

# The Development of Islamic Law in Indonesia Through Traditional Theory and Legal Changes

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Received: 28-06-2021

Revised: 01-12-2021

Accepted: 30-12-2021

## Abstrack

The purpose of this article is to build an argument that 'adat has a close relationship with Sharia law, so the development of Islamic law in Indonesia in the future must place 'adat' as a strong database. This study approach uses normative legal research that analyzes secondary data sources as primary materials, data collection techniques use literature studies which are analyzed qualitatively with descriptive and concluded inductively. The results of the study show that 'adat or 'Urf can be contextualized as Positive Islamic law that is formulated consciously and intentionally among the ideal values of sharia. The emergence of the regulation of Sharia Economic Law is based on 'adat or 'urf Indonesia referring to QS 7 Paragraph (199), that "*ma'ruf*" means to be recognized, increasing to the meaning of being more recognized. "Recognized" received confession by the public at large. The Law Number 21 of 2008 concerning Sharia Banking and Supreme Court Regulation Number 2 of 2008 concerning the Compilation of Sharia Economic Law (*KHES*) are questionable for their validity as sharia law in Indonesia because there is no discussion in the Al-Qur'an and hadith, but the regulations are good and recognized by the collective consciousness. In *Kompilasi Hukum Islam* (Compilation of Islamic Law) (*KHI*) it can be seen from the position of 'urf that affects Islamic law 1) joint property of husband and wife, 2) mandatory will for adopted children and adoptive parents, and 3) substitute heirs. The novelty in this study is to strengthen the argument that the formulation 'custom can be developed more widely as a collective consciousness in the field of Islamic law regulations in Indonesia to determine legal certainty.

**Keywords:** 'Custom; legal changes; and *urf*

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## INTRODUCTION

In the study of Islamic law, adat or 'Urf is recognized as a source of Islamic law by being defined as a community habit that is recognized by the collective spirit and accepted by common sense, both in words and in deeds. Recognition of adat as a source of Islamic law as long as it does not conflict with Al-Qur'an, hadith, consensus, and adat is generally accepted in the community (Syamsul Anwar, 2007). The basis for accepting adat as a source of Islamic law is QS 7 Paragraph (199) which reads: "*Be forgiving and tell people to do what is right*". The well-known rules in terms of adat as a source of law are the rules of "*al 'adah muhakkamah*" (Adat is the source of legal determination) and "*isti'malun naas hujjatun yajibu al 'amalu biha*" (Community practice is evidence that must be practiced) (Ahmad Az Zarqa, 1983).

The results of the study of Ahmad Az-Zarqa, a scholar of Syrian Islamic law, stated that Hanafi and Maliki jurists made adat an important part of the discovery of Islamic law, although they limited the role of adat in terms of private law (Ahwan Fanani, 2014). Ahmad Az-Zarqa's study places adat in the context of Islamic law which is fixed and Islamic law which is elastic. Fixed Islamic law is based on texts of *qath'i*, while elastic Islamic law is based on texts *dzanni* from *ijtihad*. The object of this fiqh rule "Changes in Islamic law due to changes in place and time," is Islamic law which is elastic. This rule can be applied because of changes in *Urf* (customs) and the attitude of the people who are still partly apathetic to Islamic law (Murtadho Ridwan, 2018).

Syamsul Anwar said that 'urf is a instrumental sources other than *ijma'*, *qiyas*, *maslahat mursalah*, *istihsan*, *istishab*, preventive measures (*sadduz-zari'ah*), fatwas of Companions, and the religious laws of the prophets before the Prophet Muhammad. saw. Syamsul Anwar emphasized in detail:

"The derivation of legal norms (shariah law) from these sources must also follow the *istinbat* rules and procedures that have been stipulated in the fiqh proposal. Failure to comply with these provisions or deviations from them can cause the legal norms (shariah law) to lose their shariah legitimacy. In fact, several existing sharia civil law laws contain articles that emphasize, "In understanding, constructing, and interpreting the articles of this law, the legal principles and proposals of Islamic jurisprudence are used." Likewise, in the model of the Islamic Civil Code made by the Commission of Experts at the Secretariat General of the Arab League, a provision is formulated, "in constructing and interpreting the articles of this law, the principles of fiqh proposals are referred to." (Syamsul Anwar, 2016).

The focus of the study of Adat theory and legal changes in ushul can be formulated as follows: a) What is the relationship between Sharia Law, 'Adat and 'Urf in Ushul Fiqh? b) What is the Urgency of 'Urf in Islamic Law Reform in Indonesia? c) How is the practice of 'Adat or 'Urf in the Contextualization of Islamic Law in Indonesia in the field of Islamic Economic Law (Hukum Ekonomi Syariah/HES) and *Kompilasi Hukum Islam* (Compilation of *Islamic Law /KHI*)? The purpose of the study is to map the relationship between Sharia, 'Adat and 'Urf Law in Ushul Fiqh, so that the urgency of urf can be traced in the Contextualization of Islamic Law in Indonesia in the field of Sharia Economic Law and (KHI). The usefulness of this study can be used as a database in efforts to reform Islamic family law and *muamalah* law in Indonesia.

## RESEARCH METHODS

This study approach uses normative legal research by analyzing secondary data sources as primary material. The search for primary materials was traced from various authoritative sources in the study of 'adat and urf written by experts Abdul Wahab Khalaf, Abu Zahrah, Ahmad Az Zarqa, and Yūsuf al-Q aradāwi, while secondary material was obtained from the results of studies

published in accredited journals with use the help of Google Scholar or Moraref. Priority for secondary materials in the form of articles published in accredited journals and written by experts in the fields relevant to this study.

Data collection techniques uses the method of literature review or documentary study. Qualitative data analysis describes the data obtained. In drawing conclusions, use inductive thinking methods, namely drawing conclusions from a statement or proposition that is specific to something general.

## RESULTS AND DISCUSSION

### 1. Theory of 'Adat: Adat and 'Urf in Ushul Fiqh

In Ushul Fiqh, *'adat* and *'Urf* are two words that are studied by ushul experts. The word *'adat* has been absorbed into the standard Indonesian language, while *'Urf* comes from the words *'arafa ya'rifu*, 'something that is already known', and *'adat* from *'ada ya'udu*, 'something that is repeated' or something that is repeated. There is no difference (repeated and known), that is, an act that has been done repeatedly becomes known and recognized by many people. The words *'adat* and *'urf* are referred to as synonyms (*mutaradif*) (Mustofa, 2019).

Abdul Wahab Khallaf defines *'Adat* and *'Urf*: "... something that has been known by many people and done by them, from words, deeds or (something) left behind. It is also called *al-'Aadah*". In the language of the *syara'* experts there is no difference between *al-'Urf* and *al-'Aadah (adat)*" (Abdul Wahab Khalaf, 1978). Abu Zahrah defines "*Something that has become a human habit in their association and are established and embedded in their affairs*" (Abu Zahrah, 1958). The difference between the two words in terms of content means, *'adat* is only seen in terms of repeatedly, does not include good and bad judgments so that *'adat* has a neutral connotation, while *'Urf* has a good connotation which can be seen in the use of the word *'urf* with the meaning *ma'ruf* in al. Qur'an (Qs. Al A'raf 199, Qs. Al Baqarah 229, and Qs. An Nisa 19).

In ushul fiqh, *'urf* can be seen from the perspective of the object, the scope of use, and the judgment of good and bad. *'Urf* from the perspective of the object is divided into, 1) *'Urf qauli*, *'Adat* that apply in the habits of society. In everyday life, the word Allah wants is beef, not including fish meat, even though in language it is all called meat. Regarding the shari'a law, a person swears not to eat meat (as stipulated in the oath law), then the meat in question is meat based on the meaning of *'urfy* or *'urf*. 2) *'Urf fi'ly* or *amaly* are people's habits that become practices and actions, such as the habit of buying and selling transactions, giving and receiving without being accompanied by an *ijab qabul* (Mustofa, 2019).

*Urf* from the perspective of use consists of, 1) *'Adat or'urf* general, habits that have generally been applied in all corners of the world regardless of country, nation and religion, such

as a) nodding their heads in agreement and shaking their heads in disapproval, b) in swimming pools. People pay according to a set rate regardless of how long and how much water is used. 2) '*adat or'urf* special, habits carried out by a group of people in a certain place or at a certain time, such as a) '*adat* draws lineage through the mother/women (matrilineal) in West Sumatra, through the father (patrilineal) Batak customs, b) the Sundanese use the word "*Paman*" only for the father's younger brother, not the father's older brother, while the Javanese use the word "*Paman*" for the father's brother and sister (Mustofa, 2019).

'Urf from the perspective of good and bad judgment 1) '*Sahih Adat*', '*Adat* that is repeated, accepted by many people, does not conflict with religion, good manners and culture, such as giving prizes to the champion holding a *halal bihalal* event. 2) '*Fasid Adat*', '*Adat* that applies in a place that is contrary to religious values and laws, such as gambling to celebrate something by drinking intoxicating drinks (Syamsul Anwar, 2007).

Table 1. Adat or 'Urf in Perspective

No	Perspective 'Adat and 'Urf	Type	Example
1	Object	<i>'Urf qauli</i>	The word اللحم that is desired is beef excluding fish meat, even though in language it is all called meat
		<i>'Urf fi'ly or amaly</i>	Habits in buying and selling transactions submit and receive without being accompanied by consent qabul
2	Uses	<i>'adat or 'urf general</i>	Nodding his head in agreement and shaking his head in disapproval
		<i>'adat or 'urf special</i>	' Adat draws lineage through the mother line/women (matrilineal) in West Sumatra and through the father (patrilineal) in the Batak, b) the Sundanese use the word " <i>Paman</i> " is only for father's brother, not for father's brother, while the Javanese use the word " <i>Paman</i> " for father's brother and sister
3	Good and bad judgments	<i>'Sahih Adat</i>	Giving gifts at events <i>halal bi halal</i>
		<i>'Fasid Adat</i>	Gambling to celebrate something by drinking intoxicating drinks

## 2. The terms 'Adat or 'Urf Can Be a Source of Determination of Islamic Law

*Ushul Fiqh* expert Ahmad Az Zarqa argues that adat can be guided in establishing sharia law' with the following rules:

- a) *'Al 'Adah al Muhakkamah* (Adat become the legal basis). This rule is complemented by the rule of *innama tu'tabaru al 'adatu itthadhot au gholabat* (Adat that guides the generally accepted and consistent custom), and the rule of *al 'Ibrotu lil gholib asy Syai' la lin Nadzir* (which is guided by the generally accepted, not rarely apply).
- b) *"Hoodoo Isti'malun hujjatun yajibu al 'AMALU Biha"* (Practice community is proof that must be carried out) and the principle *ofal Haqiqatu tutraku bi dalaltil' is* (intrinsic meaning of the instructions left by customs). Even in the known Islamic contract law rules *al ma'ruf 'urfan ka al masyrut syartan* (which is known in Adat is the same as that agreed in the agreement clause) (Ahmad Az Zarka, 1983).

Adat and 'Urf which are specific and general in nature as well as actions and words apply in general, applies in the majority of cases that occur in the community and its application is adopted by the majority community. In practice in the community, there are several customs as follows:

- a) 'Adat and 'Urf have become public when the problem to be determined by law arises. 'Urf, which will be used as a legal basis, exists before the case where the law will be determined.

“For example, a person who performs a marriage contract and at the time of the contract it is not explained whether the dowry is paid in full or in installments, while the 'Adat that prevails at that time is to pay off the entire dowry. Then the 'adat in that place underwent a change, and people were used to paying off the dowry. Then a case arose which caused a dispute between husband and wife regarding the payment of the dowry. The husband adheres to Adat that is currently in effect (which appears later), so he decides to pay the dowry in installments, while the wife asks to be paid in full (according to the 'old adat when the marriage contract takes place). Based on these terms and conditions, the husband must pay off his dowry, in accordance with adat that were in effect at the time the marriage contract took place and do not demand adat that arise later'.

- b) 'Adat and 'Urf do not conflict with what is clearly stated in a transaction. In a transaction when both parties have clearly determined the things that must be done:

"In buying a refrigerator, it is agreed by the buyer and seller, it is clear that the refrigerator was brought by the buyer himself even though 'Urf determines that the refrigerator is bought, the merchant delivered to the buyer's house but because in the contract they had clearly agreed that the buyer would bring the goods himself to his house, the 'urf was no longer valid.

- c) 'Customs and 'Urf do not conflict with the texts, thus causing the law contained in the texts to be inapplicable, 'urf like this cannot be used as a *syara'* argument', because the validity of 'urf can be accepted if there is no text containing the law of the problem faced (Fauzul Hanif Noor Athief, 2019).

### 3. Sharia Law, 'Adat and 'Urf in *Ushul Fiqh*

Sharia law and 'adat and 'urf can conflict to obtain legal status for a problem faced by society. Conflicts can occur in relation to the law and which are not related to the law. *First, it can*

happen that 'adat and 'urf with *syara'* are not related to legal material, sourf takes ' precedence over shari'a. For example, if a person swears that he will not eat meat, but it turns out that he eats fish later, it is determined that he/she has not violated the oath. According to '*Urf*, fish does not include meat, while in *syara'* sense fish includes meat. Someone swears that he will not sit under a roof, but it turns out that later he/she sits under the sky, then it is stated that he/she has not violated his oath by saying that even though in the Qur'an it is stated that the sky is a roof, but in the sense of 'urf the sky is not a roof.

*Second*, '*Urf* with *syara'* which is related to legal material, then shari'a takes precedence over '*urf*. For example, if someone has a will for a relative, whether it is included in the definition of a relative being an heir or not. Based on the definition of *syara'*, the heir is not included in the expert who may receive a will, so he/he is no longer included in the definition of kin as referred to here. In the sense of '*urf* a relative is a person who is related by blood, whether he is an heir or not. The definition of relatives spoken in the will does not include heirs (Amir Syarifudin, 2001).

*Third*, '*Urf* with general texts of Al-Qur'an. Hanafi jurists state that the '*urf* is strengthened to mentify general texts. The example in the verse of the Qur'an mentions that the period of breastfeeding is for two full years, but in adat of the Arabs, other people feed children by paying them. This adat or 'urf is used to breastfeed the child for two whole years. According to the Shafi'i jurists, only are corroborated to mentakhsis common texts '*Urf Qauli* and not '*Urf Fi'li*. Example of a stock sale and purchase contract (order/indent). In general, the texts prohibit the trading of something that is not at hand during the sale and purchase contract. In general, the text prohibits the sale and purchase of stock, which at the time of the contract, there are no goods, but buying and selling in the form of greetings has become a common '*urf* in society.

*Fourth*, '*Urf* with *Qiyas*. Ibn Humam puts '*urf* as *ijma'* does not find texts, so that if it clashes with *qiyas*, then must be prioritized '*Urf*. Hanafi jurists practice *ishtisan*, also including '*urf* itself, so that he/she practices and prioritizes '*urf* over *qiyas*. Examples of buying and selling bees and silkworms. Imam Abu Hanifah at first determined that it was forbidden to sell bees and silkworms using the *qiyas* argument, namely *qiyas* to frogs on the grounds that they were both pests of the soil. However, both pests have benefits and people are used to maintaining them (some have become '*urf*), so Muhammad ibn Hasan al-Saibani allowed the buying and selling of silkworms and bees based on '*Urf* (Amir Syarifudin, 2001).

Table 2. '*Adat and 'Urf* Versus Reality

No	' Adat and 'urf Versus reality	Priority	Example
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1	'Adat and 'urf with syara' are not related to legal material	<b>'Urf precedence over shari'a</b>	takes A person swears not to eat meat, but it turns out later he eat fish, then it is determined that he/she does not violate the oath of
2	Adat and 'Urf with syara' related to law material	<b>Sharia precedence over 'urf</b>	A person wills for his relatives, whether included in the definition of a relative is an heir or not. understanding of syara', the heir is not included in the expert who may receive wills.
3	'Adat and 'Urf with general texts of the Qur'an	<b>'Urf is strengthened for general mentaksis texts The</b>	Verse of Al-Qur'an states that the period of breastfeeding is for two full years, but In the 'adat of the Arabs, other people feed their children by paying them. Traditional or 'urf is used to suckle their children for two full years
4'	customary and with Qiyas	<b>'Urf Prior' Urf</b>	The skill of selling bees and silkworms

#### 4. Urgency 'Urf in Renewal of Islamic Law in Indonesia

Hasbi Ashiddiqie stated that without 'urf Indonesia, Islamic law will feel foreign to Indonesians. According to Hazairin, it is necessary to change the classical fiqh that is still in effect in Indonesia today and reformulate it to suit the Indonesian context. In Munawir's view, Indonesian 'urf is a very important consideration for interpreting sharia texts, to suit the context of Indonesian society (Hazairin, 1982).

Busthanul Arifin stated that the meaning of 'urf is not only adat of society, but also the adat of the legal tradition that develops in society. Therefore, customary law and laws inherited from the Dutch colonial government that apply in society can also be seen as 'urf (Busthanul Arifin, 1996). Qodri Azizi broadens Busthanul Arifin's view by stating that social traditions and legal traditions can be seen as living traditions in society and this is an important consideration for formulating Indonesian Islamic law. 'Urf is the consideration for the formulation of Indonesian schools to be interpreted broadly, not only interpreted as a habit of the Indonesian people, but also in the social and political context of Indonesia (Ahmad Qodri Azizy, 2004).

The position of 'urf in Indonesian Islamic law makes a distinction between matters of ritual worship ('Ibādah maḥḍah) and social issues (mu'āmalah). The formulation of Indonesian Islamic law is only related to social issues, not matters of worship rituals (Hazairin, 1981). Formal laws

and regulations can be related to ritual worship, but only at the management and implementation level, not related to legal material. Rituals such as prayer, fasting, and hajj which have been described in sharia texts do not require interpretation associated with the Indonesian 'urf. Differences of opinion in the details of their respective worship, Muslim groups in Indonesia can interpret or follow opinions according to the tendencies of the schools they follow.

Indonesian Islamic law distinguishes the terms sharia and fiqh. Sharia is the Islamic teaching given by God to the Prophet Muhammad, while fiqh is the result of the interpretation of Islamic jurists about sharia. Sharia is the source of law contained in the Qur'an and hadith, while fiqh is the result of human reasoning and understanding towards the Qur'an and the Sunnah of the Prophet produced through *ijtihad* (a concerted effort to conclude Islamic law from its source). Sharia applies to all places and times, while fiqh can vary and change from one community to another and from one time to another (Hazairin, 1981).

There are three key words related to the position of 'urf in the sense of Islamic law in Indonesia, namely 'urf, sharia, and Indonesian fiqh. The difference between the three terms can be explained as follows:

Local community customs ('urf) are real, everyday practices that occur in Indonesian society. Habits that are practiced consciously continuously over a long time by the collective community will become the norm of habit among them. These customary norms are real and empirical norms that apply in society (Satjipto Rahardjo, 2000). However, customary norms in society are not always in accordance with the ideal values of sharia. If habits are customary norms based on the reality of behavior that lives in society, then sharia values are ideal norms that need to be implemented in empirical reality in society. Sharia values are ideas that become the standard reference for the formation of Islamic law, so that the actions and behavior of individuals or communities are considered legal or illegal (Abu Ameenah Bilal Philips, 2002).

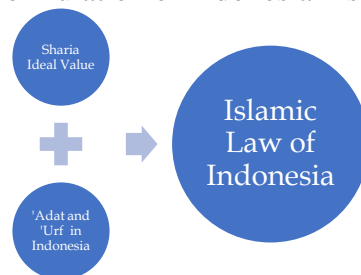
Sharia in this context is the ideal values contained in *the Qur'an and the Hadith* of the Prophet, and are not always identical with legal verses or hadiths that are understood textually. Therefore, Al-'Ashmāwi distinguishes between shari'ah (ideal values of sharia contained in the Qur'an and the Prophet's Hadith) and *ahkām al-syar'ah* (practically the rule of law contained in the text of the Qur'an). 'an and Hadith) (Muhammad Sa'id 'Ashmawi, 2004). Here, sharia is closer to the meaning of *maqāṣid al-syar'ah* than legal verses or hadiths which are understood textually (Yūsuf al-Q aradāwi, 1994). Sharia will be able to answer all the problems that arise along with the development of different places and times. With this ideal value, sharia must be interpreted and contextualized so that it can be applied in a certain way to society. Sharia, for example, commands justice, but the implementation of justice in a society needs to be adapted to the conditions and situations of the community.



“The contextualization of sharia which is diametrically different from the existing customary norms ('urf) is formed by contextual and local fiqh. Fiqh is formed and formulated consciously and intentionally connecting the ideal values of sharia, as *das sollen* (what should be), with the real norms of society, as *das sein* (what is). In other words, fiqh is the result of a dialectic process between the ideal sharia on the one hand and the reality of 'Urf in society on the other. Therefore, fiqh is not only closely related to the ideal sharia world view, but also to the real customs of society so that the fiqh formulation must account for two aspects, namely the ideals of the philosophical aspect and the empirical sociological aspect. Philosophically, fiqh must contain the ideal values of sharia, and sociologically fiqh must accommodate the realities of social life. The position of fiqh is thus between the ideal sharia and the 'urf of the real community. With these characteristics, fiqh must be positive, not normative, answer and resolve real legal problems and problems in society. This is where the importance of fiqh as an Islamic legal norm is revealed so that it can be used as a source of positive law formation in a country” (Agus Moh Najib, 2020).

The relationship between the ideal sharia, namely the actual customary norms of society ('urf), and fiqh (Islamic law) in the context of Indonesian Islamic law is as follows:

Figure 1. Formulation of Indonesian Islamic Law and 'Adat



This formula illustrates that Islamic law (fiqh) is formed as a result of a dialogue between the ideal values of sharia and the customs of society ('Urf). Sharia values are contained in the Qur'an and the Sunnah of the Prophet, while 'urf in this context is Indonesian customs and culture. Thus, Indonesian Islamic law is the result of dialogue between sharia and customs, including customary law, existing positive law, Indonesia's socio-political context.

## 5. The Practice of 'Adat' or 'Urf in the Contextualization of Islamic Law in Indonesia in the field of Islamic Economic Law and *Kompilasi Hukum Islam* (Compilation of Islamic Law / KHI)

### a. The Practice of 'Adat' Urf in the Development of Sharia Economic Law

In the development of sharia economic law in Indonesia, according to Syamsul Anwar, the emergence of sharia economic regulation is based on on 'adat or 'urf Indonesia. The basis for accepting adat as a source of Islamic law is QS 7 Paragraph (199) which reads: "*Be forgiving and tell people to do what is right*", according to Syamsul Anwar that "*ma'ruf*" means being recognized, increasing to being acknowledged. Syamsul Anwar emphasized that the opposite of "recognized" is the one that is not recognized, so that it is rejected by the community. Syamsul Anwar gave an example of current Fintech practices that can make customers miserable because

they have to pay more than the loan amount. Currently there are many loan offers to customers via telephone numbers that tempt customers. The convenience offered by Fintech companies can easily reach large numbers of customers. But in practice, many customers are stuck with the loan schemes offered by Fintech. "Recognized" in the sense of getting recognition by the public at large. From this acknowledgment, in accordance with the well-known rules in the term 'adatrule', *namely the "al 'adah muhakkamah"* (Adat is the source of legal determination) and *"isti'malun naas hujjatun yajibu al 'amalu biha"* (Community practice is evidence that must be practiced) (Results of Discussion with Syamsul Anwar at the Doctoral Program in Sharia Sciences UIN Sunan Kalijaga Yogyakarta).

Law Number 21 of 2008 concerning Sharia Banking and the Compilation of Sharia Economic Law (KHES) stipulated by Supreme Court Regulation Number 2 of 2008 has questioned its validity as sharia law in Indonesia. According to Syamsul Anwar, the provisions in the law are not found in the discussion of the Qur'an and hadith, but the regulations are good and recognized by the collective consciousness (Results of the discussion with Syamsul Anwar at the Doctoral Program in Sharia Sciences UIN Sunan Kalijaga Yogyakarta). According to Syamsul Anwar, that the validity of the regulation is based on "*ma'ruf*", "*it has been recognized*", "*recognized*", by collective consciousness. The practice of Islamic economics in society must be regulated so that there is a balance in the supply and acceptance of the economy in society. Collective awareness of the community is included in the regulation of legislation in the field of sharia economic law to determine the existence of legal certainty. A person who makes a sale and purchase transaction with a *murabahah* contract, for example, can be given legal protection by Law Number 21 of 2008, because *murabahah* contract is included in the clause in the law.

In the author's view, the guarantee of legal certainty in sharia economic law in Indonesia is very urgent in line with the development of the practice of sharia contracts in sharia financial institutions. The public is familiar with a variety of contracts, both those that are practiced in Islamic banking and outside of Islamic banking.

**b. The Practice of 'Urf in the Development of the Compilation of Islamic Law (*Kompilasi Hukum Islam /KHI*)**

The position of *'urf* influences Islamic law in Indonesia which is formalized in (*KHI*). The author proposes 3 (three) examples, 1) joint property of husband and wife, 2) mandatory will for adopted children and adoptive parents, and 3) substitute heirs. These issues have been discussed in several articles to provide examples of local values being incorporated into national law (Euis Nurlaelawati, 2013). Ratno Lukito places the local amalgamation of common property norms and

mandatory wills as an example of how Islamic sharia and adat (adat) are dialogued (Ratno Lukito, 1997).

### 1) Joint Assets

Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage states that joint assets are property acquired during marriage, which distinguishes it from what was obtained by a husband or wife through inheritance or business before marriage. Thus, whoever works, whether husband and/or wife, contributes to the joint assets of the property acquired during the marriage ((Ratno Lukito, 1997). The 1991 Compilation of Islamic Law (KHI), specifically Article 96, makes it clear that the marriage is terminated because death, half of the joint assets is the right of the spouse. Conversely, in the event of a divorce, Article 97 of the KHI states that both parties have the right to half of the joint assets as long as it is not specified otherwise in the marriage contract (Articles 96 and 97 of the Compilation of Islamic Law).

This provision for joint property is a product of Indonesian fiqh, especially the influence of Hasbi and Hazairin in thinking about the 1974 Marriage Law and the influence of Munawir Sazali and Busthanul Arifin in the 1991 KHI. Classical fiqh does not clearly discuss the assets of a husband and wife acquired during marriage. Classical Fiqh, based on Arab patrilineal society, generally only states the property rights obtained by the husband as the result of his business is the property of the husband, only the husband is obliged to support his wife. In terms of sharia, the verses of the Qur'an generally suggest that the relationship between husband and wife in the family must be based on a good relationship, (Qur'an 4:92) including in matters of property management during marriage.

In Adat of the people in Indonesia, this shared asset is recognized, although in different terms. In Java it is called *gono gini*, in Bali it is called *druwe gabbro*, in *Minangkabau* it is called *harta suarang*, Bugis people call it *clawra*, in Pasundan and West Java people know it as *campur kaya*, *barang sekaya*, *atau kaya reujeung*, and in Kalimantan it is called *barang perpantangan* (Dominikus Rato, 2016). on the basis of *urf*, then in the laws and regulations in Indonesia, especially in KHI, it is stated that the existence of a shared asset which is split in half is the right of husband and wife in the event of divorce or death (Livia Holden and Euis Nurlaelawati (eds.), 2019).

The discussion on the issue of joint ownership resurfaced through a judicial review submitted by Ike Farida to the Constitutional Court on May 11, 2015. He felt aggrieved because after having a husband from a foreign citizen, his right to own immovable property had been lost. As mentioned, in the Marriage Law No. 1 of 1974 it is stated that assets

acquired during marriage become joint property (Article 35), as long as there is no marriage agreement that agrees to separate assets during the marriage. This marriage agreement can only be made before marriage and the contents of the agreement cannot be changed (Article 29). According to the Agrarian Law Number 5 of 1960, Article 21 and Article 36, foreign nationals cannot own property rights in Indonesia, so Ike Farida and her husband with foreign nationals also do not have ownership rights.

The review of Article 29 of the Marriage Law concerning Marriage Agreements was then granted by the Constitutional Court through Decision Number 69 / PUU-XIII / 2015. The judges of the Constitutional Court at the plenary session on October 27 2016 decided that Article 29 of Law Number 1 concerning Marriage must be understood that the marriage contract can be made before or during the wedding, and the contents can be changed if agreed by both parties and not to the detriment of the parties. An Indonesian, who is divorce with foreigner and wants to have property rights, must make a marriage agreement to separate the assets of the spouse who is a foreigner.

## 2) **Mandatory Wills (*Wasiat Wajibah*)**

Article 209 of the KHI states that adopted children have the right to get a mandatory share of the will as much as one-third of the inheritance left by their adoptive parents. Likewise, adoptive parents are also entitled to a portion of the property of their adopted child, as much as a third of the inheritance, if the child dies first.

In classical fiqh, there is no section for adopted children or adoptive parents. The Qur'an, 33:4-5 states that adopted children have a kinship only with their biological parents and that they only have a brotherly relationship with the adoptive parents so that they can help and share with one another, but they have no kinship. Adopted children and adoptive parents have no inheritance rights from each other. In the customs of society in Indonesia, children and adoptive parents are considered to have become part of the nuclear family, so it is the same as the relationship between parents and biological children, although it depends on the family system adopted. Adopted children can inherit from adoptive parents and biological parents (Dewi Sulastri, 2015).

The relationship between parents and adopted children, sharia on the one hand does not recognize any kinship, so they do not inherit from each other, but on the other hand, Urf Indonesian views that parents and adopted children legally have the same relationship as the relationship between parents and adoptive children. Biological children, so they can inherit each other. Basically, Indonesian fiqh stipulates that adoptive parents of children, although they cannot inherit from each other, can receive each other's share of property through a

mandatory will as much as one-third of the property (Ratno Lukito, 1997). Indonesian fiqh is seen trying to dialogue and bridge the gap between sharia and urf provisions that are developing in Indonesian society. The concept of a mandatory will is very relevant to the idea of the re-establishment of the Indonesian school of thought that seeks to dialogue between sharia values and legal practice in society, especially in an effort to resolve inheritance problems. The mandatory will in the KHI was introduced to solve the adoption problem related to inheritance distribution.

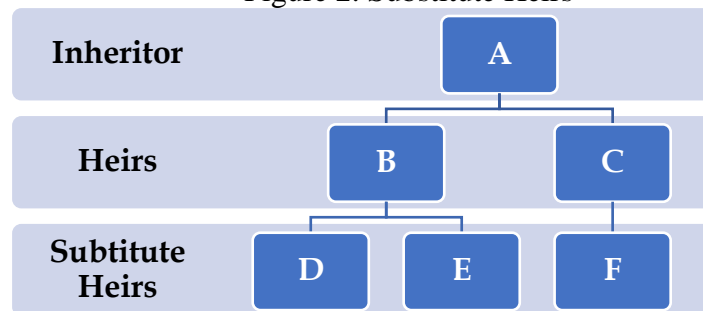
The decision of the religious courts has been able to enforce justice for all, by giving part of the inheritance through a mandatory will, namely to provide non-Muslim relatives with a maximum share of one-third of the inheritance (Muhamad Isna Wahyudi, 2015). Judges also have to pass a mandatory will to stepchildren, who are actually more closely related to the heirs than adopted children. This shows that the concept of a mandatory will is one of the solutions for dialogue between sharia values and urf that is developing in Indonesian society. The concept of an obligatory will to become a madhhab Indonesian jurisprudence which is used to resolve several cases of inheritance law has developed in the community, both through rules that have been enacted in law and through judges' decisions in court.

### 3) Substitute Heir

Article 185 of KHI states that an heir who dies before the heir can be represented by a child. However, the portion of the child must not exceed the portion of the other heirs who are equal to those represented. The representation of heirs is known by the Indonesian people through the concept of *plaatsvervulling* which comes from the Dutch colonial inheritance law. This concept has been applied for a long time in Indonesian society through Articles 841-848 of the Civil Code (*KUHP Perdata*).

According to Busthanul and Qodri Azizi, 'urf' is not only defined as the customs of the Indonesian indigenous peoples, but also known to the Indonesian people, including the law that comes from the Dutch colonial heritage. In the Qur'an, 4:9 states that it is not permissible to leave offspring in a weak condition, including economically. Protecting orphans from economic weakness on the other hand, KHI stipulates that orphaned grandchildren can represent the position of parents who died before their grandparents (Ratno Lukito, 2005). The determination of KHI is also based on the view of Hazairin who interprets the word "*mawāli*" in Al-Qur'an 4:33 with descendants representing the deceased parents as heirs.

Figure 2. Substitute Heirs



## CONCLUSIONS

Based on the analysis in the discussion above, this study can conclude as follows:

1. The relationship between sharia law, 'adat and 'urf can lead to conflicts both related to law and not related to law. 'Urf with syara' which is related to legal material, then shari'a takes precedence over 'urf, while adat and 'urf with syara' are not related to legal material, so 'Urf takes precedence over shari'a.
2. **The urgency of 'Urf in Islamic Law Reform in Indonesia** must be synergized with the contextualization of sharia in Indonesian society, so that it can form a contextual fiqh or Islamic law within the framework of locality. Islamic law is formed and formulated consciously and intentionally linking the ideal values of sharia as *das sollen* (what should be), with the real norms of society, as *das sein* (what it is). The dialectic of 'Urf in society on the one hand with sharia idealism on the other hand must support each other so that it can be accounted for philosophically and sociologically empirically, so that the formulation of 'adat can be developed more broadly as a collective awareness of fields in Islamic law regulations in Indonesia to determine certainty. Law becomes the novelty in this study.
3. **The practice of 'Adat or 'Urf in the Contextualization of Islamic Law in Indonesia is found in the fields of Islamic Economic Law and Compilation of Islamic Law (Kompilasi Hukum Islam /KHI).**

In the **Development of Sharia Economic Law**, sharia economic regulations emerged based on Indonesian custom or 'urf based on QS 7 Paragraph (199), that "*ma'ruf*" means to be recognized, to increase to be more recognized. "Recognized" in the sense of getting recognition by the public at large. From this acknowledgment, in accordance with the well-known rules in the term 'adat rules of ', namely the "*al 'adah muhakkamah*" (custom is the source of legal determination) and "*isti'malun naas hujjatun yajibu al 'amalu biha*" (Community practice is

evidence that must be practiced). Law Number 21 of 2008 concerning Sharia Banking and Supreme Court Regulation Number 2 of 2008 concerning the Compilation of Sharia Economic Law (KHES) are questionable for their validity as sharia law in Indonesia, because there is no discussion in the Koran and hadith, but these regulations good and recognized by the collective consciousness. The validity of these regulations is based on “*ma'ruf*”, “recognized”, by collective consciousness. Collective awareness of the community is included in the regulation of legislation in the field of sharia economic law to determine the existence of legal certainty. **The Practice of 'Urf in the Contextualization of Islamic Law in Indonesia in *Kompilasi Hukum Islam* (KHI)** can be seen from the position of '*urf*' influencing Islamic law in Indonesia which is formalized in (KHI) in 1) joint property of husband and wife, 2) mandatory will for adopted children and adoptive parents, and 3) substitute heirs.

Based on the conclusions above, the authors recommend research on the values of '*urf*' in society that can continue to be explored for material on reforming Hukum Ekonomi Syariah (Islamic Economic Law) (HES) regulations and the Compilation of Islamic Law. Research can be carried out in the form of applied research and development research that is applied in the preparation of existing laws and regulations as well as the formation of new draft laws in the field of Islamic law.

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