

Analytical Study on Egyptian Inheritance Law Reform (*Faraidh*)

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Abstract. *The decline of Muslims became the background for the birth of reform ideas. This can be seen with the birth of various figures who are aggressively voicing reforms in various fields, such as politics, education and law. History has recorded names such as Jamaluddin al-Afgani with Pan-Islamism, Muhammad Abduh with education reform, and Rasyid Ridho with the idea of legal dynamics. Which in turn has an impact on the modernization of the writing and learning system of Islamic law and the laying of Islamic law in state legislation. Islamic law, especially inheritance law, is practiced by Muslims in Indonesia on the basis of personal awareness and encouragement of faith and obedience to Islam. This law uses the main sources of the Qur'an and Hadith, which are complemented by Ijtihad and qiyas carried out by scholars and judges. The history of Islamic law reform cannot be separated from the dialectic of evolution that occurred from time to time, geographical scope and conditions. The main model of this movement is in the spirit of spreading and implementing Islamic law which emphasizes progressive efforts in the legal field with the spirit of reform. The spirit of renewal through the idea of reforming Islamic law, especially in the field of family law, occurred in the middle of the second decade of the 20th century in Turkey. This enthusiasm continued to give birth to brilliant ideas in the progress of law formation, one of which was followed by the birth of a mandatory will on the application of inheritance law issues in Egypt in order to meet the state's needs for the codification of family law regulations.*

Keywords: Analysis; Inheritance; Law; Updates.

1. INTRODUCTION

There are 13 aspects of Islamic family law in the world that are undergoing reformation changes, namely the minimum age limit for marriage, limiting the role of guardians in marriage¹, restrictions on the permissibility of polygamy, family living, restrictions on husband's divorce rights, rights and obligations of the parties due to

¹ Encyclopaedia Britannica, (2014), 15th ed. Vol.21. <https://www.britannica.com/topic/inheritance-law>, Morgan, L. H, Ancient Society, 2nd ed. Mustapha, A, et al, (1958), *Inheritance, Pakistan*: Women Aid Trust

divorce, pregnancy period and its implications, parental guardianship rights, *waqf*² processing, close family inheritance rights and mandatory wills.

Changes made in various countries are certainly caused by several things, if you look at the legal context they have changed. Atho' Mudzhar divides the objectives of family law reform when viewed from the various reform efforts in various countries, namely: 1) Aiming at the unification of state law. The reason is because there are a number of schools that are followed by more than one school of thought. The legal unification is grouped into 3, namely: Unification of law that applies to all citizens regardless of religion, Unification which aims to unite the two main schools in Muslim history, namely between Sunni and Shi'i beliefs, such as Iran and the population who follow the two sects and Unification in one particular school, such as among the followers of Shafi'i, Hanafi, or Maliki. 2) Aims to elevate the status of women. Although it is not explained explicitly, it can be seen from the history of the emergence of which is to respond to the demands of increasing the status of women. 3) Aims to respond to the developments and demands of the times because traditional *fiqh* concepts are considered less able to answer them. 4) Strengthen the rights of members of these families above the rights of more distant family members³.

From these efforts, a method of legal reform was created in giving birth to various dimensions of its formation, especially if you want to create an actual and progressive family law in accordance with the benefit of the country. As explained by Bunyan Wahib, reform of legal substance in various countries is carried out by means of *takhayyur* (selection of legal opinions), *talfiq* (amalgamation of legal schools), and *Ijtihad* (innovation or legal invention). *Takhayyur* is carried out by adopting the provisions of existing legal opinions that are judged to be in accordance with the community. *Talfiq* is carried out in an eclectic way, by combining several existing legal opinions so that legal provisions are obtained that are in accordance with the community. *Ijtihad* is done by reinterpreting religious texts.

Legal reform in the historical framework, especially in the field of family law, began with the promulgation of family law in Turkey, with the birth of the Family Law Code (*Qanun al-Ailat*). The emergence of the idea of family law reform occurred in the middle of the second decade of the 20th century, precisely in 1915 by issuing two decisions of the Ottoman Caliph (two imperial decrees) by Sultan Muhammad V regarding the rights of wives. The Ottoman dynasty, which adopted many legal rules from the Hanafi school, in its later developments felt the need to amend the law on wife's rights.⁴ This amendment was made because the Hanafi School was considered not to give fair rights to the wife. Because according to the Hanafi school, a wife who has been abandoned by her husband for many years, or her husband suffers from a

² Sukarmi, S., & Victoria, Argo. (2018). Cash Waqf in Sustaining of Indonesian Society "In Legal & Economic Perspective". *AL-ITQAN: JOURNAL OF ISLAMIC SCIENCES AND COMPARATIVE STUDIES*, IRKHS-IIUM, Malaysia, 2(1), 83–97. <https://doi.org/10.31436/al-itqan.v2i1.43> and Ong Argo Victoria, (2018) *Waqf Al-Nuqid In Indonesia (In Law Perspective)*, Jurnal Pembaharuan Hukum Vol 5, No 1 Universitas Sultan Agung, <http://jurnal.unissula.ac.id/index.php/PH/article/view/2999>

³ Berkey, J.P, (2003), *The Formation of Islam: Religion and Society in the Near East*, 600-1800, Cambridge: Cambridge University Press

⁴ Wallis, T.P, (2014), "*Primogeniture and Ultimogeniture Under scrutiny in South Africa and Botswana*" LLM Dissertation, North-West University, South Africa, May, 2016, The Law of Library Congress, "Inheritance Laws in Nineteen and Twentieth Centuries" March, 'Abd al'Ati, H, The Family Structure in Islam: American Trust Publication

disease that endangers marriage, does not have the right to file for divorce, and this is the initial milestone in the renewal of the application of Islamic law as a standard rule in legislation.⁵

Furthermore, Egypt as an area that was once part of the Ottoman Turks, participated in carrying out legal reforms, especially in the field of family law. Starting from the birth of Act No. 25 of 1920 concerning family law or the so-called *Qanun al-Ahwal al-Syakshiyah* then followed by the birth of the law on marriage registration, the law on polygamy and so on, which occurred in the early 1920-1950s. And what is phenomenal, and widely adopted by various countries is the birth of Act No. 71 of 1946 regarding wills. According to many parties, this regulation was the initial initiator of reform in the field of inheritance law for the Egyptian state, which substantially exceeds the provisions in Islamic inheritance especially regarding the position of orphaned grandchildren. Then how can Egypt become a country that plays an important role in reforming the field of Islamic inheritance? This is what needs to be explored to find out to what extent Egypt has become one of the Muslim countries that has played a role in reforming Islamic inheritance law in the world. Through this paper, the author tries to analyze historically-sociologically legally by explaining in sequence the historical aspects of the formation, to the concepts and principles that are placed as a reference for the formation of inheritance laws in Egypt.

2. RESEARCH METHODS

This research is a qualitative research with a sociological juridical approach. The data used in this research are primary data sources and secondary data collected by means of interviews, literature study and observation. The interview that the author conducted was an open interview, where respondents had the freedom to express their answers without being limited by the author. In the literature study, collected data or theories as well as guidelines from books related to the problem under study. The observation is carried out as a complement, which is carried out by observing and systematically recording the phenomena studied. The data that has been collected is then analyzed using a qualitative approach with content analysis techniques. The analysis is carried out in four main steps. (a) review all data collected from primary and secondary sources. (b) grouping all data, (c) linking data with theory. (d) interpret and draw conclusions from the analyzed data⁶.

3. RESULTS AND DISCUSSION

At first the territory of the Islamic empire was very wide. With a span of territory starting from the European continent in the west, the African continent in the south, and the Asian continent in the middle east. Until the world war which resulted in various areas that were once controlled by the Islamic empire, which at that time was controlled by the Ottoman Turks, were divided and formed the identity of the country. This started the colonization and domination of western countries over Muslim areas. Apart from being colonizers, they also participated in influencing the formation of laws

⁵Ahmad Bunyan Wahib, "Family Law Reform in the Muslim World", *Journal of Ijtihad: Journal of Islamic Law and Humanitarian Discourse*, Vol. 14, No. 1, June 2014, p. 10.

⁶Yusuf, A. R. and Sheriff, E. E. O, (2005), *Succession Under Islamic Law*, Lagos: Malthouse Press Limited, Al-Jibali, M, *Inheritance Regulation and Exhortation*, 2nd ed., Al-Madinah, Saudi Arabia: al-Kitaab and as-Sunah publication, and Doi, A.I, *Shariah: The Islamic Law*, London: Ta Ha Publishers

in these countries. One of the areas that was separated from the Ottoman empire and then liberated itself from foreign power was the state of Egypt⁷.

The influence of the Ottoman State was very close in the application and practice of law in the Egyptian state. This can be seen by the implementation of legal products in the Hanafi school as the state school. In addition, this country has also since been separated from the territory of the Ottoman Turks, then colonized by the French state, the rules set out in the Napoleonic Code in 1883, on the grounds that Islamic law in its existing form cannot be used as material for state legislation. However, this program ended because it received strong criticism from the community by stating that Islamic law was able to meet the needs of the state in the formation of legislation⁸.

This incident caused turmoil in reform efforts from various parties, both traditionalists and reformists. Mardani in his book *Islamic Marriage Law* states that the history of family law reform in Egypt began around 1920. Even though before that there were efforts to form a draft civil law and a *waqf* law⁹ initiated by judge Qudri Pasha, based on the Hanafi school of thought, but both of them were never promulgated at all so that they did not have binding legal force. Nevertheless, these regulations did little to contribute to efforts to realize Islamic legislation that came afterward.¹⁰

In the same year, with a short time codification efforts were rolled out again. With the birth of Act No. 25 of 1920 concerning family law (*Qanun al-Ahwal al-Shakhsiyyah*). This law is Egypt's first attempt to ratify the rule of law and is a form of legal unification based on the law, although its substance still adheres to the opinion of a school of thought. Its contents concern the main issues related to family law, such as rules regarding living, the right to file for divorce and several other general provisions.

Efforts to establish and carry out legal reforms continue to be encouraged. In 1929, Act No. 25 of 1920 was perfected by issuing Act No. 25 of 1929 which consists of 23 articles with nine main issues. This law abolished several articles in the previous law and gave birth to several new articles, including those concerning divorce claims with the wife's initiative and other general provisions.

This legal reform in Egypt continued to occur continuously until the early 1950s. Legal institutions in Egypt are gradually carrying out legal reforms that have an important impact on family law (marriage and inheritance). Act No. 25 of 1929 was then followed by other laws such as Act No. 56 of 1923 regarding the age limit for marriage, Act No. 25 of 1929 regarding the rules for divorce and domestic quarrels, followed by the civil

⁷ Abd al'Ati, H, (2011), *The Family Structure in Islam*, American Trust publication see Abdul Rahman Amirah, (1946), *Lajnat al-Tahkeek wa Al-Bahth Al-'Ilmy Bidar Al-Wafa', n.d.*. See also Tafsir Al-Murāghī" (See Al-Murāghī, Ahmad Mustapha, Tafsir Al-Murāghī, Vol. IV, 1st ed.(Cairo: Mustapha Al-Halaby and Sons Publishers, 1946-1365 A.H) and other Books of Tafsir.

⁸ Abdul, M.O.A, (1988), *The Classical Caliphate: The Islamic Institution*, Lagos: Islamic Publication Bureau, p. 98

⁹ Sukarmi, Op.Cit.

¹⁰ Al-Sabuni, M.A , Al-Mawarith Fii Shariati Al-Islamiyyah Fii dhaohi al-Kitab Wa Al-Sunnah (Darul-Kutub, 1388 A.H) and Al-Shawkāni, Muhammad bin Ali bn Muhammad, *Fath Al-Kadīr (Book of Tafsīr)*, Vol. I, (ed.)

code of 1931, Act No. 77 of 1943 regarding inheritance law, and Act No. 71 of 1946 regarding will law¹¹.

From the various efforts to codify the law, we can see what aspects have been updated. Starting from preparation or before marriage to divorce and inheritance. One of the visible and influential in representing reform is the Islamic inheritance law in Egypt, this can be seen when the promulgation of regulation no. 71 of 1946 concerning the will which regulates the mandatory will for orphaned grandchildren. Sri Hidayati in her writings also stated that among the most prominent and controversial issues in the field of inheritance is the position of orphaned grandchildren on the inheritance of their grandfathers. Although previously Act No. 77 of 1943 regarding inheritance as part of an effort to unify the law, but for the authors of this law it does not describe and reflect substantially reforms in the field of Islamic inheritance. Because the majority of the articles in this law codify the principles of inheritance law in the Hanafi school. Although there are several articles that include the views of other schools, they are not so prioritized¹².

We can prove this by looking at one of the provisions, namely about "*radd*" or excess in inheritance. According to A. Hanafi, who stated that this provision was a new provision and was different from the previously applicable provisions, that if there is an excess of inherited property, while the family entitled to inherit is no longer there, the husband or wife who is still alive, in addition to receiving their usual share, also has the right to inherit accept these advantages, because he is more important than the Ashabi Sababi family. This provision turned out to be refuted when listening to Abdullah Sidik's opinion which stated that the above provisions were actually based on the opinion of Caliph Uthman and Zaid's companions who allowed this provision. These basic provisions were then held and applied in the Maliki and Shafi'i schools. So, Actually this rule is a form of legal amalgamation or *talfiq* which is applied in inheritance regulations in Egypt because it comes out of the Hanafi school which is a priority school, but in substance the law of this rule is still based on the opinion of the school. The other rules are also the same, there is *talfiq* in the application of the legal method, but in substance it is still based on the opinion of the priests of the school of thought.

Back to the discussion of orphaned grandchildren which reflects the contemporary theme of *Ijtihad* applied in Egypt. According to Islamic law, as stated in *fiqh* books, a grandson is not entitled to receive an inheritance if he meets a son or in other words he is hindered by a son. This provision is based on the fact that sons are certainly closer and take precedence over orphaned grandchildren. So, the child of the child may not obtain inheritance as long as the owner of the part that has been clearly defined (*dzaw al-furud*) is still there. Children of children who have died (grandchildren) when the father was still alive, thus, also do not get inheritance rights, if there are one or more sons¹³.

¹¹ Berkey, J.P, (2003), *The Formation of Islam: Religion and Society in the Near East*, 600-1800, Cambridge: Cambridge University Press, p.xi

¹²Sri Hidayati, "Stipulations of Mandatory Wills in Various Contemporary Muslim Countries", *Ahkam Journal*, Vol. XII, No. 1, January 2012, p. 81.

¹³ Justice Orire, A., (2000) "Shariah: A Legal System and A Way of Life" in A. M Yakubu et al (eds.) *Understanding Shariah in Nigeria and Kamali, M.H, Principles of Islamic Jurisprudence*, 2nd Rev. ed., Kuala Lumpur, Malaysia: Ilmiah Publishers

This provision is considered by some legal experts in various Muslim worlds as a provision that does not provide a sense of justice to grandchildren. To solve this injustice problem, Islamic jurists in the world have tried to introduce provisions of a will which, although not made by the testator, must be implemented. This provision is known as the concept of mandatory will. And if we trace this through discussing the history of reform in the field of law, especially regarding inheritance, it was Egypt who initiated the provisions regarding this mandatory will and introduced it to several other Muslim countries.

Apart from talking about legal reasons, the social construction of Egyptian society has also influenced the reform of Islamic inheritance law, and we can see this from the opinion of Husayn Ahmad Amin, a writer, journalist and lecturer at Cairo University. He, as quoted by Nadia Abu Zahrah, stated that social stagnation was caused by the crisis of trust in the Islamic community and the absence of reform of Islamic law. This will result in Islamic law being passive and ineffective in solving social problems. Finally, society as a legal subject (*mukallaf*) is in a position where their rights are discriminated against. This is exacerbated by people who are blind to understanding Islam, they (in this case academics,

Seeing the social decline and decline of Muslims that occurred in Egypt, reform efforts emerged. With the birth of Islamic reformers or *mujadids* who influenced the understanding of Islam in Egypt, such as Jamaluddin al-Afgani, Muhammad Abduh and Rasyid Ridho. The idea of reform that they advocated made the *ulama* and Egyptian society in general try to review and rush to carry out legal reforms, especially in the field of family law. Why family law? Because it is this field that has a more real and direct impact on each individual, especially in relation to Islamic inheritance. Because inheritance is one of the important things whose discussion demands justice and equality in practice, because it involves the survival of a person or many people.¹⁴

For this reason, regarding the position of orphaned grandchildren who are veiled by father's brothers, there is a need for reconstruction so that the achievement of justice and benefit in the distribution of inheritance can be realized. This effort was welcomed by the Egyptian government, with the issuance of Act No. 71 of 1946 regarding wills. We can learn about this provision by looking specifically at Articles 76-78, which essentially states:

Article 76: "If an heir (*al-mayyit*) does not make a will for the offspring of a child who died before him (the heir), or died together with him, as much as the part that should have been obtained by the child from the inheritance, then the offspring will receive that share through a will (mandatory) within the limit of 1/3 of the property, provided that (a) the offspring does not inherit, (b) the deceased person (the heir) has never given the property in other ways as big as his share. If it has been given or has been given but it is less than the share that should have been received, then the deficiency is considered a mandatory will. This will becomes the right of first-degree descent from boys and girls and subsequent descendants according to the male line. Each degree

¹⁴ Nicholson, R. A, (1994), *A Literary History of the Arab*, New Delhi: Kitan Bhavan see Radford, M.F, (2000), "The Inheritance Rights of Women Under the Jewish and Islamic Law", Boston College International and Comparative Law Review, Vol.23, Issue 2, Article 2

veils its own offspring, but cannot veil the offspring of others. Each degree divides the will as if it were inherited from their parents."

Article 77: "If someone gives a will more than what should be received, then the excess is considered as an *ikhtariyyah* will. If it is lacking, the deficiency is perfected through a mandatory will. If there is a will to some descendants and leave some others, then the mandatory will is applied to all descendants and the existing will is considered valid as long as the provisions in article 76.

Article 78: "A mandatory will takes precedence over other wills. If the heir (*al-mayyit*) does not testify to the person for whom it is obligatory to testify, and he wills to another, then the person for whom the will is obligatory is entitled to receive the share that he should receive from the remaining 1/3 of the inheritance if sufficient. If not, then for him and for those who are given another will, it is within the 1/3 limit."

From the explanation of the article above, the position or position of orphaned grandchildren can now be protected and their rights facilitated by the law through mandatory wills. This was the initial milestone in the reform of Islamic inheritance law which played an important role in the reform of the provisions on inheritance distribution initiated by Egypt. And these ideas and concepts are then studied and followed in various countries that apply Islamic law in their laws, including our country Indonesia which also implements mandatory wills. This is stated in article 209 of the Compilation of Islamic Law by implementing mandatory wills for children and adoptive parents¹⁵.

4. CONCLUSION

The role of Islamic inheritance law reform carried out by Egypt began with legal unification in including various opinions of fuqaha (*talfiq* / amalgamation) on the application of inheritance law through Act No. 77 of 1943 regarding inheritance. Various efforts to solve problems in the field of inheritance are bridged and resolved through the law which is more of a Hanafi style. However, a new problem emerged which textually in various schools of thought and Act No. 77 of 1943 was not covered and facilitated, namely regarding the rights of orphaned grandchildren who were veiled by the brothers of their late father. In the not too distant future (3 years since the application of the inheritance law) Act No. 71 of 1946 on wills, which in article 76 requires in the distribution of inheritance to include the rights of orphaned grandchildren by giving 1/3 of the inheritance of the heir. It can be said that this effort is a new breakthrough that substantially changes the provisions in Islamic inheritance which clearly veil orphaned grandchildren. By looking at social needs and the general benefit, Egypt forms the best law for its people with the idea of reforming Islamic inheritance law through the issuance of Act No. 71 of 1946 on the will, and the first country to initiate it was Egypt. Egypt forms the best law for its people with the idea of reforming Islamic inheritance law through the issuance of Act No. 71 of 1946 on the will, and the first country to initiate it was Egypt. Egypt forms the best law for its

¹⁵ Wallis, T.P, (2014), "*Primogeniture and Ultimogeniture Under scrutiny in South Africa and Botswana*" LLM Dissertation, North-West University, South Africa, May, 2016, The Law of Library Congress, "Inheritance Laws in Nineteen and Twentieth Centuries" March, 'Abd al'Ati, H, The Family Structure in Islam: American Trust Publication

people with the idea of reforming Islamic inheritance law through the issuance of Act No. 71 of 1946 on the will, and the first country to initiate it was Egypt.

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