

## **The Position of Girls in Obstructing Brother's Inheritance: A Sunni and Shia Fiqh Perspective and the Supreme Court's Jurisprudence**

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### **ABSTRACT**

This study aims to analyze the position of girls in hindering their brother's inheritance from the perspective of Sunni and Shia jurisprudence and the jurisprudence of the Indonesian Supreme Court. The research method used is a literature study with a descriptive-analytical approach, which involves the study of Sunni and Shia fiqh literature and the analysis of Supreme Court decisions related to inheritance cases. The results of the study show that there are significant differences between Sunni and Shia jurisprudence in determining the inheritance rights of girls. Sunni jurisprudence generally gives priority to boys, although girls still receive a share of the inheritance but do not completely block the rights of brothers. In contrast, Shia jurisprudence gives a stronger position to girls, which can reduce or hinder the inheritance rights of brothers. In the jurisprudence of the Supreme Court of Indonesia, efforts were found to harmonize the rules of fiqh with the principle of justice in national law, which aims to ensure a fairer distribution of inheritance. The conclusion of this study is that the interpretation of girls' inheritance law in the context of fiqh and national jurisprudence needs to be developed to achieve gender justice in the distribution of inheritance. The implication of this research is the importance of inheritance law reform that considers both fiqh perspectives and judicial decisions to create a fairer and more inclusive legal system in Indonesia.

**Keywords:** Inheritance; Daughter; Jurisprudence.

## **INTRODUCTION**

The division of inheritance is often a source of family disputes, especially when it comes to the inheritance rights of daughters and brothers (Khosyi'ah & Rusyana, 2022). Indonesian society, which is predominantly Muslim, follows the rules of inheritance law based on sharia principles (Reskiani et al., 2022). However, there are differences in the interpretation and application of inheritance law between various schools in Islam, especially between Sunnis and Shia (Yusuf, 2017). Although Islamic inheritance law aims to provide justice, in practice there are often gender injustices. Court cases have shown that girls often receive a smaller share of the inheritance than their brothers (Mir-Hosseini, 2019). This reflects the imbalance in the treatment of women in the context of the applicable inheritance law.

Literature extensively documents the divergent approaches to inheritance law between Sunni and Shia jurisprudence within Islamic legal traditions. Sunni jurisprudence generally adheres to the principle of "men get two parts over women," reflecting a patriarchal framework deeply rooted in classical and contemporary fiqh literature (Al-Hibri, 2017). This principle prioritizes male heirs in the distribution of inheritance, often resulting in unequal shares between male and female relatives. Conversely, Shia jurisprudence offers a more inclusive stance towards girls' inheritance rights. Certain Shia texts advocate for equal or even greater shares for daughters compared to their male counterparts under specific conditions, challenging the traditional Sunni interpretation (Nasr, 2007).

The differences in interpretation between Sunni and Shia schools of thought significantly impact the application of inheritance laws in Muslim societies worldwide. These legal variations play a crucial role in shaping family dynamics, economic stability, and gender equality within these communities (Cheema, 2012). For instance, in Sunni-majority countries, inheritance practices may perpetuate gender disparities despite advancements in women's rights in other domains. In contrast, Shia-majority regions may exhibit more flexibility in inheritance distribution, potentially affording greater financial security to female heirs (Betts, 2013). Such differences underscore the broader socio-legal implications of inheritance laws on family cohesion and welfare across Muslim societies, prompting ongoing scholarly and societal debates on equity and justice (Husain et al., 2024).

Although the Supreme Court seeks to harmonize sharia principles with applicable national law, there is a gap between theory and practice. A review of Supreme Court decisions shows that despite efforts to create justice, decisions are often still gender-biased. This is due to conservative interpretations of Islamic law that favor men's inheritance rights more than women's. In addition, the lack of a deep understanding of Shia jurisprudence also exacerbates this gap. This gap highlights the need for more in-depth analysis and a more inclusive approach to legal decisions.

The purpose of this study is to examine the position of girls in hindering the inheritance of brothers from the perspective of Sunni and Shia jurisprudence and the jurisprudence of the Supreme Court of Indonesia. The argument of this research is that the current interpretation of inheritance law is still unfair to women, and there needs to be reform efforts to create a more inclusive and gender-equal inheritance law system. By analyzing the differences in views between Sunni and Shia jurisprudence and Supreme Court decisions, this study seeks to provide recommendations for the development of a fairer family law in Indonesia. The study also argues that the integration of a more inclusive view of fiqh with the principle of justice in national law can help reduce gender inequities in the distribution of inheritance.

## **METHODS**

This study uses a qualitative approach with descriptive-analytical methods to examine the position of girls in hindering their brother's inheritance from the perspective of Sunni and Shia jurisprudence and the jurisprudence of the Indonesian Supreme Court (Kalaian et al., 2019). The first stage is to conduct a literature study to collect relevant secondary data. The data sources used include Sunni and Shia fiqh literature, Islamic inheritance law books, scientific journals, articles, and related legal documents. In the context of Sunni jurisprudence, the literature studied includes the works of classical scholars such as Imam Shafi'i, Imam Malik, Imam Hanafi, and Imam Hanbali, as well as contemporary scholars who interpret inheritance law. For Shia jurisprudence, this study examines works such as the book *Al-Kafi*, *Man La Yahduruhu Al-Faqih*, and other works that provide a view of inheritance rights from a Shia perspective. This literature study aims to understand the basics of inheritance law in the two schools and their differences in regulating the inheritance rights of daughters and brothers.

The next step is to analyze the decisions of the Supreme Court of Indonesia related to inheritance cases. This primary data is obtained from the Supreme Court decision database and legal journals that publish important decisions. The analysis was carried out on rulings containing issues regarding the inheritance rights of girls and brothers, focusing on how the Supreme Court interprets and applies Sharia principles as well as national law. This approach allows the research to identify the patterns of decision-making, gender inclusivity, and legal harmonization efforts undertaken by the Supreme Court (Firdaus et al., 2020).

After collecting data from various sources, the next step is to conduct a descriptive-analytical analysis. Descriptive analysis is used to systematically and accurately describe the conditions found in the literature and court decisions. Analytical analysis is used to evaluate and interpret data, identify gaps between theory and practice, and develop arguments in favor of the need for inheritance law reform.

## **RESULTS AND DISCUSSION**

### **The Context of the Position of Girls in the Inheritance Law of Sunni and Shia Fiqh**

This study highlights how inheritance law in Sunni and Shia jurisprudence treats the inheritance rights of daughters and brothers, showing significant differences in the approaches of the two schools. In the context of Sunni jurisprudence, inheritance law is based on the principle that men get two parts over women (Imam Muhardinata, 2020). This principle is enshrined in many Sunni fiqh literatures, which explicitly state that boys get twice the share of girls. For example, in the book "Al-Umm" written by Imam Shafi'i, as well as "Al-Muwatta" compiled by Imam Malik, it is emphasized that the distribution of inheritance must follow this provision. This principle is rooted in the interpretation of the Qur'an verse (Surah An-Nisa, verse 11) which states that "the portion of a boy is equal to the portion of two daughters."

Furthermore, Sunni fiqh literature shows the existence of a strong patriarchal structure in the distribution of inheritance. The rights of girls are often limited and subordinate to the rights of boys. This patriarchal structure reflects the historical and social context in which the laws were developed, in which the role of men as the main breadwinner took precedence. As a result, in practice, girls often receive a smaller share of the inheritance, and this has an impact on their well-being. These provisions reinforce social norms that consider men as primary heirs and women as secondary beneficiaries, which in many cases, results in gender injustices in the distribution of inheritance.

On the other hand, in Shia jurisprudence, it is found that girls have more inclusive and fair inheritance rights. Major Shia texts such as "Al-Kafi" and "Man La Yahduruhu Al-Faqih" offer different interpretations regarding girls' inheritance rights. In some situations, girls may obtain an equal or even greater share of the inheritance than brothers. For example, if there are no sons, the daughters can get the entire inheritance or block the inheritance rights of the further brothers. These texts show greater flexibility and a willingness to adjust inheritance rules to be fairer to women (Akhlq, 2023).

The differences in the interpretation of inheritance law between Sunni and Shia jurisprudence reflect a wider variation in the application of inheritance law in various Muslim communities. Communities that follow Sunni jurisprudence tend to maintain patriarchal structures that favor men in the distribution of inheritance, while communities that follow Shia jurisprudence show greater inclusivity towards women's rights. This variation has a significant impact on gender equity in inheritance distribution, where more inclusive communities tend to create a better balance between girls' and boys' inheritance rights. This research emphasizes the importance of considering various interpretations and contexts in applying inheritance law to achieve justice and gender equality in society.

## **Convergence of Inheritance Law in Indonesia**

The establishment of Islamic inheritance law in Indonesia cannot be separated from the legal system that existed before the arrival of Islam, namely customary law and civil law. These two systems give significant color to the development and practice of Islamic inheritance law in Indonesia today. Customary inheritance law, for example, is greatly influenced by the principle of lineage that applies in the society concerned (Redi & Antasari, 2022). This principle can vary between patrilineal, matrilineal, or bilateral, which affects the way the inheritance is determined and the inheritance is divided (Asih & Citra, 2021). In addition, in customary inheritance law, there are choices of inheritance systems such as individual, collective, or majority, which adds complexity in determining heirs and receiving inheritance shares.

On the other hand, in the Civil Code, inheritance law is part of the property law contained in the Second Book of the Civil Code on Things, Chapter XII to Chapter XVIII. Here, heirs, heirs, and inheritances are the main focus. When the heir does not leave a will, the inheritance will be divided according to the provisions of the law (*ab intestato*). This gives rights to blood families, including husbands or wives who live longer than the heirs. However, if there is a will, the distribution of inheritance will follow the provisions stated in the will, as long as it does not conflict with the applicable law (Kuncoro, 2015).

In the context of Islamic inheritance law, the principles of inheritance taken from the Qur'an and hadith are the main guidelines for the Muslim community in Indonesia. This Islamic inheritance system regulates the distribution of property based on heirs which is clearly determined in Islamic teachings. The integration of customary law, civil law, and Islamic inheritance law reflects the cultural diversity and values held by Indonesian society at large. The development of inheritance law in Indonesia is not only limited to written regulations but also through jurisprudence or court decisions that interpret and develop the application of inheritance law in various real cases. This makes the inheritance law framework in Indonesia very dynamic and able to adapt to social, cultural, and evolving social changes.

The integration of customary law, civil law, and Islamic inheritance law in Indonesia results in a unique and complex inheritance law framework. This is reflected in the way Indonesian people view and apply the inheritance rule, which is often influenced by local values, traditions, and religious teachings adhered to (Djawas et al., 2024). For example, inheritance practices are still heavily influenced by the customary inheritance system which may be contrary to the principles of civil law that are generally applicable in Indonesia (Djanuardi et al., 2021). Meanwhile, for Muslim communities, Islamic inheritance law provides clear guidance regarding the inheritance of property based on the designated heirs, such as children, husband or wife, parents, and other close relatives.

The development of inheritance law also continues to experience dynamics in the social and legal context in Indonesia. This development is reflected in efforts

to integrate the universal values of civil law with the specific principles of customary law and Islamic law, with the aim of achieving justice and equality in the distribution of inheritance. Jurisprudence plays an important role in adapting inheritance law to changes in society, such as adjustments to mixed marriages or complex family conditions. Thus, the inheritance legal framework in Indonesia not only serves as a tool for the distribution of inheritance, but also as a reflection of diverse social and cultural values, which continue to change over time and evolving social conditions.

### **The Concept of Hijab Inheritance in Classical Fiqh and KHI**

Al-Hajb, according to the language, means barrier, while in terminology, it is a barrier that prevents the heirs from obtaining all or part of the inheritance. It is not permissible for a person who does not understand the chapter of hijab (inheritance barrier) to give a fatwa on the issue of *faraid*. Because it is feared that he will give inheritance to people who are not entitled to receive it, resulting in people who are entitled not to receive the inheritance and those who are not entitled to receive it.

There are two types of hijab division in the discourse of Islamic inheritance, the first is *hijab bi al-wasfi* (by nature), namely heirs who are prevented from receiving an inheritance because of one of the hindrances, namely slavery, murder, and religious differences. This type may occur in all heirs, each of whom may be a slave, an heir killer, or a different religion from the heir. The existence of heirs who are obstructed by *hajb bi washfin* is considered non-existent. Therefore, they cannot obstruct other heirs and do not make the heirs get *ashabah*.

Secondly, *hijab bi asy-syakhshi* (with a person), i.e. the heir is prevented from obtaining an inheritance due to the existence of another heir. This hijab can be classified into two categories, *hijab hirmān* and *hijab nuqṣān*. *Hijab hirmān* is an heir who is prevented from receiving any inheritance at all. This type of barrier may occur in every heir except for 6 (six) heirs who have a direct lineage to the heirs, namely: father, mother, son, daughter, and husband or wife. *Hijab nuqṣān* is an heir who is prevented from getting a part of the inheritance, if the barrier does not exist, he will undoubtedly get a larger share. This type of barrier may occur in any heir without exception. For example, the change of the husband's inheritance from 1/2 to 1/4 because there are sons and daughters according to the Quran surah an-Nisa verse 12 (Rahmad, 2017).

Hamka in the tafsir al-Azhar states that *if they have children*, one or more, male or female, either their children with their current husbands or their children with their former husbands (Hamka, 2015). so that the word *walad* in this verse includes both boys and girls. Therefore, according to Ibn Abbas, girls can inherit their brother's inheritance, as *walad* says in surah an-Nisa verse 176 which reads.

KHI is a form of reform of Islamic law with nuances of Indonesian fiqh which can be considered as the result of *ijtihad* of scholars and scholars in an effort

to codify and unify Islamic law which previously referred directly to fiqh books, in article 174 paragraph (2) states that if all heirs exist, then those who are entitled to inheritance are only: children, fathers, mothers, widows or widowers. Likewise, Article 182 regarding *kalalah*, KHI states that heirs are not entitled to inheritance if the heirs still have heirs in the form of father and son. In the article, it is not further detailed, whether it is meant that a son, a woman, or both can *hijab hirmān* the heirs of the heirs of the heirs.

### **Supreme Court Decision No. 86K/ AG/ 1994**

The legal system in Indonesia tends to use the tradition of civil law law with laws and regulations as a source of law. This is different from common law which places the previous judge's decision (jurisprudence) as the source of law. In the development of contemporary law, it turns out that the Supreme Court's decisions have become the mecca for the legal problems faced by the next judge. Likewise with Islamic inheritance law, some jurisprudence is a reference in the method of settling inheritance law, such as in the case of a daughter who hijabs the heir's brother.

In Malimbu hamlet, West Juara Village, Tanjung District, there are 2 brothers (brother and sister), namely Amaq Itrawan and Amaq Nawiyah. Then Amaq Nawiyah had passed away, and left a daughter named Le Putrakimah binti Amaq Nawiyah, in addition to leaving an heir also left an inheritance in the form of 2 plots of garden land covering an area of 6 (six) hectares which when the late Amaq Nawiah died, the garden land had not been divided by the heirs but was immediately controlled and managed by Amaq Itrawan, because at that time the son of the late Amaq Nawiyah (Le Putrakimah) was still a child. In 1930 Amaq Itrawan passed away and left behind heirs 1 (one) wife and 3 men and 4 women who had each died.

After Amaq Itrawan died, the 6 (six) hectares of garden land was controlled by his wife and children Amaq Itrawan, not given to Le Putrakimah as Amaq Nawiyah's heir. then after Amaq Itrawan's wife and children died, the garden land was taken over and controlled by Le Putrakimah (Defendant) and controlled the garden land inherited by his father (Amaq Nawiyah), therefore the grandchildren of Amaq Itrawan were not willing if the garden land was controlled by Le Putrakimah. They feel entitled to part of the land and garden. Therefore, the grandchildren of Amaq Itrawan and Amaq Itrawan's children, namely Nursaid bin Amaq Mu'minah, Muslim bin Inaq Kadariah, Ma'rif bin Inaq Kadariah, and Mas'ud bin Amaq Itrawan filed a lawsuit for inheritance distribution. At the cassation level, the Supreme Court gave inheritance to Amaq Nawiyah's daughter, Le Putrakimah, so that Le Putrakimah as the heir of the daughter was the brother of her mother.

The ruling equates the position of boys and girls in the ability to hijab other relatives as heirs. The judicial reform team consisting of the Supreme Court, the Indonesian Judicial Monitoring Society of the Indonesian Faculty of Law (MaPPI FHUI) and the Australia Indonesia Partnership for Justice 2 (AIPJ2) in 2018 showed that this termination is a Supreme Court decision with a gender perspective

and is expected to be a benchmark for judges in deciding cases that provide proper protection for women's rights. The decision contains an abstraction of the legal rule 'the child as the sole heir, does not distinguish between male and female' in line with Article 174 paragraph (2) of the Compilation of Islamic Law (Syarifuddin, 2020).

This is different from the opinion of the majority of scholars who set the law by referring to the historical descent of the inheritance verse, by not making girls as a *hirman hijab* for the heir's brother, as exemplified by Wahbah Zuhaili:

ماتت امرأة عن: بنت، وأخ شقيق، وأخت لأب: للبنت النصف، والباقي للأخ الشقيق؛ لأنه عصبه، ولا شيء للأخت لأب؛ لأنها محجوبة به.

"A woman dies, leaving behind a daughter, a brother, and a sister, and the daughter gets half, and the rest goes to the brother, because she is *ashabah*. The half-sister gets nothing, because she is overwhelmed by her brother." (Zuhaili, 2011)

The author argues that the main purpose of Islamic inheritance is to protect descendants from poverty after the death of the heir. This is the substance of QS. An-Nisa: 9 which states "and fear those who (die) and leave weak (financial) offspring." This verse is then reinforced by the substance of the Prophet's hadith which states that it is better for the heirs to leave their heirs in a state of wealth than to leave them in a state of poverty. The heirs of the heirs can be said to no longer need the inheritance from the heirs as the main thing, this is because most of the heirs already have their own livelihoods and incomes. Thus, the inheritance can be optimized to support and support the needs of the heir's children, both male and female, after the death of the heir.

Islamic inheritance that has been established in the books of *fiqh* is certainly very relevant if applied to families that are oriented to the *extended family* system, namely the extended family system. In a family system that maintains closeness among extended families, the role of heir siblings during their lifetime certainly cannot be ignored. Thus, giving inheritance to them when there is no heir of the son can be considered as a connection between the heir and with the hope that the death of the heir does not break the family relationship with the daughter and his wife. However, the current family model of Indonesian society tends to adhere to the nuclear family system of a family that only consists of a nuclear family, such as husband, wife and children. So, of course, the concept of benefits needed will be different.

The theory of *maslahah* can be used as an approach by involving executive, legislative, and judicial powers that have been realized by the issuance of the KHI and the jurisprudence of the Supreme Court No. 86K/AG/1994 as a guideline for judges in deciding cases of girls' *hijab* rights. Accompanied by increasing public awareness of the importance of inheritance for heirs' children to welcome the future after the death of their parents, both boys and girls. In the case of the heir only



leaving the house as an inheritance. If the house is forced to be shared with the heirs, by being sold, of course there will be harm to the heirs' daughters. That way, the daughter must get all the inheritance of the heirs from the radd line.

The Supreme Court Decision No. 86K/AG/1994 is an *ijtihad* by looking at sociological justice, although not absolute, so it does not apply historical from the text, but prioritizes justice. Therefore, when looking at the formulation that interprets the word *walad*, namely only boys and not women, in applying the law sociologically is not relevant to Indonesian society that adheres to the bilateral inheritance system, where children, both boys and girls, are the first priority group that hijab the second priority group, namely brothers, and judges are obliged to explore, follow, and understand the values of law and the sense of justice that live in society and the sense of justice that lives in society and the sense of justice that lives in society and the sense of justice that lives in the community. justice. This is an important point in establishing and maintaining justice in society, so that in its application it is not a legal format but rather justice and benefits.

## **CONCLUSION**

This study reveals the complexity in the application of Islamic inheritance law in Indonesia, where Sunni jurisprudence tends to give privileges to boys with the principle that a man gets two parts of the inheritance compared to women. In contrast, Shia jurisprudence offers a more inclusive interpretation that in some cases allows girls to get a larger share of the inheritance or even hinders the inheritance rights of brothers. However, the reality on the ground shows that the rulings of the Indonesian Supreme Court often still show a tendency to give greater preference to brothers in the distribution of inheritance, illustrating the existence of a clear gender bias in judicial practice. This hints at the need for reforms in the inheritance law system to ensure that the principles of gender justice are well realized in practice.

The recommendations of this study highlight the need for better integration between inclusive *fiqh* views and gender justice principles in the context of Indonesian national law. These reforms are expected to reduce disparities in the distribution of inheritance between girls and brothers, as well as improve legal protections for women's rights in general. In addition, this study emphasizes the importance of a holistic and evidence-based approach to formulate legal policies that are fairer and in accordance with social justice values in Indonesia. As such, inheritance law reform efforts must involve a wide range of stakeholders, including scholars, legal practitioners, and civil society, to create a more inclusive and responsive legal framework to social dynamics and gender equality aspirations in Indonesian society today.

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