

LEGAL CERTAINTY AND THE LIMITATION OF FULL ASSET HIBAH TO NON-MARITAL CHILDREN: A COMPARATIVE ANALYSIS OF THE INDONESIAN CIVIL CODE, COMPILATION OF ISLAMIC LAW, AND AHKAM HADITH

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Abstract

This study examines the legal certainty surrounding the transfer of 100% of assets through hibah Indonesian Civil Code (ICC), the Compilation of Islamic Law (CIL), and the perspective of Ahkam Hadith. This issue arises from the inherent tension between the principle of freedom of property disposition and the protection of heirs' compulsory shares (legitime portie). This research adopts a normative juridical approach with a comparative method, focusing on the synchronization between positive legal norms and their underlying theological foundations. The findings reveal that Article 913 of the ICC permits the filing of a reduction claim (inkorting) when a grant infringes upon the compulsory portion of heirs. From an Islamic legal perspective, the CIL imposes limitations on hibah to prevent prejudice against heirs, in line with the principles derived from Ahkam Hadith, particularly the hadith of Nu'man bin Bashir, which emphasizes justice (al-'adl) among children and the prohibition of harm. Furthermore, the limitation of one-third of the estate in Islamic legal practice reinforces the restriction against total transfers that may eliminate legitimate inheritance rights. This study concludes that the transfer of 100% of assets to a child born out of wedlock potentially creates legal uncertainty and increases the risk of annulment of the notarial deed. Therefore, notaries play a crucial role in mitigating such risks through the incorporation of preventive clauses in legal instruments, ensuring legal protection and alignment with principles of justice in Islamic law, thereby minimizing the likelihood of future disputes.

Keywords: *Legal Certainty, Hibah, Out-of-wedlock Child, Hadith Ahkam, Notary Mitigation.*

Abstrak

Penelitian ini menganalisis kepastian hukum hibah 100% kepada anak luar kawin melalui studi komparatif KUHPerdara, Kompilasi Hukum Islam (KHI), dan Hadis Ahkam. Isu ini krusial karena adanya ketegangan antara kebebasan mengalihkan harta dengan perlindungan hak mutlak (legitime portie) ahli waris. Menggunakan metode yuridis normatif dengan pendekatan perbandingan, penelitian ini mengkaji sinkronisasi norma hukum positif dan landasan teologis. Hasil penelitian menunjukkan bahwa Pasal 913 BW memungkinkan tuntutan pengurangan (inkorting) jika hibah melanggar bagian mutlak. Dalam perspektif Islam, KHI membatasi hibah agar tidak merugikan ahli waris, sejalan dengan prinsip Hadis Ahkam (Hadis Nu'man bin Basyir) yang mewajibkan keadilan (al-'adl) antar anak dan menghindari kemudharatan. Perbedaan instrumen batas maksimal sepertiga harta dalam KHI memperkuat larangan hibah total yang berpotensi memutus hak waris sah. Penelitian menyimpulkan bahwa hibah 100% kepada anak luar kawin memicu ketidakpastian hukum dan risiko pembatalan akta. Oleh karena itu, notaris berperan vital melakukan mitigasi melalui klausul akta yang preventif guna memastikan perlindungan hukum dan keselarasan dengan nilai keadilan syariah demi menghindari sengketa di masa depan.

Kata Kunci : *Kepastian Hukum, Hibah Anak Luar Kawin, Hadist Ahkam, Mitigasi Notaris*

INTRODUCTION

A notary, as a public official, plays a pivotal role in ensuring legal certainty through the creation of authentic deeds possessing full evidentiary force. In the context of family law, this role becomes increasingly significant when addressing legal issues related to the status of children, particularly those born out of wedlock. Social facts in contemporary Indonesian society show a dramatic shift following the Constitutional Court Decision No. 46/PUU-VIII/2010. This landmark ruling established that children born out of wedlock possess a civil relationship with their biological fathers if proven by science and technology. Empirically, this legal development has triggered a wave of social awareness among parents who wish to secure the economic future of their out-of-wedlock children. Consequently, many parents choose to transfer 100% of their assets through *hibah* (inter vivos transfer) during their lifetime, assuming it will permanently shield the child from being marginalized in future inheritance distribution (Ulwi et al., 2024). However, this widespread social practice triggers a profound normative dilemma (*das sollen vs das sein*).

Normatively, the Indonesian legal system through both the Civil Code (*KUHPerdata*) and the Compilation of Islamic Law (CIL) has established mandatory limitations (*dwingend recht*) on the transfer of property. Under the Civil Code, the doctrine of *legitime portie*, as stipulated in Article 913, strictly protects the compulsory portion of statutory heirs. Meanwhile, the CIL introduces preventive restrictions under Article 210 paragraph (1), aiming to ensure that *hibah* does not prejudice the rights of other heirs by imposing a quantitative limit. These normative constraints are fundamentally aligned with the ethical principles derived from *Ahkam Hadith* (prophetic traditions on legal rulings), particularly the prophetic injunctions to ensure fairness among children and to avoid acts that result in harm (*lā ḍarar wa lā dirār*) (Izza et al., 2023). Prior literatures have extensively debated the civil status of out-of-wedlock children post-Constitutional Court ruling (Mahmudi, 2018; Munawir, 2022) or focused purely on their general inheritance rights under Islamic jurisprudence (Hutasoit et al., 2024; Waris & Junaidi, 2023). However, these existing studies suffer from a major limitation: they treat civil law mechanisms and sharia family doctrines as separate, isolated silos, while completely overlooking the practical operationalization of these rules by public officials. Consequently, previous research fails to address the professional dilemma of a notary who is obligated to facilitate a client's intention but ends up drafting a structurally flawed deed that is highly vulnerable to judicial annulment or reduction (*inkorting*). This study directly rectifies this critical gap by integrating cross-systemic statutory constraints with classical theological interpretations to construct an operational risk-mitigation framework for notaries handling total asset transfers.

Accordingly, this research establishes three interconnected dimensions of novelty to elevate the discourse on family law and notarial practices. First, in terms of *theoretical novelty*, this research expands the implementation of the "Preventive Legal Guard" (*al-himāyah al-wiqā'iyah*) theory by demonstrating that the one-third (1/3) limitation is an analogical (*qiyās*) instrument constructed from *wasiyyah* (wills) to constrain *hibah*

autonomy, thereby enriching the conceptual synthesis between civil dogmatics (*legitime portie*) and sharia preventive justice. Second, regarding *methodological novelty*, this study shifts from a superficial statutory analysis to a rigorous comparative-doctrinal framework that applies legal hermeneutics to *Ahkam Hadith* source texts (specifically the traditions of Nu'man bin Bashir and Sa'ad bin Abi Waqqas) and directly cross-examines them with the dogmatic principles of Western Civil Law and the Compilation of Islamic Law. Third, concerning *practical novelty*, this paper delivers a concrete preventive legal engineering tool for notaries by formulating protective, bulletproof contractual clauses to secure property transfers to out-of-wedlock children without violating the mandatory shares of statutory heirs. Therefore, this study aims to comparatively analyze the legal limitations of transferring 100% of assets through *hibah* within the framework of the Civil Code, the Compilation of Islamic Law, and *Ahkam Hadith*. Furthermore, it explicitly seeks to formulate a proactive and protective mitigation model for notaries to prevent future family disputes and maintain legal certainty.

METHOD

This study adopts a normative juridical approach (*penelitian yuridis normatif*) centered on the structural analysis, vertical-horizontal synchronization, and teleological interpretation of legal norms within doctrinal legal research. The methodology is specifically designed to unpack the multi-layered legal certainties and limitations associated with executing a 100% *hibah* deed for children born out of wedlock. By looking beyond superficial statutory readings, this research operationalizes three core interconnected legal approaches. Through the statute approach, a rigorous examination is conducted on the mandatory, non-derogable provisions (*dwingend recht*) that govern asset protection, focusing specifically on the civil doctrine of *legitime portie* in the Indonesian Civil Code and the strict regulations within Presidential Instruction No. 1/1991 regarding the Compilation of Islamic Law (CIL). This is structurally expanded by the comparative approach, which systematically contrasts the divergent normative constructions, remedies, and post-dispute mechanisms between western civil traditions and Islamic legal institutions.

Meanwhile, the conceptual approach is seamlessly integrated to construct a profound philosophical and theological benchmark, tracing the foundational principles of justice and family equilibrium derived from *Ahkam Hadith* as the ultimate filter for validation. To maintain analytical rigor, the legal materials utilized in this doctrinal investigation are qualitatively compartmentalized into a strict hierarchy. The primary legal materials consist of formal statutory instruments, comprising the Indonesian Civil Code, the Compilation of Islamic Law, and authoritative judicial benchmarks found in the landmark Constitutional Court Decision No. 46/PUU-VIII/2010. These statutory fabrics are heavily cross-examined with secondary legal materials, which form the academic and jurisprudential core of this study. These include the fundamental textual traditions (*Kutub al-Tis'ah*) containing specific prophetic narrations on property distribution, authoritative classical jurisprudential treatises (*Kutub al-Turath*) across the

major Sunni schools of thought, contemporary notarial law literatures, and peer-reviewed legal journals. Crucially, to strengthen the analytical depth of these secondary materials, doctrinal data is complemented by authoritative legal opinions (*fatwa/ihdiyath*) obtained through qualitative semi-structured interviews with 2 key expert informants: a prominent Islamic religious leader (*tokoh agama*) and an academic expert in Islamic inheritance law (*dosen ilmu waris*). Within this normative framework, these interviews do not function as empirical field data, but strictly serve as secondary doctrinal opinions to clarify contemporary jurisprudential applications. To support and clarify abstract terminology, tertiary legal materials such as comprehensive legal dictionaries and specialized encyclopedias are utilized to prevent semantic ambiguity during interpretation.

The process of data collection was conducted through structured library research, qualitative thematic document tracking, and expert opinion interviewing, whereby relevant textual provisions and authoritative insights were carefully identified and indexed. To answer the editor's requirements, the analytical framework operationalizes three specific techniques: first, the synchronization of legal norms is executed through a vertical and horizontal hierarchy analysis to evaluate the friction between *legitime portie* and Article 210 of the CIL; second, the comparison of data is conducted using a comparative-doctrinal matrices to map out the exact convergence and divergence points between the Civil Code and Sharia doctrines; third, the *Ahkam Hadith* texts are analyzed through legal hermeneutics, which rigorously evaluates the textual syntax (*matn*), the contextual historical background (*asbab al-wurud*), and the theological weight of the narrations. To ensure data validity, source triangulation was applied by continually cross-examining the expert interview insights against statutory texts and classical jurisprudential weights. Ultimately, the synthesis of these multi-systemic legal norms is processed deductively to generate a prescriptive legal engineering model, specifically providing concrete protective clauses and proactive risk mitigation strategies for notaries to secure property transfers while successfully insulating families from future devastating litigation.

RESULTS AND DISCUSSION

The Validity of Total Asset Dispositions to Non-Marital Children: Dogmatic Dialectics Between the Civil Code and the Compilation of Islamic Law

Normatively, a lifetime gift is an *inter vivos* legal act anchored in the principle of freedom of contract, yet this autonomy is inherently restricted by the state to protect the compulsory statutory shares of heirs. Within the Indonesian Civil Code (*KUHPerdata*), this constitutional restriction is manifested through the doctrine of *legitime portie*, which establishes an untouchable minimum reserve for direct upward or downward heirs that cannot be bypassed by the grantor through lifetime transfers or testaments. Relevant legal instruments in the Civil Code include provisions regarding gifts under Article 1666, alongside the strict calculation of *legitime portie* under Articles 914 and 915.

If a child born outside marriage is subsequently recognized through formal legal procedures, they automatically attain the status of a lawful heir. However, under Article

863 of the Civil Code, their forced heirship reserve differs fundamentally from that of marital children. When analyzing an exhaustive lifetime gift, if there are no other statutory heirs meaning the grantor has no legal spouse, marital children, parents, or siblings—the recognized non-marital child holds a valid claim to the entire estate. In this specific scenario, an absolute *inter vivos* transfer of 100% of the assets is legally valid and secure because no other party's protected reserve is violated. Conversely, if other direct heirs exist, such as surviving parents or a legal spouse, the recognized share of children born outside marriage is legally capped at one-half of the estate. If the biological father insists on executing an exhaustive lifetime gift to them, the surviving parents can invoke their *legitime portie* to claim half of what they would normally receive by law (Hutasoit et al., 2024).

Following the landmark Constitutional Court Decision No. 46/PUU-VIII/2010, non-marital children who were not voluntarily recognized by their biological fathers can establish a civil relationship utilizing science and technology, such as DNA testing. Once a court establishes this civil relationship, the child obtains identical inheritance and gifting protections as a recognized child. This normative structure emphasizes that any absolute asset transfer that breaches statutory ceilings opens an avenue for injured heirs to file a lawsuit for reduction (*inkorting*). Therefore, a total asset disposition is not automatically null and void *ab initio*, but remains highly vulnerable to ex-post judicial correction. In judicial practice, the Supreme Court consistently defends these forced heirship reserves. For instance, in Supreme Court Decision No. 179 K/Sip/1961, the Court emphasized that legal actions by a testator that violate an heir's absolute share can be targeted for a reduction by the injured party. A similar defense is reflected in Supreme Court Decision No. 3000 K/Pdt/1984, which underscores that individual property sovereignty is never absolute when clashing with the statutory reserves of the core family.

To elevate this dogmatic gridlock into a broader jurisprudential discourse, a critical question must be addressed: *Does the quantitative limitation on lifetime gifting unjustly infringe upon individual property ownership rights, and how does it affect the friction between individual autonomy and heir protection?* This study operationalizes a multi-layered framework utilizing the trinity of legal values: legal certainty, justice, and legal protection. From the perspective of property dogmatics, an individual possesses absolute ownership rights (*milkiyyah tammah*), which under Article 570 of the Civil Code grant the freedom to enjoy and dispose of property.

However, both civil traditions and Islamic jurisprudence converge on the philosophical principle that property rights carry a restrictive social and familial function. Under Gustav Radbruch's triad of legal values, while individual autonomy demands freedom, **the theory of legal certainty** requires the state to construct stable, predictable boundaries to prevent systemic familial chaos. If an owner is permitted to execute an exhaustive property gifting during their lifetime, it establishes severe legal uncertainty for the core family unit. Therefore, statutory ceilings such as the *legitime portie* in civil law and the one-third ceiling in Islamic law do not infringe upon property rights; rather, they

serve as a necessary constitutional mechanism to ensure that individual actions do not dissolve the economic predictability guaranteed by the state to statutory heirs.

This perspective is heavily reinforced by **the theory of legal protection**. When a notary prepares an absolute asset transfer deed that completely strips the estate for the benefit of a non-marital child, the deed becomes material for imminent judicial annulment. Legal protection must operate in two dimensions: proactive-preventive and reactive-remedial. The statutory imposition of forced heirship shares functions as a preventive legal protection shield established by the state. It protects vulnerable family members from systemic disinheritance, while simultaneously protecting the notary from future professional liability. Without these quantitative restrictions, a total asset transfer would create a structural legal defect, causing the deed to face reduction in court, thereby destroying the very legal certainty the notary was supposed to establish.

Ultimately, this normative tension between individual autonomy and heir protection must be balanced through the lens of **the theory of distributive justice**. Aristotelian distributive justice posits that fairness is achieved not through mechanical equality, but through proportional distribution based on merit, status, and socio-legal relationships. Children born outside marriage, following the Constitutional Court ruling, undeniably possess a right to economic protection from their biological father. However, applying distributive justice means that fulfilling the rights of non-marital children must not be achieved by completely annihilating the compulsory statutory portions of marital heirs. John Rawls' justice as fairness highlights that inequalities in distribution are only permitted if they work to the maximum benefit of the least-advantaged family members. Total disinheritance through an absolute lifetime gift fails this test. It inflicts an absolute harm (*darar*) upon lawful heirs, violating the fundamental Islamic legal maxim *la darar wa la dirar* (harm shall neither be inflicted nor reciprocated).

Therefore, distributive justice demands a proportional compromise: the biological father may secure the non-marital child's future using the autonomous one-third allocation, leaving the remaining two-thirds to protect the core family, thereby achieving a perfect equilibrium between lifetime property autonomy and post-mortem family protection. In contrast to the Civil Code, the Compilation of Islamic Law (CIL) adopts a strict preventive limitation approach. Article 210 paragraph (1) of the CIL states that any person who is at least 21 years old and of sound mind, without coercion, may donate up to one-third of their property to another person or institution. This quantitative ceiling aims to maintain a balance between individual property autonomy and the protection of heirs to avoid socio-economic neglect. Islam places great emphasis on protecting blood heirs. However, absolute asset transfers exceeding the one-third boundary can be declared valid according to Article 210 paragraph (2) of the CIL provided they secure the consensus of all heirs. According to Article 100 of the CIL, a child born outside marriage possesses a legal relationship only with the mother and the mother's family.

Consequently, non-marital children do not hold automated inheritance rights from their biological father. Because they are legally positioned as “outside persons” regarding their father's estate, they become the most appropriate subjects to receive a lifetime gift

or an obligatory will (*wasiyyah wajibah*). If a biological father wishes to transfer property to a non-marital child, he is strictly bound by the maximum limit of one-third. If he wishes to execute an exhaustive lifetime gift, the explicit consent of the father's legal heirs such as a legal wife, marital children, or siblings is absolutely mandatory (Kudrat, 2016). Nevertheless, this quantitative limit is not entirely absolute (Arnold & Jamal, 2019). The principle of owner sovereignty is accommodated through the mechanism of mutual consent (*at-taradhi*) in Islamic law, which is rooted in the textual spirit of Surah An-Nisa verse 29, commanding believers not to consume wealth unjustly except by way of trade by mutual consent (*'an taradin minkum*).

Although the immediate context of this text governs commercial transactions, Islamic jurists (*fuqaha*) utilize it as a universal maxim establishing that all forms of property transfers, including *hibah*, are valid and legally blessed as long as they are based on the conscious consent of all interested parties. In the case of an absolute asset transfer, the interested parties are the legitimate heirs. If they provide their consent, any *shari'i* obstacle is removed. The primary prophetic tradition restricting the gifting of property to others is the narration of Sa'ad bin Abi Waqqas recorded by Imam al-Bukhari and Muslim, which decrees that a third is already a substantial amount, and it is far better to leave heirs wealthy than to leave them poor and begging from people. However, another authentic narration is used to legitimize agreements made by the parties as long as it does not permit what is prohibited, namely the tradition *Al-Muslimuna 'Ala Shurutihim*, which states that Muslims are strictly bound by their terms and promises. This implies that if the legitimate heirs have given their conscious consent to the absolute lifetime gift, their right to the portion of the inheritance they should have received has been waived voluntarily.

Ontologically, the legal structure of an exhaustive lifetime gift under Islamic law is a manifestation of mutual consent. Although Article 210 of the CIL limits property disposition to protect the heirs, this protection is an individual right that can be set aside. The logical flow rests on the principle that the one-third limit is a defensive right for the heirs, not an unalterable absolute obligation. When the heirs give their conscious consent, a formal relinquishment of rights occurs, rendering the agreement to distribute assets beyond the normal portion valid and binding. This shows that legal engineering through a deed of consent is not merely a superficial formality, but rather the fulfillment of *sharia* requirements to reach a perfect degree of validity. Furthermore, this equilibrium is related to inheritance provisions under Articles 171 to 214 of the CIL, which emphasize distributive justice. In the practice of religious courts, this limitation is reinforced through jurisprudence, such as Supreme Court Decision No. 368 K/AG/1995, which confirms that gifts exceeding the limits of reasonableness and harming the heirs can be adjusted or declared invalid. Decisions within the religious court environment consistently place the principles of justice and protection of heirs as primary considerations (Dwi Hermanto, 2022).

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The Role and Responsibilities of Notaries in Mitigating the Risk of Annulment of Hibah Deeds

As a public official authorized to draw up authentic instruments, a notary plays a central role in ensuring that legal acts of property transfer are not only formally valid but also materially compliant with applicable legal norms. This authority is regulated under Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning the Office of Notaries (UUJN), which obliges notaries to act honestly, carefully, independently, and impartially. In the context of executing an exhaustive lifetime gift, the notary's role extends far beyond passive formal documentation toward a proactive, preventive, and risk-mitigating framework. First, notaries perform a critical preventive function through comprehensive legal counseling. In this regard, the notary is

required to provide an exhaustive legal explanation to the appearing parties concerning the potential consequences of an absolute asset transfer that may infringe upon the forced heirship reserves under the Civil Code or exceed the one-third quantitative threshold under the Compilation of Islamic Law (CIL) (Waris & Junaidi, 2023). Through this advisory role, the notary ensures that the parties act with full legal awareness, effectively mitigating the likelihood of future familial litigation. Second, the notary is bound by a strict prudential and verification obligation. This requires a meticulous examination of the legal standing of the parties, including the identification of all potential heirs and the verification of familial lineages through supporting documents such as inheritance certificates (*surat keterangan hak waris*) and relevant civil records. Such verification is crucial, as the material validity of an exhaustive lifetime gift is highly dependent on whether it unconstitutionally marginalizes the rights of other legally protected parties (Berger, 2005). Third, notaries undertake a legal structuring function by incorporating advanced protective mechanisms within the deed. To provide a concrete contribution to preventive legal engineering, the notary must shift from using standard, passive templates to drafting highly specific, defensive contractual clauses. To achieve this, three standardized, bulletproof clauses are formulated below as operational models for notaries handling property transfers to children born outside marriage:

Clause 1: Statement, Warranty, and Acknowledgment of Forced Heirship Reserves *“The Grantor hereby explicitly declares, warrants, and acknowledges to the appearing Notary that this absolute inter vivos transfer is executed with full consciousness regarding the mandatory restrictions of forced heirship shares (legitime portie) under Article 913 of the Indonesian Civil Code and the one-third quantitative ceiling under Article 210 paragraph (1) of the Compilation of Islamic Law. The Grantor guarantees that this asset disposition does not purposefully aim to cause economic neglect or total disinheritance of any surviving lawful statutory heirs.”*

Clause 2: Explicit Derogation and Heirs' Consent Mechanism *“We, the undersigned, being the lawful statutory heirs of the Grantor, hereby declare our full, voluntary, and irrevocable consent (at-taradhi) to this exhaustive property gifting executed by the Grantor in favor of the Beneficiary (the non-marital child). We explicitly waive our future legal rights to file any lawsuits for reduction (inkorting) or reintegration (inbreng) in any judicial institution, acknowledging that this transfer is executed in good faith to preserve family equilibrium.”*

Clause 3: Notarial Hold-Harmless and Indemnification Clause *“The appearing Parties hereby agree to fully release, indemnify, and hold harmless the Notary from any administrative, civil, or ethical liabilities, as well as future third-party claims or judicial lawsuits arising from the material calculation of shares post-mortem. The Parties confirm that the Notary has fulfilled the statutory obligation of legal*

counseling and risk verification under the Law on Notarial Office (UUJN) prior to the signing of this authentic deed.”

These clauses reflect a proactive and protective methodology, effectively transforming the notarial deed into an active shield of legal protection rather than merely a passive record of party agreement (Bruinessen, 1990).

Fourth, notaries may adopt alternative legal strategies when an exhaustive lifetime gift poses an unmanageable risk of future dispute. For instance, the transfer of assets may be structured through a combination of a lifetime gift within permissible statutory limits and other valid legal mechanisms, such as conditional sale and purchase arrangements (*akta jual beli*), provided they are supported by real consideration and executed in good faith. This multi-layered approach reduces the likelihood of the transferred assets being subject to claims for judicial reduction. In addition, the incorporation of the derogation mechanism through heirs' consent, as drafted in Clause 2, significantly strengthens the legal standing of a transfer that exceeds normative limits under the framework of Islamic law (Carroll, 1998). Although agreements concerning future inheritance are generally restricted under civil law dogmatics, the inclusion of such explicit consent functions as strong documentary evidence demonstrating the absence of familial dispute and the absolute presence of *at-taradhi* among the core family unit. From a liability perspective, failure to fulfill these counseling and drafting obligations may expose the notary to severe administrative, civil, and ethical sanctions. Although an authentic deed possesses perfect evidentiary weight, it is highly susceptible to judicial reduction if proven to violate mandatory legal provisions (*dwingend recht*) (Hakim, 2023). Therefore, the notary must ensure that the deed satisfies not only formal requirements but also substantive justice. Overall, the role of the notary in asset transactions involving non-marital children reflects a paradigm shift from a passive recorder of legal acts to an active guardian of legal certainty. By integrating legal counseling, strict verification, and strategic drafting, the notary contributes significantly to preventing future litigation and ensuring that property transitions successfully align with both positive law and the principles of justice (Fakultas Hukum Universitas Asahan et al., 2020).

The Perspective of Ahkam Hadith on Asset Limitations: Prophetic Traditions, Positivation into the Compilation of Islamic Law, and Doctrinal Consistency

A normative analysis concerning the legal phenomena of transferring an entire estate through an absolute *inter vivos* transfer to a non-marital child requires a meticulous textual and contextual investigation of *Ahkam Hadith* (prophetic traditions on legal rulings). The core of this discussion rests upon two pivotal prophetic traditions that offer distinct yet complementary legal implications (*istidlal*) in determining the thresholds of property disposition. The first foundational pillar addresses the doctrine of distributive justice among offspring, derived from the tradition of Nu'man bin Bashir recorded by Imam al-Bukhari and Muslim. In this narration, Prophet Muhammad explicitly refused to witness a unilateral gift given by Bashir to one of his sons without extending the same to

his other children, strictly proclaiming, “Fear Allah and be just among your children... For I will not bear witness to an act of injustice (*jaur*)”. Methodologically, the macro-contextual background (*asbab al-wurud*) of this prophetic injunction serves as a preventive *sharia* filter against potential psychological and social friction (Kimber, 1998) such as deep-seated familial resentment (*al-hasad*) and the eventual fracturing of kinship bonds caused by parental discrimination during their lifetime.

In interpreting this restriction, classical jurists across the major Sunni schools of thought exhibit a sharp jurisprudential divergence (*ikhtilaf*). The Shafi’i, Hanafi, and Maliki schools (*Jumhur Ulama*) interpret the prophetic command to maintain equality among children not as a binding legal obligation (*wajib*), but rather as an ethical-religious recommendation categorized as *Sunnah (an-nadb)*. Consequently, the legal implication under the majority view dictates that if a parent in a healthy state deliberately executes a deed transferring their entire asset pool to a child born outside marriage for economic security, the transaction remains formally valid and binding under Islamic private law (*nafidz*). From the Shafi’i and Hanafi standpoints, a property owner maintains absolute dominion over their assets (*milkiyyah tammah*) during their lifetime, preventing any premature intervention by potential heirs whose rights are not yet legally active, even though such an act is deemed highly discouraged (*makruh tanzih*) due to its departure from moral-familial justice (Nasrun, 2017).

In stark contrast, the Hanbali school adopts a rigid literalist interpretation, elevating the prophetic mandate in the tradition of Nu’mān bin Bashir to a strict obligation. Under Hanbali doctrine, preferential property distributions that lead to extreme disparities and entirely marginalize other legitimate offspring (Rofii, 2014) such as an exhaustive lifetime gift are classified as a form of prohibited oppression (*zulm*). Consequently, the Hanbali school deems such a total transfer void *ab initio (batil)* from its inception, rendering the contract unenforceable unless all statutory heirs whose rights were infringed upon formally and voluntarily grant their post-mortem ratification (*at-taradi*). The second structural pillar within *Ahkam Hadith* that serves as a quantitative constraint is the tradition of Sa’an bin Abi Waqqas regarding estate limitations, where the Prophet decreed, “One-third, and one-third is much. Indeed, it is better for you to leave your heirs wealthy than to leave them poor and begging from people”.

Although this tradition textually establishes the fundamental boundaries of testamentary dispositions or wills (*wasiyyah*), which only become active post-mortem, the four major schools of thought reach an absolute consensus (*ijma’*) when integrating this rule with property transfers executed during death-sickness (*maradh al-mawt*) (Teguh Abdurrohman Shodiq & Tajul Arifin, 2024). Jurists across all schools unanimously agree that if a parent transfers their comprehensive estate to a non-marital child while suffering from a terminal illness that results in their death, the legal status of that gift is automatically converted into a *wasiyyah*. The dynamic juridical effect of this conversion is that the nominal value of the gift is immediately truncated by operation of Islamic law to a maximum of one-third of the net estate. The remaining two-thirds must be returned to the general estate for standard distribution among legitimate statutory heirs. Any

amount exceeding this one-third boundary remains legally frozen and invalid unless all surviving lawful heirs formally provide their consent and ratify the excess portion (*ijazah*) after the donor's demise.

The institutionalization of these prophetic traditions into Indonesia's positive legal framework through the Compilation of Islamic Law (CIL) represents a dynamic process of positivizing textual *Ahkam Hadith* into binding statutory legislation. The codifiers of the CIL transformed the moral and theological cautions found in the traditions of Nu'man bin Bashir and Sa'ad bin Abi Waqqas into rigid, state-enforced provisions, specifically encapsulated under Article 210. This process of positivization reflects a calculated application of *siyasa shar'iyah* (Islamic legal policy) aimed at actualizing *al-maslahah al-mursalah* (public interest). By codifying religious text into a statutory instrument, the Indonesian state infuses sovereign enforceability into prophetic ethics, translating abstract theological warnings against familial injustice into a concrete, predictable, and measurable rule of law that notaries can directly operationalize. This unified legal structure serves as a robust defensive mechanism to protect the compulsory shares of lawful heirs from strategic lifetime disinheritance (Sulong, 2015).

However, an epistemic tension emerges when examining whether the CIL maintains absolute consistency with classical jurisprudential doctrines (*fiqh al-furu'*). A critical comparative analysis reveals a distinct jurisprudential divergence. Under classical majority jurisprudence (*Jumhur Ulama*), an individual who is in a state of sound health (*fi haalat al-shihhah*) retains unrestricted sovereignty over their property. Consequently, classical majority consensus dictates that an exhaustive lifetime gift of an estate to any party is formally valid and legally binding, despite being morally discouraged. Classical jurists strictly restricted property transfers to the one-third threshold only if the disposition was executed during death-sickness (*maradh al-mawt*). Contrarily, Article 210 paragraph (1) of the CIL establishes a sweeping, universal restriction, capping all lifetime gifts at a maximum of one-third, regardless of whether the donor is healthy or terminally ill, unless the explicit consent of the statutory heirs is secured under paragraph (2). Therefore, the CIL exhibits a deliberate and structural departure from the standard Shafi'ite paradigm traditionally dominant in the Indonesian archipelago. Instead of maintaining rigid consistency with classical majority views, the Indonesian codifiers utilized the mechanism of *takhayyur* (eclectic selection of juristic opinions) to adopt a highly restrictive approach that aligns closely with the Hanbali school, or effectively extended the *maradh al-mawt* defensive doctrine to all lifetime transactions universally. This inconsistency is not a structural flaw; rather, it is a conscious legal engineering strategy designed to elevate preventive justice and family welfare over absolute individual autonomy, ensuring that the state can successfully shield the core family unit from strategic disinheritance.

Empirical Legal Consciousness: Academic and Practitioner Perspectives on Property Transfers to Non-Marital Children

o ground the normative doctrines within current empirical realities, this study integrates a socio-legal assessment through qualitative interviews with prominent Islamic legal academics and grassroots religious practitioners. This empirical inquiry aims to capture the living legal culture (*living law*) regarding absolute property transfers and evaluate how field-level actors navigate the intersection between religious ideals and social exigencies.

One of the key informants, H. Ilham Asqalani, an academic lecturer specializing in Islamic inheritance law (*fiqh mawaris*), offers an autonomy-centric, progressive interpretation. He posits that, from a fundamental doctrinal standpoint, an exhaustive lifetime transfer of assets to a non-marital child is not categorically prohibited under Islamic jurisprudence. Within this framework, a lifetime gift is classified strictly as a voluntary, gratuitous legal act (*tabarru'*) which, unlike a post-mortem testamentary disposition (*wasiyyah*), is not inherently bound by a rigid, pre-determined quantitative ceiling such as the classical one-third limit. Therefore, the material validity of such a disposition is determined not by the absolute volume of the property transferred, but rather by its alignment with the overarching principles of justice and the protection of third-party rights. However, Asqalani emphasizes that this autonomy is highly conditional.

The primary ethico-legal constraint hinges upon the prevention of harm (*darar*) to statutory heirs. In complex familial constellations where legally entitled heirs such as a surviving spouse, parents, or marital children exist, the complete evacuation of an estate in favor of a single non-marital child cannot be socially or legally justified, as it effectively nullifies the financial rights of those core heirs (Yusron, 2021). Conversely, in the absence of other entitled heirs, such a transfer may be considered permissible from an Islamic legal perspective. This viewpoint highlights an important intersection between normative doctrine and practical reasoning. While classical Islamic law recognizes the flexibility of hibah as a voluntary transfer, it simultaneously imposes ethical constraints to ensure that such transfers do not lead to injustice (Yusuf, 2017). Conversely, in rare empirical scenarios where no statutory heirs exist, such an absolute transfer becomes entirely permissible. This academic viewpoint highlights a crucial socio-legal mechanism: because non-marital children are structurally excluded from the formal Islamic inheritance (*mawaris*) system due to the absence of legal paternal lineage, parents frequently utilize flexible *inter vivos* property dispositions as a deliberate legal engineering alternative to secure the child's socio-economic survival outside the rigid boundaries of statutory inheritance (Yakin, 2015).

In stark contrast to this flexible academic interpretation, a more formalistic and systemic protective approach is articulated by Muallim Pahrul, S.H.I., M.H., the leader of the Raudhatul Muhibbin Ta'lim Assembly. Representing the grassroots practitioner perspective, he argues that individual property autonomy is not absolute and must remain strictly subservient to the structural integrity of the broader Islamic socio-economic inheritance framework. His conservative socio-legal arguments can be conceptualized into three fundamental dimensions:

- a) **The Quantitative Analogy of Testamentary Limitations:** He argues that to prevent the deliberate circumvention of *sharia* inheritance rights belonging to legitimate statutory heirs, any lifetime gift must be structurally capped at a maximum of one-third of the total estate. He advocates for a strict legal analogy (*qiyas*) between *inter vivos* gifts and post-mortem wills (*wasiyyah*) to serve as a public-interest shield.
- b) **The Socio-Economic Function of Escheated Property:** In empirical cases characterized by a total vacuum of statutory heirs, Pahrul strictly rejects the validity of a comprehensive asset transfer to a non-marital child. He asserts that after covering standard funeral liabilities, the remaining estate must legally escheat to the state treasury (*Baitul Maal*). This wealth must be managed collectively for the broader public welfare (*maslahah ammah*) such as public infrastructure or socio-religious facilities rather than being entirely absorbed by an individual who lacks a legally recognized lineage (*nasab*).
- c) **The Primacy of Formal Kinship over Personal Competence:** He maintains that a child's personal capabilities, intelligence, or acute financial needs do not grant them a backdoor entry into property acquisition streams. In Islamic legal sociology, the allocation of family wealth is strictly governed by objective, formal kinship ties (*nasab*), the absence of which acts as an immutable legal barrier to total estate acquisition (Ali & Khan, 2017).

This sharp divergence between Asqalani’s flexibility and Pahrul’s rigid formalism demonstrates that the legal culture surrounding asset distribution to children born outside marriage is highly fragmented. While academics prioritize individual autonomy and the immediate socio-economic welfare of a vulnerable child, practitioners lean toward absolute procedural formalism to preserve the public system from strategic disinheritance. This internal tension within the living law directly explains the operational gaps that notaries must resolve in their daily practices, which are critically systematically mapped in the analytical matrix below:.

Analytical Dimensions	The Indonesian Civil Code (KUHPerdota)	The Compilation Of Islamic Law (Cil)	Empirical Realities & Legal Practices (Field Data)	Critical Legal Gaps & Socio-Gaps
Underlying Philosophy	Absolute individual property autonomy balanced by <i>ex-post</i> economic safety nets.	Collective family protection and prevention of socio-economic neglect through divine ceilings.	Pragmatic parental affection and an urgent desire to secure the economic future of non-marital children.	Conflict between the rigid legal definitions of family and the emotional fluid realities of biological parenthood.
Enforcement Mechanism	Ex-post (reactive): The deed remains valid	Ex-ante (preventive): Immediate	Circumvention through formal legal loopholes	Formal state enforcement fails to control private

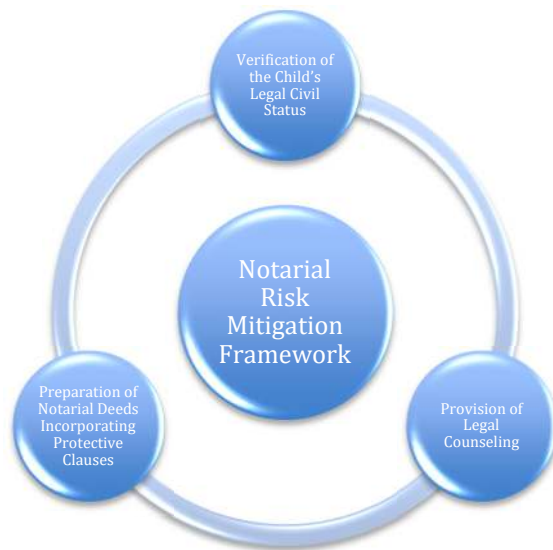
	unless injured heirs file a lawsuit for reduction (<i>inkorting</i>).	quantitative limitation capped at 1/3, requiring absolute consent from heirs.	or undocumented, informal under-the-table asset distributions.	family arrangements made in informal spaces.
Legal Status of Non-Marital Children	Attains heirship only if voluntarily recognized or proven through judicial orders.	Possesses biological and financial claims, but lacks direct automatic inheritance rights from the father.	Highly vulnerable to total disinheritance by the core family post-mortem if no secure deeds exist.	Dualism forces parents to utilize <i>inter vivos</i> transfers as an absolute necessity rather than a mere option.

A critical analysis of Table 1 reveals that the formal statutory substance of both legal regimes operates under a foundational assumption of family harmony, which frequently clashes with the complex realities of modern legal culture. Interviews with legal practitioners and advocates indicate that the demand for executing exhaustive lifetime gifts to children born outside marriage remains high due to deep-seated anxiety over post-mortem family litigation. Practitioners note that biological fathers are hyper-aware that once they pass away, the core legal family will likely marginalize non-marital offspring, stripping them of any informal access to the estate.

Consequently, the father’s legal consciousness prompts them to actively look for legal loopholes during their lifetime, viewing absolute property transfers as an indispensable shield of economic survival for the child. Furthermore, field insights from religious authorities and local scholarly leaders (*Tuan Guru*) reveal a fascinating structural contradiction within Indonesia's Islamic legal culture. While the formal text of Article 210 of the CIL strictly enforces a preventive one-third limitation to preserve the financial equilibrium of statutory heirs, local religious practices often prioritize the absolute sovereignty of the property owner over statutory restrictions. Interviews show that when a biological father seeks to transfer his entire asset pool to a non-marital child, some local religious figures sanction the transaction under the classical principle of absolute mutual consent (*at-taradhi*), argumentatively bypassing the state-enforced codification of the CIL. They perceive the state's one-third cap as an administrative restriction rather than an immutable divine obligation.

This socio-legal discrepancy can be theorized using Lawrence Friedman’s legal system framework, which posits that a structural and substantive law will fail to achieve its objective if it is unsupported by the prevailing legal culture. The strict preventive restriction of the CIL and the corrective reduction mechanism of the Civil Code are continuously undermined by a protective parental culture that prioritizes biological bonds over formal civil status. Because the state constructs a rigid wall denying non-marital children automated inheritance rights from their biological father's line, it inadvertently

creates a strong counter-reaction: parents utilize absolute *inter vivos* asset dispositions as a desperate mechanism of legal engineering. Therefore, the lack of harmony between formal text and cultural practice proves that achieving absolute legal certainty cannot be done by merely writing restrictive statutes; the state must provide flexible, integrated legal avenues such as standardized notarial consent models to accommodate biological responsibilities without destroying the economic protection of the core family unit.



The diagram illustrates a structured Notarial Risk Mitigation Framework in addressing potential legal issues arising from *hibah* (inter vivos transfer), particularly in cases involving children's legal status. This framework is constructed upon three interrelated pillars, namely the verification of the child's legal status, the drafting of notarial deeds with protective clauses, and the provision of legal counseling. Each component operates not only as an independent mechanism but also as an integrated system aimed at ensuring legal certainty and safeguarding the rights of all parties involved. First, the verification of the child's legal status constitutes a fundamental preliminary step. In the context of *hibah*, the determination of whether a child is legally recognized has significant implications for their entitlement, especially in relation to inheritance rights and the potential classification as a lawful heir. This verification process enables the notary to identify any legal ambiguities at an early stage, thereby minimizing the risk of future disputes. Without such verification, the validity and enforceability of the *hibah* arrangement may be called into question. Second, the drafting of notarial deeds with protective clauses serves as a juridical instrument to anticipate and mitigate potential conflicts.

Through the incorporation of specific clauses such as limitation provisions, conditional transfers, or dispute resolution mechanisms the notary actively constructs a legal safeguard within the deed itself. This reflects a preventive approach, where legal risks are addressed *ab initio*, rather than corrected after disputes arise. In this regard, the notarial deed functions not merely as a formal document, but as a strategic tool for legal

protection. Third, the provision of legal counseling complements the technical and formal aspects of notarial practice by emphasizing the advisory role of the notary. Through legal counseling, parties are informed of the legal consequences of *hibah*, including its potential impact on heirs' rights and future claims (Supriyadi, 2016). This process enhances the parties' legal awareness and promotes informed decision-making, thereby reducing the likelihood of misunderstandings or disputes. Taken together, these three components demonstrate that the role of the notary extends beyond administrative formalities toward a more proactive and preventive function. The integration of verification, drafting, and counseling reflects a comprehensive approach to legal risk mitigation, which aligns with broader principles of legal certainty, justice, and the protection of vulnerable parties (Al Amin, 2016). Consequently, this framework not only strengthens the legal validity of *hibah* transactions but also contributes to the realization of equitable outcomes in family law practice.

CONCLUSION

This study demonstrates that the legal validity of transferring 100% of assets through *hibah* to a child born out of wedlock is inherently conditional and depends on the applicable legal framework. Under the Indonesian Civil Code, such a transfer may be formally valid; however, it remains legally contestable if it infringes upon the compulsory portion (*legitime portie*) of other heirs, thereby exposing the transaction to claims for reduction (*inkorting*). In contrast, the Compilation of Islamic Law (CIL) adopts a preventive approach by limiting *hibah* to one-third of the estate, unless the explicit consent of all heirs is obtained. From the perspective of *Ahkam Hadith*, the limitation of *hibah* is fundamentally grounded in the principles of justice (*al-'adl*), proportionality, and the prohibition of harm (*lā ḍarar wa lā ḍirār*), ensuring that property transfers do not result in the marginalization of statutory heirs.

Theoretical Implications Theoretically, this research elevates the academic discourse by expanding the implementation of the "Preventive Legal Guard" (*al-himāyah al-wiqā'iyyah*) theory within Islamic family law and notary practices. This study successfully constructs a profound conceptual synthesis between Western civil dogmatics (*legitime portie*) and Sharia preventive justice. It demonstrates that the one-third quantitative limitation is an analogical (*qiyās*) instrument adapted from testamentary rules (*wasiyyah*) to constrain *hibah* autonomy. By doing so, this study bridges the epistemic dichotomy that previously isolated civil legal mechanisms from Sharia family doctrines, while enriching the jurisprudential understanding of the restrictive social and familial functions of individual property ownership.

Practical Implications Practically, this study delivers a concrete, operational model of preventive legal engineering for public officials. It shifts the notary's role from a passive administrative recorder into an active guardian of legal certainty (*legal gatekeeper*).

This is achieved through the formulation of three standardized, bulletproof contractual clauses: the statement of forced heirship awareness, the explicit heirs' consent mechanism (*at-tarādī*), and the notarial hold-harmless/indemnification clause .

This framework serves as a practical, defensive shield that notaries can readily operationalize to secure lifetime asset transfers to non-marital children while successfully insulating families from devastating post-mortem litigation. Regulatory Recommendations In terms of regulatory policy, there is an urgent need for legal authorities to pursue a structured harmonization between the national Civil Code and Islamic legal frameworks regarding *inter vivos* property transactions. The state is strongly recommended to intervene in the legislative and practical space by creating flexible, integrated legal avenues, such as introducing standardized notarial consent models. Future amendments to the Compilation of Islamic Law (CIL) or notarial regulations must provide a balanced mechanism that accommodates parental biological responsibilities toward non-marital offspring without dismantling the economic safety nets and constitutional rights guaranteed to statutory heirs within a lawful marriage (Muamar, 2016).

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