or institutions. A will takes effect after the testator dies and must be executed in the presence of two witnesses or a notary. The number of wills is limited to a maximum of one third of the inherited assets, unless approved by all the heirs. A will to an heir is also only valid if it has the approval of all other heirs, either verbally or in writing accompanied by witnesses²⁹.

²⁶ Muhammad bin Idris Asy-Syafi'i, *Al-Umm, Jilid V, Cet. Ke-1*, Jilid V, C (Beirut: Dar al-Fikr, 2001). p. 187

²⁷ Kementerian Agama Republik Indonesia, *Kompilasi Hukum Islam*. p. 99-105

²⁸ Kementerian Agama Republik Indonesia.

²⁹ "Intruksi Presiden Nomor 1 Tahun 1991 Tentang Kompilasi Hukum Islam Buku II Mengenai Hukum Kewarisan,"

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The advantage of the Compilation of Islamic Law over the Shafi'i theory lies in its recognition of mandatory wills, which are wills that are valid based on legal provisions, not the will of the testator. Through this concept, adopted children and adoptive parents who do not have inheritance rights can still receive a share of the inheritance. However, the weakness is that mandatory wills are only given to adopted children and adoptive parents, excluding other relatives such as aunts or descendants of relatives who are barred from inheriting. In Shafi'i, a grant is understood as the gift of property to another person during life without compensation, while the provision of benefits without the transfer of ownership is called ariyah or a loan.³⁰

In Al-Umm, Imam Shafi'i explains that gifts made for friendship or charity cannot be withdrawn. The perfection of a gift depends on the handover (qabd). A gift to an adult child is not valid until it is directly received by the recipient, whether or not the child is still supported by his father. This opinion is supported by Abu Bakr, Aisha, and Umar ibn Khattab. Uthman ibn Affan argued that the father is merely the manager of the child's assets. In general, a gift or voluntary charity without compensation is only considered valid and binding after it is officially accepted by the recipient³¹.

Meanwhile, in the Compilation of Islamic Law (KHI) inheritance, gifts are regulated in Articles 210 to 214 of Chapter VI on Inheritance. Article 210 regulates³²: (1) A person who is at least 21 years old, of sound mind and without coercion can donate up to 1/3 of his/her property to another person or institution in the presence of two witnesses to be owned. (2) The property donated must be the right of the donor. Furthermore, Article 211 regulates that a gift from a parent

³⁰ Sayid Sabiq, *Fikih Sunnah* (Kairo: dar hadis, n.d.). p. 67

³¹ Muhammad bin Idris Asy-Syafi'i, *Al-Umm, Jilid V, Cet. Ke-1*. P. 356 & 359

³² Kementerian Agama Republik Indonesia, *Kompilasi Hukum Islam*.

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to his/her child can be counted as an inheritance. Article 212 regulates the withdrawal of a gift, where the gift cannot be withdrawn except for a gift given by a parent to his/her child. Article 213 explains that a gift given when the donor is sick and close to death must receive the approval of his/her heirs³³.

The Compilation of Islamic Law (KHI) has two advantages over the Shafi'i school of thought regarding gifts. First, the KHI limits gifts to a maximum of one-third of the estate to protect the rights of heirs, although this limits the personal authority of the owner of the property. Second, gifts from parents to children are considered inheritance, aiming to achieve justice and equality for all children. However, the KHI's weakness lies in the lack of detailed explanations regarding the criteria for what constitutes inheritance, potentially creating legal uncertainty.

Terminology Analysis of the Concept of Wills and Grants in Indonesian Islamic Heritage

The Shafi'i jurisprudence and the Islamic Religious Law (KHI) do not explain bequests in a specific chapter, but instead distinguish between bequests and gifts. However, the concept of bequests is found in Minangkabau, Batak, and Acehnese customary law. More concretely, this term is explained in the Civil Code (KUHPerduta). Article 1666 of the Civil Code defines a bequest as an agreement in which the donor transfers an object freely and irrevocably to the recipient while both are still alive. This law expressly recognizes only bequests made between living persons (*inter vivos*), emphasizing the legal distinction between a bequest as a lifetime agreement and a will, which only comes into effect after death³⁴.

³³ Kementerian Agama Republik Indonesia.

³⁴ Raden Subekti and Raden Tjitrosudibio, "Kitab Undang-Undang Hukum Perdata," 2009.

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This practice of giving is classified as a "gratuitous" (Dutch: "om niet") agreement, the word "gratuitous" in Article 1666, is intended only to show the performance of one party, while the other party does not provide any counter-performance in return for the performance. Such an agreement is also termed a "unilateral" agreement as opposed to a "reciprocal" (bilateral) agreement. The words "during the life of the grantor" are to distinguish the grantor from gifts made in a testament (will), which will only have legal force and effect after the grantor dies and at any time during the grantor's life can be changed or withdrawn by him. The gift in a testament (will) in the Civil Code is called a "legaat" (hibah wasiat) which is regulated in inheritance law, while this grant is an agreement. Because a gift according to the Civil Code is an agreement, it cannot be withdrawn unilaterally by the person giving the gift³⁵.

Here the author needs to explain a little about the meaning of grants in the category of wills in terms of several opinions of Shafi'iyah scholars which the author quotes from the book *Ilmu Mawarits Lengkap dan Praktis* by Teungku Muhammad Zukhdi Karimuddin;

- a. According to Wahbah az-Zuhaili; "A will is handing over something that is valid after death by means of tabubaru' (doing good) both in the form of objects and in the form of benefits."
- b. According to Imam Zakariya al-Ansyari; "A will is a voluntary, deliberate granting of property rights that is carried out after the giver dies."³⁶

According to Sayyid Sabiq in *Sunnah Fiqh*, a will is a gift of goods, receivables or benefits to another person that takes effect after the testator dies.

³⁵ Ipah Saripah and Ila Nurmila, "Hukum Hibah 'Umra Menurut Imam Malik Dan Kitab Undang-Undang Hukum Perdata Pasal 1666," *Istinbath | Jurnal Penelitian Hukum Islam* 14, no. 2 (November 5, 2020): 149, <https://doi.org/10.36667/istinbath.v14i2.480>.

³⁶ Muhammad Zukhdi, *Ilmu Mawarits Lengkap Dan Praktis Dalam Mazhab Syafi'i*, Bandar Publishing (Banda Aceh, 2021). P. 290

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Thus, a will is a voluntary gift of property rights which is carried out after the death of the giver, whether in the form of movable, immovable or receivables³⁷.

The author found a discussion in Al-Umm, Juz V, page 189, that approximates the concept of a bequest in the form of a gift. Imam Shafi'i explains that if someone makes a will with terms such as "a portion," "a portion," or "a tribe" of their assets, then the heirs are given the authority to determine the portion to be given to the beneficiaries. If the beneficiaries claim the beneficiary wanted a larger amount, the heirs can be asked to swear that they were unaware of this. Imam Shafi'i also emphasized that the amount of assets remains legally binding. This opinion is based on the Qur'anic principle that good and bad deeds, even the smallest atom, are still taken into account. Therefore, every portion of assets, no matter how small, still has legal value and must be treated fairly according to the will of the testator³⁸.

Therefore, it is mandatory to make a will for them with the text of the will's verse, because the will's verse still applies to them. Meanwhile, for relatives who receive inheritance, it is used and decided based on the verses of the inheritance. In this case, the jurists agree that a will for non-relatives is not mandatory. So of course this will is mandatory, especially for relatives who do not receive any inheritance at all. In fact, Ibn Hazm is of the opinion that if a will is made for relatives whose heirs do not receive an inheritance, the judge must take action to give part of the inheritance to the relatives who do not receive an inheritance as a will that is obligatory for them. Thus, it is mandatory to make a will for grandchildren who do not receive an inheritance, whether they are

³⁷ Sayid Sabiq, *Fikih Sunnah*.

³⁸ Muhammad bin Idris Asy-Syafi'i, *Al-Umm, Jilid V, Cet. Ke-1*. P. 189-190

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daughters' children or sons whose mother and father died before their grandfather³⁹.

Analysis of the Ta'lili Method of Reasoning for Wills and Gifts for Remaining Heirs According to Shafi'i Fiqh

Thus, from the many explanations and analyses of the author on the discussion of the Islamic inheritance law system practiced in Indonesia, both those contained in the Shafi'iyah fiqh inheritance law theory and in the Compilation of Islamic Law inheritance law theory, here the author finds and produces a new study on heirs who do not receive their rights for certain reasons, both those found in the ashbabul furudh or ashabah groups and even the dzawil arham heirs (replacement heirs) with the term the author gives, namely the remaining heirs. According to the author, these remaining heirs are heirs whose inheritance rights are not mentioned in the Qur'an and hadith in detail (tafsili) and there are differences (ikhtilaf) in the opinions of classical and modern scholars in determining the law regarding their rights, namely;

Firstly, the Shafi'i theory, as in the group of dzawil furudh heirs whose inheritance rights are not stated clearly and definitely in the text of the text, are the heir rights of grandchildren (orphans) whose fathers died first, as the author has explained in the point of mutual inheritance rights. The second KHI theory, such as in the group of ashabah heirs whose inheritance rights are covered are the inheritance rights of siblings (both female and male) as in the author's explanation at the point where daughters and granddaughters can cover the inheritance rights of siblings. The three theories of Syafi'i and KHI, such as in the group of dzawil arham heirs, if in KHI it is called the replacement heir group,

³⁹ Al Shiddieqy and Tengku Muhammad Hasbi, "Fiqh Mawaris Hukum Pembagian Warisan Menurut Syariat Islam," Semarang: PT. Pustaka Rizki Putra, 2010. P. 274-275.

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are the heir rights of grandchildren of daughters, mother's sisters and brothers, father's sisters or aunts who do not get inheritance rights because they are distant relatives or are not main relatives.

In terms of solving the first problem, the author is more focused on using the ta'lili reasoning method regarding the obligation to provide maintenance to orphans (grandchildren whose father has died) in terms of maqashid sharia, because it contains elements of Islamic da'wah (hifz al-din and hifz an-Nasal). The steps of the ta'lili method of reasoning in the case of the obligation to provide maintenance to orphans (grandchildren whose father has died) are by using legal istinbath in a qiyasi (ta'lili) manner. However, to find the problem point in the case of the obligation of guardianship regarding the provision of maintenance to orphans using the ta'lili reasoning method, below it is necessary to explain the solution through the pillars of qiyas, namely:

a. *Al-ashl, the original case, the provisions of which have been established in the text, and the analogy of these provisions to the new case;*

The case of granting inheritance rights to orphans is based on verse 7 of An-Nisa', which affirms the rights of men and women to inheritance from their parents and relatives, including grandfathers. However, a hadith narrated by Bukhari from Zaid explains that grandchildren take the place of children if there are no sons. Grandchildren and daughters can inherit and wear the hijab like biological children, but they do not receive an inheritance if there are still male heirs. As a result, in inheritance practices, orphaned grandchildren are often prevented from receiving inheritance from their grandfathers because of the presence of uncles as closer heirs according to the Shafi'i inheritance system⁴⁰.

b. *Al-far', new case, target of application of the original provisions;*

⁴⁰ Al-Albani, *Ringkasan Shahih Bukhari I*.

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What is a new case here is the granting of a testamentary gift to an orphan (a grandchild whose father died) in the form of an inheritance as a living responsibility. As in the provisions contained in the original case, based on the text of the Koran, surah al-Baqarah verses 180-181; "It is prescribed for you, when one of you comes (signs of) death, if he leaves a lot of wealth, to make a will for his parents and close relatives in a wise manner, (this is) an obligation for those who are pious. So whoever changes the will, after he has heard it, then indeed the sin is for those who change it. Indeed, Allah is All-Hearing, All-Knowing."

Imam Syafi'i's statement in his book al-Umm is similar in that it is based on a hadith narrated by Malik from Ibn Syihab from Abi Salmah bin Abdurrahman from Jabir bin Abdullah that the Messenger of Allah said: "Whoever gives something for the rest of his life and for those after him, then the gift is for the person to whom he gave it. It will not return to the person who gave it. Because he has given it as a gift, what happens to him is the inheritance right." This statement is explained in the Qur'an, surah al-Baqarah verse 215: "They ask about what they earn. Answer: "Whatever wealth you earn should be given to parents, relatives, orphans, the poor and people who are on a journey". And whatever good you do, then indeed Allah is All-Knowing."

c. *Al-'illat, the cause, which is the nature of the original case and is found to be the same as the new case;*

Based on the ta'lili reasoning method, there is a similarity between the inheritance rights in the Qur'an and the determination of bequests for orphaned grandchildren. The main underlying 'illat' is social responsibility and the obligation to ensure economic welfare so that the family is not left in poverty. In the inheritance verse, the 'illat is the testator's responsibility to ensure the heirs

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live a sufficient life. Meanwhile, in bequests, the 'illat is the responsibility of the grandfather's guardianship over the livelihood of grandchildren who have lost their father. This legal reasoning is in line with QS. An-Nisa: 9, which commands Muslims not to leave behind a weak generation and worry about their welfare, so that the granting of bequests becomes an instrument of piety and justice for descendants in need.

d. *Al-hukm (provisions) of the original case which are extended to new cases.*

Regarding the rights of orphans (grandchildren whose fathers have died), who do not receive inheritance rights from their grandfather's inheritance because they are veiled by their father's brother (uncle). This is an action that is contrary to the principle of ijbari of the revelation of the shari'ah of Allah SWT, also contradicts the Qur'an, Surah An-Nisa', verse 9: "And fear Allah SWT, O those who, if they leave behind them weak children, they fear for their (welfare)." So, giving a bequest to orphans (grandchildren whose fathers have died) in the form of inheritance as a guardianship responsibility for their livelihood, this is something that is permitted and even recommended in Islam. Because basically the issue of the rights of orphans (grandchildren whose fathers have died) there is a text in Surah An-Nisa', verse 7 as mentioned above, but it is not specifically recommended to give it to orphans. Moreover, this verse has been interpreted by a hadith narrated by Imam Bukhari explaining: "That Zaid said; Grandchildren do not have the right to inherit together with sons".

According to Imam Shafi'i's explanation in Al-Umm, a bequest to an orphaned grandchild is a form of responsibility for maintenance and guardianship. A father is obligated to provide for an indigent child, and this principle also applies to grandchildren, who are still considered his children. Therefore, a grandfather has a legal standing similar to a father in his obligation

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to provide maintenance. If the parents are unable to meet the child's needs, the grandfather is obligated to assist based on strong family ties. This obligation also extends vertically to the ancestors above him in the Islamic legal system⁴¹.

The author agrees with al-Jashshash, Abu Muslim al-Ashbahani, and Ibn Hazm regarding the handling of obstructed heirs. For the first group, namely orphaned grandchildren whose fathers died first, giving a testamentary gift is mandatory. This is based on the verse of the will which remains valid for those as close relatives who do not receive a share of inheritance (pusaka). On the other hand, for the second group (relatives who wear the hijab) and the third group (dzawil arham), giving a will is sunnah. This approach follows the opinion of the jurists that the obligation of a will only applies to very close relatives, while for distant relatives or those who are not the main priority, this gift is a recommendation for justice and the benefit of the family⁴².

CONCLUSION

The study concluded that for orphaned grandchildren (the first group) whose fathers died first, providing a bequest is obligatory based on the text of the will verse because they are close relatives who do not receive an inheritance. Meanwhile, for distant relatives (the second and third groups), such as sisters who wear the hijab or dzawil arham, providing a bequest is sunnah. This is in line with the opinion of the jurists that a bequest for relatives who are not categorized as close is not obligatory. Reforming the bequest provides a solution for inheritance distribution through the method of ta'lili reasoning, kulliyah rules, and community uruf. This approach ensures certainty, justice, and

⁴¹ Muhammad bin Idris Asy-Syafi'i. P. 260-261

⁴² Shiddieqy and Hasbi, "Fiqh Mawaris Hukum Pembagian Warisan Menurut Syariat Islam."

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legal validity in the transfer of assets (tamlik). The goal is to meet the living needs of children, grandchildren, and relatives who are economically dependent on the testator, while simultaneously realizing the overall welfare of the family in the future.

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