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Submission date: 05-Jan-2022 11:46AM (UTC+0700)

Submission ID: 1737632793

File name: Manuscript_Article.docx (111.84K)

Word count: 7842

Character count: 39052

ISLAMIC LAW THOUGHTS: FATHER'S POSITION AS HEIR IN SYĀFI'ĪYAH JURISPRUDENCE AND KUHPERDATA

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Abstrak

Penelitian ini bertujuan menjawab permasalahan pokok, bagaimana posisi ayah sebagai ahli waris menurut fiqh *Syāfi'īyah* dan KUHPerdata dan mengapa terjadi perbedaan posisi antara keduanya. Penelitian ini adalah penelitian Library Research menggunakan pendekatan kualitatif dengan metode deskriptif komparatif. Hasil temuan menunjukkan, adanya perbedaan posisi ayah sebagai ahli waris dalam fiqh *Syāfi'īyah* dan KUHPerdata. Dalam fiqh *Syāfi'īyah* ayah mempunyai posisi yang pasti sebagaimana yang disebutkan dalam surat An-Nisa':11, sebagai *zawil furūd* bersama dengan keturunan pewaris, sebagai *'aṣabah* bila tidak ada anak serta sebagai *zawil furūd* dan *'aṣabah* bersama dengan anak perempuan. Ayah sama kedudukannya dengan keturunan pewaris tanpa ada dihalangi pewaris manapun. Sedangkan KUHPerdata posisi ayah sebagai ahli waris digolongkan dalam golongan II dan ayah baru mempunyai hak waris apabila ahli waris golongan pertama sudah tidak ada dan ayah tidak menjadi ahli waris bersama dengan keturunan pewaris, karena ayah disamakan dengan saudara walaupun ayah berada dalam derajat yang pertama yaitu sama dengan keturunan pewaris.

Kata Kunci: ayah, fiqh *Syāfi'īyah*, KUHPerdata, warisan

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Abstract

This study aims to answer the main problem, how the position of the father as the heir according to *Syāfi'īyah* jurisprudence and KUHPerdata and why there is a difference in place between the two. This research is a library research study using a qualitative approach with a comparative descriptive method. The results show a difference in the father's position as the heir in *Syāfi'īyah* jurisprudence and KUHPerdata. In *Syāfi'īyah* jurisprudence, the father has a definite place as mentioned in Surat An-Nisa':11, namely as *zawil furūd* when together with the descendants of the heirs both men and women, as *'aṣabah* if there are no children and as *zawil furūd* and *'aṣabah* when together with a daughter. The father is in the same position as the heir's descendants without being hindered by any heir. While KUHPerdata father's position as the heir is classified in group II, the new father has the right if the heir of the first group no longer exists. The father does not become an heir and the descendants of the heir because the father is equated with a brother even though the father is in the first degree, which is the same as the descendants of the heirs.

Keyword: father, inheritance, KUHPerdata, *Syāfi'īyah* jurisprudence.

Introduction

Three developments influence inheritance law that applies in Indonesia in the initial concept of the legal system in the distribution of inheritance. The

three mechanisms in the legal system are Islamic law, KUHP data, and customary law. All three have several differences regarding the elements in inheritance, one of which is regarding the position of the heirs. Meanwhile, the mechanism for the distribution of inheritance between the heirs is a manifestation of the recognition of the existence of individual property rights both to the property of a person who has died, which will be transferred to his heirs and must be divided equally between men and women, children and adults if it has been fulfilled. conditions for receiving the inheritance.¹

Islamic inheritance law is part of Islamic law itself. Accordingly, its mechanism has been applied in Indonesia since Islam entered the archipelago, namely in the seventh century, during the Islamic empire, colonial period, and independence period until the present era.² In Islamic law, the rules on inheritance issues and legal aspects concerning inheritance (*tirkah*) are arranged systematically.³ Islamic law has also positioned a person's property rights to the assets of both men and women through the *syara'* way, such as the transfer of someone's property rights while still alive or the transfer of property to the heirs after someone dies.⁴

If a person died and left an inheritance, the property left as inheritance must be distributed to the heirs entitled to receive the inheritance.⁵ In the Qur'an, it is stated that the father is one of the heirs who are entitled to the property left by his son (heir) as stated in the letter an-Nisa: 11,

ولأبويه لكل واحد منهما السدس مما ترك إن كان له ولد فإن لم يكن له ولد وورثه أبواه فلأمه الثلث

¹ For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third;⁶

¹ M. Hasbi Ash-Shiddieqy, *Fiqh Mawaris: Hukum Pembagian Warisan Menurut Syariat Islam* (Semarang: Pustaka Rizki Putra, 2011), p.7.

² Emy Rachmawati and Burhanudin Harahap, "Justice Dimensions of Islamic Inheritance Law in Determining The Inheritance Rights Of Parents, Children and Husband/Wife," *International Journal of Multicultural and Multireligious Understanding* 5, no. 3 (2018): p.287, <https://doi.org/10.18415/ijmmu.v5i3.338>.

³ Shahbaz Ahmad Cheema, "Distribution of Inheritance under Islamic Law: An Appraisal of Online Inheritance Calculators," *Journal of Islamic Thought and Civilization* 11, no. 1 (2021): p.115, <https://doi.org/10.32350/jitc.111.07>.

⁴ Muhammad Ali Ash-Shabuni, *Pembagian Waris Menurut Islam* (Depok: Gema Insani Press, 1996), p.39.

⁵ Amir Syarifuddin, *Hukum Kewarisan Islam* (Jakarta: Kencana Prenada Media Group, 2015), p.6.

⁶ Aziz Abdul and Rouf Abdul, *Al Quran Dan Terjemahan* (Jakarta: Al-Huda Gema Insani, 2002), p.116.

From the fragment of the verse above, it can be seen that the father has the position as the heir who is entitled to the property left by the heir (his son). If the heir leaves offspring, his father as *zawil furūd* is entitled to receive an inheritance according to the provisions set out in the Qur'an, and if the heir does not leave offspring, the father's position is as *'aṣabah*.

Umar Ibn Khattab's opinion in the case of inheritance (*Gharawain*) which is also mentioned in the problem (*Umariyatain*), is composed of two groups of heirs. The first group consists of a husband, mother, and father, and the second group consists of a wife, mother, and father.⁷ In the first group, a woman dies, leaving her husband, mother, and father as heirs. So the husband gets a half share. The mother receives a third of the remaining property that the husband's claim has taken. At the same time, the rest is for the father's share by way of *'aṣabah*. In the second group, a man dies, leaving his wife, mother, and father, then the wife gets a quarter of the share, the mother receives a third of the remainder, and the rest goes to the father's claim.⁸

As for the reason that the mother is given a third of the remaining assets in this matter, because if the mother is given a third of all the help, then the mother's share will be doubled, because after the mother takes a third of all the assets, then the remaining one-sixth of the property goes to the father's share, thus the mother's share is women are double the father's share as men. However, if the mother is given a third of the remaining property, then the father's share is still doubled, meaning that the male claim is double that of the female share.⁹

Whereas in the KUHPerdata principle of inheritance, there are two divisions, namely heirs by law (*ab intestato*) and heirs by will (*testamentary*).¹⁰ The heirs according to the law or heirs *ab intestato* have been regulated in article 832 of the KUHPerdata, which is determined based on blood relations¹¹, so there are four groups : (a) The first group is the legitimate children of the heirs or their descendants and the husband or wife who is left behind (article

⁷ Achmad Kuzari, *Sistem Asabah: Dasar Pemindahan Hak Milik Atas Harta Tinggalan* (Depok: Rajawali Pers, 1996), p.120.

⁸ Fipy Rizky Amalia Luawo and Haswida Amalia, "The Implementation of Inheritance Based on The Tribe of Kaili Ledo and Islamic Inheritance Laws," *Jurnal Dinamika Hukum* 19, no. 2 (2019): p.319, <https://doi.org/10.20884/1.jdh.2019.19.2.2525>.

⁹ Ash-Shabuni, *Pembagian Waris Menurut Islam*, p.39.

¹⁰ R. Soetojo Prawirohamidjojo, *Hukum Waris Kodifikasi* (Surabaya: Airlangga University Press, 2011), p.4.

¹¹ Budi Hariyanto, "Tinjauan Yuridis Terhadap Pembagian Harta Waris Beda Agama Menurut Kitab Undang Undang Hukum Perdata (Kuh Perdata) Dan Kompilasi Hukum Islam (KHI)," *IUS* 8, no. 2 (2021): p.35, <https://doi.org/10.51747/ius.v8i2.688>.

852 of the KUHPerdato)¹², (b) The second group will become heirs if there is no heir from the first group who has the right to inherit. The second group is one of the heir's parents who are still alive, together with the heir's siblings or descendants of the sibling (article 854 of the KUHPerdato)¹³, (c) The third group will become heirs if there is no heir from the first group who is entitled to inherit. The third group is blood family in a straight line up with the provisions of who is the closest in rank to the heir, receives all the inheritance, for example, the grandfather and grandmother of the heir (article 853 of the KUHPerdato)¹⁴, (d) The fourth group will be the heir if there is no one expert the first class of heirs who are entitled to inherit. The fourth group is other blood relations, for example, uncles, aunts, and cousins of the heirs (article 861 of the KUHPerdato).¹⁵

The KUHPerdato states that not all family members related by blood to the heir can inherit. The position as a new family member can inherit but does not have to get an inheritance. Family members who inherit are still based on the principle of "de naaste in het bloed, erft het goed" which means the family closer to the heir will inherit. In other words, the closer family excludes or covers, the more distant family. The heirs are divided into groups to measure the close relationship between the heir and his family members.¹⁶ In civil law, who has the right to inherit the inheritance of a person has been regulated by law to stipulate that the heir members are divided into various groups. If there are people in the first group, then that is the right to inherit all the inheritance. While other family members do not get anything, the inheritance will be transferred to the second group if there is no first-class.¹⁷

If the father receives an inheritance with his brothers, they respect head by head. If he has three or more siblings, the father's rights cannot be less than a quarter of the property because even though it appears that the position of the father and brother is the same, they are both in the second class. But the position of the father is more than the heir's brothers.¹⁸

The father's position in civil law is in the second group, so the father in civil law does not inherit if the heirs of the first class are still present because

¹² R Subekti and R Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, Cet. 37 (Jakarta: Pradnya Paramita, 2006), p.134.

¹³ Subekti and Tjitrosudibio, p.134.

¹⁴ Subekti and Tjitrosudibio, p.134.

¹⁵ Subekti and Tjitrosudibio, p.135; Eman Suparman, *Hukum Waris Indonesia : Dalam Perspektif Islam, Adat, Dan BW* (Bandung: Refika Aditama, 2018), p.30.

¹⁶ J Satrio, *Hukum Waris* (Bandung: Alumni, 1992), p.23.

¹⁷ Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 2005), p.98.

¹⁸ A Pitlo, M Isa Arief, and J.E Kasdorp, *Hukum Waris : Menurut Kitab Undang-Undang Hukum Perdata Belanda* (Jakarta: Intermasa, 1994), p.45.

the principle of civil inheritance law states that closer blood relatives close further families. And the blood family of the heir according to the much more intimate blood relationship with the heir. And this group of heirs they inherit successively.¹⁹

From the description above, it is clear that the father's position as the heir is different between *Syāfi'iyah* jurisprudence and the KUHPerduta. Therefore, this article will try to describe how the father's position in *Syāfi'iyah* jurisprudence and the KUHPerduta does not stop there, which will have implications for the acquisition of the inheritance price of the heir due to the different position of the father. At the end of this article, the reasons for these differences will be stated according to the study of *Syāfi'iyah* jurisprudence and the KUHPerduta.

Methodology

This study uses a comparative descriptive method, namely a discussion that describes the problem accompanied by a comparison of two different legal systems regarding this issue, namely between *Syāfi'iyah* jurisprudence and the KUHPerduta. A comparison will show the differences and similarities between the two legal systems.

This study uses literature research through qualitative descriptive methods so that the characteristics of the objects and facts disclosed can be seen carefully and systematically. The primary data sources in this study that the researchers collected from the books written by the *Syāfi'iyah* scholars include; *Hasyiyah Al-Bujairimi 'ala Syarh Minhaj Al-Thullab*, Sulaiman Al-Bujairimi (d. 1221 H)²⁰, *Asy-Syarkawi 'Ala Tahrir*, Muhammad Zakariya Al-Anshari (d. 926 H)²¹, *Mahalli*, Jalaluddin Al-Mahalli (d. 864 H)²², *Nihayatul Muhtaj*, Syamsuddin Muhammad Al-Ramli (w. 957H)²³, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, Ibnu Hajar Al-Haitami (d. 974 H)²⁴ and the KUHPerduta to make a comparative descriptive or comparison between the two, so that produce objective findings.

¹⁹ Fadlih Rifenta, "KONSEP ADIL DALAM HUKUM WARIS ISLAM," *FUADUNA: Jurnal Kajian Keagamaan Dan Kemasyarakatan* 2, no. 1 (2019): p.13, <https://doi.org/10.30983/fuaduna.v2i1.2024>.

²⁰ Sulaiman Al-Bujairimi, *Hasyiyah Al-Bujairimi 'ala Syarh Minhaj Al-Thullab* (Beirut: Daar al-Fikr, 1995).

²¹ Muhammad Zakariya Al-Anshari, *Asy-Syarkawi 'Ala Tahrir*, Juz II (Jeddah: Al-Haramain, 1984).

²² Jalaluddin Al-Mahalli, *Mahalli*, Juz III (Semarang: Usaha Keluarga, 1994).

²³ Syamsuddin Muhammad Al-Ramli, *Nihayatul Muhtaj*, Juz VI (Beirut: Darul Kutub Ilmiyah, 1983).

²⁴ Ibnu Hajar Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, Juz VI (Kairo: Maktabah At-Tijariyah Al-Kubra, 1994).

Classification of inheritors in *Syāfi'iyah* jurisprudence

The classification of heirs in *ẓawil furūd*}, *'aṣabah*, and *ẓawil arham* shows differences of opinion among the friends, *tabi'in*, and *fuqaha'*. Some of them reject the presence of *ẓawil arham* as heirs.²⁵ They argue that if the first and second classes (*ẓawil furu>d*) and *'aṣabah* do not exist, the inheritance is handed over to the Baitul Mal.²⁶ In addition, the grouping of heirs according to the *fuqaha'*, there are three groups: *nasabiyah* heirs (people who have blood ties to the corpse). Inheritance due to a marital relationship (*asr*) and heir due to *maula* (former master for the servant).²⁷

The classification of heirs as described above will be described systematically according to the companions, *fuqaha'* and *tabi'in*. The classifications are:

a. *Ẓawil furūd*}

Ẓawil furūd} or *Ashabul furūd*} are those who have a predetermined share of the six provisions that have been determined for them: 1/2, 1/4, 1/8, 2/3, 1/3, and 1/6.²⁸ As for those who have a particular share, there are twelve people, four from the male side: father, grandfather, brother, and husband. And eight people from the women's side: wife, mother, daughter, half-sister, half-sister, mother-in-law, granddaughter, grandmother, and so on.²⁹

b. *'Aṣabah*

According to language, the definition of *'aṣabah* is a male family from the father's side. And in terms, are all heirs who do not have a specific part clearly in the Qur'an and Al-Hadith, as according to the scholars of *'aṣabah* are all heirs who get all the inheritance when alone and take the rest of the inheritance after *'ashabul furu>d*} took their share.³⁰ There are two kinds of *'aṣabah*, namely *'aṣabah nasabiyah* because of kinship or blood relations, and *'aṣabah sababiyah*, namely, freeing slaves.³¹

1. *'Aṣabah Nasabiyah*

'Aṣabah Nasabiyah is further divided into three types, first, *'aṣabah bi nafsih* is a group of men who are related to people who have died without being interspersed by women. *'aṣabah bi nafsih* has four groups or *jihat*, namely: (1) *jihat bunuwah*, namely boys and people who die from their descendants downward, which men continuously relate. (2) *Jihat ubuwah*, which includes

²⁵ Rachmawati and Harahap, "Justice Dimensions of Islamic Inheritance Law in Determining The Inheritance Rights Of Parents, Children and Husband/Wive," p.288.

²⁶ Al-Bujairimi, *Hasyiyah Al-Bujairimi 'ala Syarh Minhaj Al-Thullab*, p.374.

²⁷ Al-Bujairimi, p.375.

²⁸ Al-Mahalli, *Mahalli*, p.4.

²⁹ Al-Mahalli, p.5.

³⁰ Al-Anshari, *Asy-Syarkawi 'Ala Tahrir*, p.185.

³¹ Al-Ramli, *Nihayatul Muhtaj*, p.3.

the father who died, the father's grandfather, if the father is dead and continues to rise. (3) *Jihat ukhuwah* includes biological brothers, half-brothers, sons of same-sex brothers, and continuing downwards as long as they are always related to men. (4) general *jihad* includes one-year uncles and half-uncles, sons of half-uncles, sons of half-fathers, and downwards.³²

Second, *'asabah bi gairih* are women who get a share of if she is alone, 2/3 if two or more women and they are together with their brothers as *'as}abah* with the provision that the share of men is two women's share,³³ and this *'asabah* has four groups, namely: First, girls and boys. The two granddaughters of a son with his brother or his uncle's son. Three siblings if inheriting with a sibling. The four sisters are the same father if he inherits with a brother of the same father.

Third, *'asabah ma'a gairih* is every woman who needs as *'as}abah* to other women. This *'asabah ma'a gairih* is limited to only two groups of women: (1) siblings of the same age or several sisters of the same period with a daughter or daughter of a son. (2) the same-sex sisters or half-sisters, together with the daughter or daughter of a son, get the remainder of the inheritance after it has been distributed.³⁴

2. *'Asabah Sababiyah*

'Asabah Sababiyah is the *maula* (master) who frees slaves. If the liberating person does not exist, the inheritance is for his other friends.³⁵

c. *Zawil Arham*

Zawil arham are those who do not have a specific part in the Qur'an and sunnah and are not *'asabah*, and they are half-sisters, mother's brothers, mother's sisters, sons, or daughters.³⁶ The mujtahid imams have different opinions about the inheritance of *zawil arham* and those who argue that if there is no *furūd* or *'asabah* heir, the property will move to the *baitul mal* of the Muslims and be used for the Muslim community in general, not specifically for or *zawil arham*. This is the opinion of Ash-Shafi'i and Malik. And those who think that *zawil arham* may inherit if not *'ashabul furūd* and *'asabah*, they argue that *zawil arham* is more deserving of inheritance than others because of kinship relations, and they take precedence in receiving inheritance before *Baitul Mal Muslim*. And this opinion is from the schools of Imam Abi Hanifah and Ahmad ibn Hanbal.³⁷

From the description above, it can be seen that the classification of heirs

³² Al-Ramli, p.4.

³³ Al-Ramli, p.4.

³⁴ Al-Bujairimi, *Hasyiyah Al-Bujairimi 'ala Syarh Minhaj Al-Thullab*, p.375.

³⁵ Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, p.439.

³⁶ Al-Bujairimi, *Hasyiyah Al-Bujairimi 'ala Syarh Minhaj Al-Thullab*, p.374.

³⁷ Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, p.438.

according to *Syāfi'iyah* jurisprudence there are three groups, namely *ẓawil furūd*}, *'aṣabah* and *ẓawil arham*, although against the *ẓawil arham* group there is still a difference of opinion between the priests of the sects.

Classification of inheritors in KUHPerdata

According to the KUHPerdata, the classification of heirs is based on the law (ab-intestato). Meanwhile, the heirs based on the testament are outside the predetermined classification system.³⁸ This classification is because the heirs are based on testament (testamentaire erfgenaam), not and not always people who have blood relations (family) with the heir. As for the heir according to the law (ab-intestato), it is the other way around; namely, he is always based on blood relations (family) with the heir.³⁹ In connection with the above explanation, the KUHPerdata divides the grouping of heirs into four groups or groups:

a. Group I heirs

The husband and wife who live the longest as well as legitimate children, both children outside of marriage that have been recognized or their descendants, this has been mentioned in Article 852 of the KUHPerdata that the first-class heirs are children or descendants, even though they are born and mixed marriage, inheriting the inheritance of their parents, without distinguishing between sons and daughters. From the provisions of Article 852 of the KUHPerdata, if the children of these descendants die, they will be replaced by the next generation. The same is true for children who have just been born or later.⁴⁰ Besides, it is also the husband or wife who lives the longest.⁴¹

b. Group II heirs

Parents (father and mother) and siblings and their offspring. Article 854 of the KUHPerdata states that:

If a person dies without leaving descendants and a husband or wife, then his father or mother who is still alive each gets a third of the share and his inheritance; if the person who dies leaves only one brother or sister who receives the remaining one third. The father and mother each inherit

³⁸ Ismail Ismail, "The Philosophical Values of Islamic Inheritance Law," *INNOVATIO: Journal for Religious Innovation Studies* 20, no. 2 (2020): p.133, <https://doi.org/10.30631/innovatio.v20i2.112>.

³⁹ C.S.T Kansil, *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia* (Jakarta: Balai Pustaka, 1989), p.225.

⁴⁰ Effendi Perangin, *Hukum Waris*, Cet. 15 (Depok: Raja Grafindo Persada, 2018), p.29.

⁴¹ Subekti and Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, p.226.

a quarter of the share if the deceased leaves more brothers or sisters, and in that case, the latter will receive the remaining two quarters.⁴²

The provisions of Article 854 of the KUHPerdata can also be concluded that the heir's father or mother and brother will inherit the assets of the heir's head by head. Furthermore, Article 855 of the KUHPerdata determines that if the person dies without leaving any descendants or wife or husband. At the same time, the father or mother is still alive, then: (1) The father or mother gets half of the inheritance if the deceased only has one brother, which gets one-half more. (2) The father or mother gets a third of the inheritance if the deceased has two brothers, who get two-thirds more. (3) The father or mother gets a quarter of the inheritance if the deceased has more than two brothers, who get three quarters more.⁴³

If the father and mother have died, the entire inheritance becomes part of the brothers and sisters, as stated in Article 856:

If a person dies without leaving a child or husband and wife, while the father and mother have been killed first, the brothers and sisters inherit the entire inheritance.⁴⁴

And in terms of the distribution of inheritance rights to siblings, it is the same if they have the same father and mother. This is confirmed in the provisions of Article 857 of KUHPerdata:

The division and what according to the articles mentioned above become the share of brothers and sisters, is carried out between them according to the same parts, if they come from the same marriage; if they are born and have various weddings, then what they inherit must be divided into two equal parts, between the father's line and the mother's line and the person and the person who died; The same-sex brothers and sisters get their share and both the bar and the paternal only or the one-and-a-half only and the line in which they belong. If there are only half brothers or sisters and only one line, they get the entire inheritance, excluding all other blood relatives and other kinfolds.⁴⁵

In the sense that if they come from different marriages (same father, but other mother or the same mother, but different father) after the father and mother die, the inheritance can be divided into: (1) The first part is part of the father's line. (2) The second part is the part of the maternal line. (3) Brothers who have the same father and mother get a share of the father's line and part of the mother's line. (4) Brothers who are the same father only get a share of

⁴² Subekti and Tjitrosudibio, p.134.

⁴³ Subekti and Tjitrosudibio, p.135.

⁴⁴ Subekti and Tjitrosudibio, p.135.

⁴⁵ Subekti and Tjitrosudibio, p.135.

the paternal line. (5) Brothers who are of the same mother only get a share of the maternal line.

If the person who dies does not leave any descendants of his wife, husband, or siblings while the father or mother is still alive, the loving father or mother inherits the entire inheritance of the child who died. As stated in Article 859 of the KUHPerdara:

The father or mother who has lived the longest inherits all of the child's inheritance who died without leaving any descendants, husband or wife, brother or sister.⁴⁶

c. Group III heirs

After group I and group II there are no more. Then the third group heirs, namely grandparents and families in a straight line upwards from the heirs, this is stated in article 853 of the KUHPerdara:

Suppose the deceased does not leave any descendants, husband or wife, brother or sister. In that case, the inheritance must be divided equally, one part for the blood family in a straight line from the father to the top, and another piece for the family from the mother in a straight line on.⁴⁷

The purpose of Article 853 of the KUHPerdara is that what is meant by a family in a straight line of father and mother are: grandfather and grandmother, both from father and mother, and so on. According to article 853 of the KUHPerdara, in category III, there is a cloving of inheritance splitting into two parts. In each part (line), the role of the inheritor is carried out as if it were an independent entity.

Although in this group III, heir cloving occurs, namely the split, each part seems to be a separate inheritance. But in this case, there is no blood family member in one line, namely the father and mother line, who has the right to inherit, so the inheritance is reunited and inherited by blood family members from another line. But all of them without prejudice to article 859, which reads:

The father or mother who has lived the longest inherits all of the child's inheritance who died without leaving any descendants, husband or wife, brother or sister.⁴⁸

The consequence of *cloving* is that in one line, there may be heirs who are more distantly related by blood to the heir than the heirs in the other line. However, suppose no blood family member inherits in one line, either from the father's line or the mother's line. In that case, the inheritance is reunited and inherited by blood family members from other lines.

According to Articles 853 and 858 of the KUHPerdara, if the deceased

⁴⁶ Subekti and Tjitrosudibio, p.135.

⁴⁷ Subekti and Tjitrosudibio, p.134.

⁴⁸ Subekti and Tjitrosudibio, p.135.

does not leave, either the descendants of his wife or husband, relatives, or parents, the inheritance falls on the grandfather and grandmother. In this case, the inheritance is divided into two parts: the grandfather and grandmother, who inherited the mother. In the absence of grandparents, the inheritance goes to the grandparents' parents, the surviving portion of the inheritance. The heirs closest to the level of blood relationship in a straight line up get half the inheritance in the line to exclude all other heirs. All blood families in a straight line of descent in the same degree get a share of the inheritance from person to person (the same claim).⁴⁹

d. Group IV heirs

If the person dies, it does not leave offspring, wife or husband, brothers, parents, grandmother, and grandfather.⁵⁰ According to Articles 853 and 858 of the KUHPerdata:

Suppose there are no brothers and sisters, and there is no living blood relative in one of the above lines. In that case, half of the inheritance becomes part of the surviving blood relatives in the upper line, while the other half becomes part of the family. Blood in the other line to the side and line up, except in the case as stated in the following article.⁵¹

If there are no relatives (group II) and relatives in one of the straight lines up (group III), then half of the inheritance (cloving) becomes part of all blood families in a straight line upwards (group of heirs). In one line, the other half becomes part of the relatives in the other line.

The relatives in the other line are the uncles and aunts and all the descendants of the uncles and aunts who have died before. They are referred to as group IV heirs. Similar to inheritance by class III heirs, if there is inheritance by class IV heirs, then cloving is carried out on the inheritance.⁵²

In this way, it is possible for a group III heir to inherit together with a group IV heir, so the inheritance remains closed and divided according to each of the heirs. Cloving on inheritance is carried out without group I and group II heirs.

So if the heir does not leave the heirs of the first class and the heirs of the second group, then his inheritance will fall to the third group of heirs, namely the blood family, in a straight line upwards. In this case, the heir's inheritance

⁴⁹ Abdulkadir Muhammad, *Hukum Perdata Indonesia, Cet. V* (Bandung: PT. Citra Aditya Bakti, 2014), p.216.

⁵⁰ Ali Afandi, *Hukum Waris Hukum Keluarga Hukum Pembuktian : Menurut Kitab Undang-Undang Hukum Perdata (BW)* (Jakarta: Bina Aksara, 1986), p.45.

⁵¹ Subekti and Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, p.135.

⁵² J. Andy Hartanto, *Hukum Waris: Kedudukan Dan Hak Waris Anak Luar Kawin Menurut Burgerlijk Wetboek Pasca Putusan Mahkamah Konstitusi* (Surabaya: Laksbang Justitia, 2015), p.20.

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must be divided into two equal parts, namely one part for all blood families in the father's line straight up and the other part for all blood families in the mother's line straight up.

If this third-class heir does not exist, then the heir's inheritance will fall to the family of deviant bloodlines to the sixth degree. If the heir leaves the heirs of the first class, then the heirs of the second, third, and fourth groups. Do not become heirs (not entitled to inherit), and if the heir does not leave the heirs of the first group, then the second group heirs will inherit, while the third and fourth group heirs are not entitled to inherit so on. One conclusion can be drawn that the heirs of the former group close the possibility of inheriting from the heirs of the latter group. If all the people who have the right to inherit no longer exist, a recognized illegitimate child can claim the entire inheritance. If the heir does not leave the heirs of the first class to the heirs of the fourth class, then the whole inheritance of the heir falls to the state.

From the description above, it can be concluded that in the KUHPerdota. The heirs are divided into groups I, II, III, and IV. And in receiving inheritance based on class, that is, if there is a group I, they are the ones who are entitled to receive the inheritance, while group II does not get anything. And if the group I does not exist, then the second group appears as heirs, and so on.

Father's position as heir according to *Syāfi'iyah* jurisprudence

In solving inheritance problems, the Qur'an uses the words *al-walad* (child/offspring) with the opposite word *al-ab* (parents). According to Al-Ramli, the words *al-ab* are used in *tatsniyah*, indicating two people. These words *al-ab* are devoted to both parents and cannot include precisely above parents, such as the coverage of *al-aulad* for offspring under children.⁵³ The reason is that the *tatsniyah* form is not the form. This form of words cannot be interpreted as plural. The granting of the right to inherit grandfather is not based on a verse but a hadith.⁵⁴

Ibn Hajar argues that outwardly, these *al-ab* words do not include those above the parents, but their use has expanded its meaning to include grandparents. When interpreting Al-Ahzab:6, Ibn Kathir stated that the verse that mentions Abraham and the other Prophets as *Aba* cannot be used to expand the meaning of *al-ab* to ancestors over parents, because according to the mujtahid, the Apostles are referred to as *ab* (father) and wife. They are *um* (mother) to their people, and the people themselves are called children (*bani banat*) of the Apostle.⁵⁵ Likewise, the Qur'an explains the form of *tasniyah* words *al-ab*, so that it cannot be extended to ancestors above parents, such as

⁵³ Al-Ramli, *Nihayatul Muhtaj*, p.3.

⁵⁴ Al Yasa Abubakar, *Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin Dan Penalaran Fikih Mazhab* (Jakarta: INIS, 1998), p.69.

⁵⁵ Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, p.438.

the expansion of the terms *al-aulad* to descendants under children. In the time of their companions, they did not refer to this verse but looked for the traditions.⁵⁶

From the description above, it can be understood that basically, the scholars agree that the words *al-ab*, because it is used in the form of *tasniyah*, cannot be extended to grandparents or ancestors above it. This is because the terms of *al-ab* show both people, namely mother and father. But here, the author prioritizes the position of the father (right) of the father as the heir according to the title discussed.

In obtaining rights as heirs, fathers have clear rights as mentioned in the Qur'an letter An-Nisa': 11, This verse explains that the position of the father and mother is the same, that is, they both get a one-sixth share if they inherit together with the descendants of the heir, but if only the two of them become heirs, the male (father) gets twice as much as the female (mother).⁵⁷

The father's right as an heir is one-sixth of the inheritance. Suppose the father inherits together with the descendants of the heir. But if he does not have children (descendants), then the father has the right as *'aşabah*, but if the heir leaves only daughters, then the father has the right as *zawil furūd*, and also takes the rest as *'aşabah* father. So in receiving the right as heir, the father can receive an inheritance in three ways, namely: *fard* (existing provisions), *ta'shib* (*'aşabah*), and a combination of *fard* and *ta'shib*.⁵⁸ And here the author will explain one by one as follows:

First, receiving the inheritance by way of *fard*, the father takes one-sixth. And this is stipulated for the father is if the child who dies has a child who receives an inheritance with *ta'shib*, namely a son and a grandson, whether the son is one or many, whether there is another heir from *'aşabah furūd* or not.

Second, receive inheritance by way of *ta'shib* only. The father obtains this situation if the deceased does not leave any children, either a boy or a girl. The father takes a right using this *ta'shib*, if the dead does not go a son, grandson of a son, daughter of *sulbi* (biological daughter), and neither daughter of a son. In this situation, the father takes all the inheritance using *ta'shib* if there is no other heir or heirs are closed by him. And father took the rest of the property after being given a share of *zawil*.

⁵⁶ Yusuf Sani Abubakar, Ahmad Faosiy Ogunbado, and Mpawenimana Abdallah Sidi, "Islamic Law of Inheritance (Fara'id): The Best Way of Estate Planning," *International Journal of Research in Commerce and Management Studies* 1, no. 01 (2019): p.124.

⁵⁷ Ismail Ibn Umar Ibn Katsir, *Tafsir Ibnu Katsir*, Juz VI (Beirut: Darul Kutub Ilmiah, 2006), p.276.

⁵⁸ Al-Bujairimi, *Hasyiyah Al-Bujairimi 'ala Syarh Minhaj Al-Thullab*, p.376; Ash-Shiddieqy, *Fiqh Mawaris: Hukum Pembagian Warisan Menurut Syariat Islam*, p.79.

Third, the father receives the inheritance by way of *fard*} and *ta'shib* together, namely if the person who dies leaves a daughter who is *sulbi*, one or more and daughters from sons. In this situation, the father inherits by way of *fard*} and *ta'shib*. The father's right is by way of *fard*}. By way of *ta'shib*, at first, the father receives one-sixth of his *fard*} together with *ashabul furudh*, and both of them take the remaining property by way of *ta'shib* after being given parts of *zawil furūd*} if there is any remaining property. If *zawil furūd*} takes all the inheritance, the father does not take the remainder using *ta'shib*, considering the general rules in giving the inheritance to *'aṣabah*.

To get the right as heir, the father can get two kinds of inheritance, namely inheritance by way of *fard*} and inheritance by way of *ta'shib*, because a father is *ashab fard*} and *ashab nasabi*.⁵⁹ And in receiving the inheritance rights, the father has never been veiled by anyone, either the *hijab hirman* (fully) or the *hijab nuqsan* (partially), because the father does not have two *fard*}, high and low. Only one-sixth of the *fard*} can be taken by *'aul*, if the problem is a *'aul* problem, such as when a wife dies leaving her father and mother, two daughters and husband. The origin of the problem was that it was twelve in *'aul* to fifteen, so my father took two-fifteenth instead of two-twelfth.

Mazhab scholars determine the shares (rights) of the father and mother when accompanied by a husband or wife, the mother gets one-third of the inheritance rights, and one third here is the remaining third after the shares of the other *zawil furūd*} heirs have been issued, namely husband or wife. Their main reason is the statement of Ibn Mas'ud that the mother should not get more than the father. Following this opinion, in the case of a husband (getting half), the mother receives a third of the remainder ($1/3 \times 1/2$), equal to a third of the inheritance.⁶⁰

From the explanation above, it can be concluded that there are two ways to receive the father's inheritance, namely *furūd*} *al-muqaddarah* and *'aṣabah*. As *furūd*} *al-muqaddarah* when inheriting with male offspring, getting one-sixth of the inheritance and as *'aṣabah*,⁶¹ if the father inherits together with female descendants only. And in inheriting with daughters, the father takes the remainder as *'aṣabah* if there is a remainder because the father cannot get less than one-sixth of the inheritance.⁶²

⁵⁹ Al-Ramli, *Nihayatul Muhtaj*, p.5.

⁶⁰ Al-Anshari, *Asy-Syarkawi 'Ala Tahrir*, p.186; Abubakar, *Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin Dan Penalaran Fikih Mazhab*, p.148.

⁶¹ Maylissabet Maylissabet, "Hukum Waris Dalam Kompilasi Hukum Islam Perspektif Filsafat Hukum," *TERAJU* 1, no. 01 (2019): p.13, <https://doi.org/10.35961/teraju.v1i01.51>.

⁶² Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, p.439.

Father's Position As Heir According to KUHPerdato

As mentioned in chapter two, the father and mother are right as heirs. If the first group no longer exists, then the father who belongs to the second group appears to get the right as heir. To get the right as an heir, the father is very dependent on who he gets the inheritance with. And to find out the position of the father's rights, here the author will explain in detail, namely:

- a. Father and mother inherit together brothers.

Article 854:1 of the KUHPerdato states that: "if someone dies leaving neither offspring nor husband or wife, while the father and mother are still alive, then each of them gets a third of the inheritance. If the deceased leaves only a brother or sister, who receives the remaining third. Article 854:2 of the KUHPerdato states that each mother gets a quarter if the deceased leaves more than one brother or sister, while the remaining two-quarters of the share becomes the brother's or sister's share.⁶³

From the provisions of Article 854, it can be concluded that father, mother, and brother inherit head after head. If we see here, there is a deviation from the principle, which says that within each group, the heirs who are closer in rank to the heirs close those who are further away. Because the heirs are in the second degree, while the father and mother are in the first degree, and both are in group I., And both are in the same group, namely group II.

In article 854:1, it is clearly stated that if the father gets a joint inheritance with a brother or sister, then the father's right is one-third (each parent). And another third belongs to the heirs. And in verse two, it is stipulated that if the father and mother inherit together more than one male or female brother, then the father's rights (both parents) are a quarter each. And the remaining two-quarters belongs to the heirs.⁶⁴

Thus, the father (both parents) will get a quarter of the share if they inherit together with two male or female heirs, each of whom will also inherit a quarter of the claim. So if the father (both parents) inherits one or two heirs together, then the father's share (both parents) is equal to that of the sibling. But if the father (both parents) inherits with more than two siblings, namely three, four, or more, then both parents take a quarter of each. So both of them get two-quarters of the share, while the rest is divided equally between his brothers.⁶⁵

So here, the legislators seem to guarantee the father and mother of the heir that each of them will not get less than a quarter of the share. Although Article 854:1 includes parents and siblings in one group of heirs, namely the second group, in practice, the father's position (parents) is not the same as the

⁶³ Subekti and Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, p.134.

⁶⁴ Subekti and Tjitrosudibio, p.134.

⁶⁵ Perangin, *Hukum Waris*, p.43.

heir's siblings. The right of the inheritor's parents to the inheritance is the same as the heir's siblings, in the case that the number of siblings who are the same as the parents is not more than two people. And in calculating the number or the number of siblings who also inherit together with their parents, there is no difference between siblings or siblings, father or mother.

b. **Father or mother inherit** with siblings.

If **the** father inherits together with his brother, it is explained in article 854 of the KUHPerdara:

"If a person dies without leaving any descendants, nor a husband or wife, while his father or mother has died first, then the mother or father who has lived the longest gets half of the inheritance. If the heir only leaves a sister or brother, one-third of the inheritance if two brothers or sisters he goes and a quarter, if more than two brothers or sisters he goes. The remaining parts are for those brothers or sisters.⁶⁶

So what needs to be paid attention to in article 855 of the KUHPerdara are: *first*, the word "father or mother" means that the heir is only one of the two parents, both father and mother, because one of them has died first. *Second*, the word "A quarter if more than two or more people." The guarantee for the rights of the father or mother is the same as Article 854.2; namely, the parent's share cannot be less than a quarter of the inheritance. With how many siblings he jointly inherits his son's inheritance. *Third*, the word "the rest" indicates that the father's position (parents) towards his child is different from the position of the brothers towards the inheritance of his deceased brother. If parents and siblings inherit together, these words mean that the father or mother gets the right first, then **the** rest is the right of the heirs.⁶⁷

From the description above, it can be concluded that in receiving an inheritance, the father's rights are the same as those of brothers if the number of siblings is not more than three and the father inherits his rights with brothers without a mother. And if there are more than three siblings, then the father's rights should not be less than 1/4 of the share. Because even though the father has the same position as the heir's brothers, they are both in the second group, but the father is still preferred because the father is closer in rank to the heir than the brother.

The cause of differences in receiving inheritance

The differences in fathers in receiving inheritance between *Syāfi'iyah* jurisprudence and the KUHPerdara are different points of view in seeing the position as heirs. In *Syāfi'iyah* jurisprudence, fathers as heirs have two positions, namely as *zawil furūd* and *'aşabah* as mentioned in Surah An-Nisa:11, that the father gets one-sixth of the inheritance if he inherits together with the

⁶⁶ Subekti and Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, p.227.

⁶⁷ Satrio, *Hukum Waris*, p.129.

descendants of the heir and if the heir does not leave offspring, then the father becomes *'aṣabah* who takes all the property or the rest of the inheritance. And the father (parent of the heir) has equal rights with the child (descendant) of the heir. According to Ibn Hajar, the secret of equality of rights between parents and heirs is that parents must be respected. But, on the other hand, both of them are given smaller shares (rights) than the heir's children because they have reduced their consumptive costs, and they even get help from other children.⁶⁸

Equality of rights of parents and children of heirs is a new thing in the Qur'an. Inheritance outside the Qur'an is not possible because parents may become heirs if the heir dies (dies without offspring) by the Qur'an Surah An-Nisa':11, which places parents in priority. Along with the heirs.⁶⁹ Here the father always gets the inheritance together with the heir's descendants. The father is never veiled even though there are children or descendants because the father as the heir is based on a *qath'i* argument, namely based on the verse of the Qur'an Surah An-Nisa' :11.

So in *Syāfi'iyah* jurisprudence, fathers are equal to other heirs in receiving an inheritance. Even fathers have the same position as sons because if there is no son, then it is the father who becomes *'aṣabah* who takes all the rest. An inheritance that should be the son's right.

Whereas in the KUHPerdata, the father's position as an heir is in group II. If we look at the inheritance law principle of the KUHPerdata which states, that blood relatives who are closer get rid of or close the family who is more distant. Based on this principle, that the father is one of the blood families who are close to the heir, but here there is another principle, namely the blood family of the heir according to the KUHPerdata are arranged in groups called "class of heirs," consisting of groups I to with group IV, measured where the closer group covers the more distant group.⁷⁰

In the group of heirs, the father is in group II, namely together with the heir's brother; However, the degree of the father is closer to the heir than the brother; they are both in the second group because the father is equated with the brother, as stated in article 854:1 of the KUHPerdata, that in principle parents are correlated with siblings. In the KUHPerdata, although the position of the father is the same as the brother, in the distribution of the rights of the father, it is considered or prioritized over the brother that the rights of the father as an heir may not be less than a quarter of the property.

Here it is concluded that the difference between fathers as heirs is due to

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⁶⁸ Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, p.437.

⁶⁹ Ali Parman, *Kewarisan Dalam Al-Quran Suatu Kajian Hukum Dengan Tematik*, Cet. I (Jakarta: Raja Grafindo Persada, 2001), p.120.

⁷⁰ Satrio, *Hukum Waris*, p.99.

different points of view in seeing the position of fathers as heirs. In the part of *Syāfi'iyah* jurisprudence, the father becomes the heir based on the provisions of the Qur'an, which always inherits with other heirs, namely the descendants of the heir. Whereas in the KUHPerdara, the father's position is equated with the brother's part so that if there is a descendant of the first class, the father does not get the right as an heir because that group hinders it. Hence, the father's request is very dependent on the presence or absence of the first group as heirs.

Conclusion

In the study of *Syāfi'iyah* jurisprudence, fathers have three positions, namely as *zawil furūd*}, *'aşabah, furūd*}}, and *'aşabah* who always get an inheritance without being hindered by anyone/any heir. However, in the KUHPerdara, the father only has one position, namely as the group II, and the father cannot get an inheritance if heirs are included in the first group.

According to *Syāfi'iyah* jurisprudence (Islamic law), the share of the father who inherits is one-sixth of the verse if the inheritance is with sons and can get more than one-sixth if together with daughters or if there are no offspring. Meanwhile, according to the KUHPerdara, the father's share cannot be less than a quarter of the inheritance. Therefore, if you are together with your mother and only one or two people, they get the same share.

The occurrence of differences in verses according to Islamic law and the KUHPerdara because in *Syāfi'iyah* jurisprudence (Islamic Law) verses are equated with sons, namely as *'aşabah bi nafsih*, so that fathers always get their rights as heirs as stated in the letter An- Nisa':11. But, on the other hand, KUHPerdara, the father's position as the heir is equated with the heir's brother so that the father is classified in group II as stated in Article 854 of the KUHPerdara and to get the right as an heir based on class, not based on degree.

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