

## CONVERGENCE OF MARRIAGE BETWEEN ISLAMIC LAW AND CUSTOMARY LAW

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### Article Info

Received: 20-11-2024

Revised: 20-02-2025

Accepted: 02-03-2025

### Keywords:

Convergence, Marriage,  
Islamic Law, Customary  
Law

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### Abstract

Customary law is a collection of norms and rules derived from the habits or customs of the community, both written and unwritten. Marriage is a physical and mental bond between a man and a woman with the aim of building a family that is *sakīnah, mawaddah, rahmah* and *barakah*. The provisions of customary law and Islamic law have significant differences. Marriage in Islamic law regarding joint property and mutual inheritance between adopted children and adopted parents can be done through the institution of mandatory wills. These two legal provisions adopted from customary law are the result of the *ijtihad* of Indonesian scholars, because the second issue is not found in *fiqh*. This innovative creation of Indonesian scholars, apart from being a manifestation of the dynamic and creative characteristics of Islamic law, is also the identity of Islam Nusantara in the field of law. Seen from this aspect, the Indonesian KHI, in the language of the Law, can be referred to as Indonesian Jurisprudence because in addition to having an Indonesian personality, it also adopts customary law that lives in local traditions.

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## 1. Introduction

Customary marriages that are valid under customary law are not always valid under national law. Marriages that are only carried out by custom are not valid according to Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. This is because every marriage must be registered according to the applicable laws and regulations. Marriage is a way chosen by Allah as a way for humans to reproduce and preserve their lives after each partner is ready to play a positive role in realizing the goals of marriage. Allah SWT does not make humans like other creatures who live freely following their instincts and relate anarchically without rules. Allah makes laws against humans in accordance with their dignity, so that the relationship between men and women is regulated honorably, in accordance with the substance of Islamic shari'a which realizes benefits for humans and always brings rahmatan li al- 'alamīn.

In the Qur'an and hadith, marriage is called النكاح and al-ziwaj, alzawju or al-zijah (الزيجة), (الزواج، الزواج). Literally, nikah means al-wath`u (الوطء), al-dhammu (الضم), and al-jam'u (الجمع). Al-wath`uad is the mashdar of watha`a (وطأ), meaning to tread, step on, enter, have intercourse and have sex. Allah SWT. says:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً

Meaning: "And among the signs that prove His power and mercy is that He created for you (men) wives of your own kind, that you may take pleasure in them and be intimate with them, and He made between you (husband and wife) feelings of affection and compassion." (Al-Rūm [30]: 21) The meaning of nikah (marriage) in linguistic terms is gathering or coming together, while in shara' terms it is a contract that implies the permissibility of wath`u using the word inkāḥ or tazwīj. Some of the followers of Hambali define marriage as a contract that uses the word nikah or tazwīj to obtain the benefit of pleasure between husband and wife.

One of the local traditions and cultures adopted by KHI into Islamic law in Indonesia is joint property. Joint property is the property of husband and wife obtained during marriage, either individually or jointly without questioning in whose name the property is registered. The provisions on joint property are contained in Chapter XIII KHI articles 85-97. In principle, these articles emphasize that the division of joint property between husband and wife who are divorced alive or who are divorced dead, or because one of them is missing, each of them gets one half / half of the joint property. It is not taken into account who works, and in whose name the joint property is registered. The provisions of joint property as mentioned in the Compilation of Islamic Law above are considered the result of ijtihad and consensus of Indonesian scholars. Because the provisions of joint property are not found explicitly in the Qur'an and hadith. The classical fiqh books also do not discuss it, except for the issue of shirkah (partnership). (Sabiq.S, 1983).

In this kind of Islamic society, rights and obligations in the household, especially matters related to household expenditure, are strictly regulated. For example, in return for the wife's loyalty to her husband, she is entitled to receive maintenance from him according to his

economic level. The husband's livelihood during the marriage is the husband's property, not considered as joint property with the wife. The wife is obliged to maintain the husband's property in the house. If the wife has an income, then the results of her efforts are not mixed with the husband's income, but are separated separately. If one day the husband has difficulty in financing, then if the husband uses the wife's money to cover the household expenses, it means that the husband has owed his wife which must be paid later. Under these conditions, if there is a divorce, then there is no division of joint property, because each property has been separated from the beginning. The husband's income is the husband's property, and conversely the wife's income is the wife's property. If the husband dies, the wife only gets a share of the inheritance from the husband's estate. The wife in this case does not get a division of joint property (Supomo, 1967).

In addition to joint property, KHI also adopts customary law through the institution of mandatory wills. The practice of adoption in customary law requires the adopted child to receive a share of the inheritance from the parents through a gift (hibah) that can provide security in life. (Supomo, 1967). In Indonesian families it is institutionalized that an adopted boy or girl is incorporated into their family environment (Tafal B, 1983 ). The practice of adoption in Indonesia, which has become a legal act, has different characteristics among societies. In patrilineal societies such as the Batak community in North Sumatra, or in the matrilineal Minangkabau community in West Sumatra, the institution of adoption is often associated with the “political” dominance of the father or mother in the family.

## **2. Research Method**

The research method used is research method with a qualitative approach which is normative juridical in nature. The type of research is descriptive analytical by describing evaluation in a comprehensive conceptual way about aspects of customary law and Islamic law in the legal system of legal system of marriage in Indonesia and in an analytical analytical point of view which is described in description by emphasizing on the aspect of recommendations for solutions or suggestions in in order to improve the implementation of civil law in civil law implementation in Indonesia.

## **3. Results and Discussion**

According to Satria Effendi M. Zein, joint property in a household was originally based on 'urf or customs in a country that did not separate the property rights of husband and wife. Joint property is not found in Islamic societies whose customs separate the husband's property and the wife's property in a household. In such Islamic societies, rights and obligations within the household, especially those related to household expenditure, are strictly regulated. For example, in return for the wife's loyalty to her husband, she is entitled to receive maintenance from him according to his economic level. The husband's livelihood during the marriage is the

husband's property, not considered as joint property with the wife. The wife is obliged to maintain the husband's property in the house. If the wife has an income, then the results of her efforts are not mixed with the husband's income, but are separated separately. If one day the husband has difficulty in financing, then if the husband uses the wife's money to cover the household expenses, it means that the husband has owed his wife which must be paid later. Under these conditions, if there is a divorce, then there is no division of joint property, because each property has been separated from the beginning. The property earned by the husband is the property of the husband, and vice versa the wife's income is the wife's property. If the husband dies, the wife only gets a share of the inheritance from the husband's estate. The wife in this case does not get a share of joint property (Effendi S, 2005).

Joint property is categorized as property acquired jointly during the marriage period only, which is the unity of wealth between husband and wife. As for their respective assets that they acquired before the marriage and the inheritance assets that they acquired during the marriage, they remain their respective assets. (Ismuha, 1965). On this basis, Ratno Lukito argues that the concept of property ownership in marriage is a product of customary law and is derived from the philosophical premise of local values that establish a balance between husband and wife in marital life. Except that, the rules on joint property above show the efforts made by exponents of Islamic law in Indonesia to accommodate Islamic law with customary law. Since most books on fiqh do not explain the institution of joint property in marriage, which is a long-entrenched and living institution in the local community, the scholars felt obliged to incorporate this community institution into the Islamic legal system. The compromising attitude taken by these exponents of Islamic law towards customary law was prompted by the fact that, in the realities of daily life, Indonesians do not stop practicing rules derived from adat. Simply abolishing the institution of joint property in marriage is, therefore, clearly impossible, and would actually be incompatible with the spirit of Islamic law which allows customary law to be practiced as long as it does not contradict the primary source of Islamic law.

In addition to joint property, KHI also adopts customary law through the institution of mandatory wills. The practice of adoption in customary law requires the adopted child to receive a share of the inheritance from the parents through a gift (hibah) that can provide security in life. In Indonesian families it is institutionalized that an adopted son or daughter is incorporated into their family environment. Of course, the practice of adoption in Indonesia, which has become a legal act, has different characteristics among community groups. In patrilineal societies such as the Batak community in North Sumatra, or in the matrilineal Minangkabau community in West Sumatra, the institution of adoption is often associated with the "political" dominance of the father or mother in the family. Among the Batak people, for example, community custom allows a family to adopt a son, but not a daughter, in order to maintain the patrilineal form of the community. After obtaining permission from the child's original parents, the adopted child is then genealogically incorporated into the adoptive father's family and gains all the legal rights of a legitimate child. In societies where both parents have equal legal standing (parental), for

example in Java, adoption is allowed not only of a son, but also of a daughter. This adoption is done for moral considerations, such as to help orphans. A family can adopt a child with the legal consequence that the child, whether male or female, will have the same rights before the law as a legitimate child.

Meanwhile, in the Islamic inheritance system, blood relationship is a valid condition for the distribution of inheritance from the testator to the heirs. However, Article 209 KHI states that adopted children and adoptive parents are recipients of mandatory wills with a maximum receipt of one-third of the inheritance. That means between adopted children and adoptive parents can inherit each other with a maximum distribution of 1/3 of the inheritance. Whereas between adopted children and adoptive parents do not have blood relations, but why between the two of them can inherit each other as stated in article 209 KHI? Presumably the institution of compulsory bequests formulated by Indonesian Islamic jurists is an attempt to bridge the gap between Islamic law and customary law. Since Islamic law vehemently rejects the institution of adoption, Islamic jurists in Indonesia have attempted to accommodate the value systems that exist in both laws by drawing from the institution of mandatory wills derived from Islamic law as a means of accepting the moral value facility that lies behind the practice of adoption in customary law. This effort must be made due to the fact that in all societies where adoption is practiced, adoptive parents are always concerned about the welfare of their adopted children when they die. As such, it is common practice for the adopted child to receive a share of the parents' estate through a gift (*hiba*) that can provide security in life.

This is the idea behind the spirit of the mandatory will in KHI. In other words, KHI tries to translate the mandatory will as a tool to allow adopted children to legally inherit the estate of the deceased, namely the adoptive parents. More than that, the Compilation also determines that the adoptive parents have a legitimate right to be the recipient of the mandatory will. In KHI's view, the relationship between adopted children and adoptive parents is so close that the word "close relatives" (*alaqrabîn*) in the verse on wills can be translated as both adopted children and adoptive parents. This tacit approval of the practice of adoption is thus reinforced by the Compilation of Islamic Law, which recognizes a new, two-way relationship in terms of inheritance between adopted children and adoptive parents through the institution of mandatory wills; a reform that is truly unique to Indonesia. In the author's opinion, this accommodation between two different legal value systems in terms of child adoption is strong evidence of the necessary efforts made by both exponents of Islamic law and customary law to avoid the emergence of conflicts. Although KHI does not equate the legal position of adopted children with that of native children, as customary law does, the revitalization of the close relationship between adopted children and adoptive parents through the institution of mandatory wills represents an attempt to bridge the theological gap between the two legal systems.

Such a concession is, arguably, actually in line with the basic rules of Islamic law on adoption, as the mandatory testament stipulated in the KHI does not: (1) equalize the legal status between adopted and natural children; (2) grant inheritance rights to adopted children such as

those obtained by ahl al-faraid; or (3) grant adopted children the right to inherit more than one-third of the total estate of the testator. The above explanation shows that in reality the two legal systems can, and do, have a harmonious relationship in Indonesian society. That means, accommodation can be characterized as a step that must be taken to bridge the gap between the two legal systems. With the provisions and arrangements for inheritance for adoptive parents and adopted children based on the legal construction of mandatory wills, it has made Islamic inheritance law in harmony with the values that live with a sense of justice and in accordance with public legal awareness. Dedi Supriyadi assesses the legal formulation of article 209 KHI as a new pattern that can distribute Islamic property *ma'rûf* to people who are not heirs. While the presence of the person concerned cannot be separated and the integrity of the family so that it is considered inhumane if the person does not receive property just because of his non-heir status. Thus, the formulation of article 209 KHI is considered to fulfill the values of benefit in maintaining human relations and the benefit of the family.

#### **4. Conclusion and Suggestion**

##### **Conclusion**

The description above shows that one of the characteristics of Indonesian Islamic law is accommodative with local culture. Such as provisions on joint property and mutual inheritance between adopted children and parents contained in KHI. The two legal provisions adopted from customary law are the result of *ijtihad* of Indonesian scholars. Because indeed both issues are not found in *fiqh*. This innovative creation of Indonesian scholars, besides being a manifestation of the characteristics of Islamic law which are dynamic and creative, it is also the identity of Indonesian Islam in the field of law.

##### **Suggestion**

This is the idea behind the spirit of the mandatory will in KHI. In other words, KHI tries to translate the mandatory will as a tool to allow adopted children to legally inherit the estate of the deceased, namely the adoptive parents. More than that, the Compilation also determines that the adoptive parents have a legitimate right to be the recipient of the mandatory will. In KHI's view, the relationship between adopted children and adoptive parents is so close that the word "close relatives" (*alaqrabîn*) in the verse on wills can be translated as both adopted children and adoptive parents. This tacit approval of the practice of adoption is thus reinforced by the Compilation of Islamic Law, which recognizes a new, two-way relationship in terms of inheritance between adopted children and adoptive parents through the institution of mandatory wills; a reform that is truly unique to Indonesia. In the author's opinion, this accommodation between two different legal value systems in terms of child adoption is strong evidence of the necessary efforts made by both exponents of Islamic law and customary law to avoid the emergence of conflicts.



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