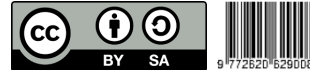


Distributive Justice of the Participation of the Interested Assets According to the Civil and Khi Kuh in the Maqashid Al-Sharia'ah Perspective

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Abstract

Inheritance is a division of property in the family to do when someone has died. Civil Code and KHI have the same three elements, namely the heir, heirs, and something that can be taken advantage for granted. Civil Code establishes the rules of inheritance in two ways, namely by Law (*ab-intestato*) and with a will (*testament*). KHI set rules about their automatically down to children or derivatives or family as already set out in the Koran. Specifications of this research is descriptive, with a normative juridical approach. Research supported by the method of approach to legislation (*Statute Approach*) nationwide, and the approach of the case (*Case Approach*), philosophy of law, legal history, the study was supported by the methods of interpretation of law (*systematic and authentic*), and comparative law.

Keywords: *Justice, civil, khi kuh, legal history, philosophy of law.*

INTRODUCTION

The process of the journey of human life in the world is birth, life, and death, all of these stages carry legal effects and consequences on their environment, especially with people who are close to them, both close in the sense of lineage and in the sense of the environment. Birth brings as a result the emergence of rights and obligations for himself and others as well as the emergence of legal relations between him and his parents, relatives, and the surrounding community. During his life, from infancy, children, tamyiz, puberty and later ages, humans act as bearers of rights and obligations, both as individuals, family members, citizens, obedient and obedient to the provisions of the Shari'a in the totality of their lives. (Suparman Usman, 1997)

Likewise, the death of a person brings legal effects and consequences to himself, his family, society and the surrounding environment. In addition, the death creates other obligations for him (the deceased) related to the management of his corpse (*fardhu kifayah*). (Abdurrahman Algeria, 2003). With the death, other legal consequences also arise automatically, namely the existence of a legal relationship that concerns the rights of his family (heirs) to all his inheritance. Even the community and the state (*baitul mal*) also, under certain circumstances, have the right to the inheritance. (Ibrahim al Maslami, 1407H)

The death of a person results in the emergence of a branch of law that concerns how to transfer or settle inheritance to the family (heirs) known as inheritance law. In Islamic law, this knowledge is known as the science of Mawaris, Fiqh of Mawaris, or Faraid.

Through the Qur'an, Sunnah, and Ijtihad Companions the share of each heir is determined with the aim of realizing justice in society. Even with very clear and perfect rules Allah determines the distribution fairly and full of wisdom. (Zamakhshari, 1407H). He stipulates this with the aim of realizing justice in human life, eliminating injustice in their lives, closing the space for the perpetrators of injustice, and not allowing complaints against people who do not get their rights in inheritance. This can be seen clearly in QS. an-Nisa' [4]: 7 that Allah swt. firmly eliminate the form of injustice that usually afflicts two types of weak human beings, namely women and children. (al Baghawi, 1420H). He supported them both with grace and wisdom and with full justice, namely by returning their inheritance rights in full.

Seeing today's reality, there are attempts to destroy the order of Islamic inheritance law that has been established by Allah. Assuming that the distribution of inheritance for a son is equal to two daughters is a form of injustice against women. (Amina Wadud Muhsin, 1994). The reality that is encountered in the community in the form of deviations from faraid law is the reason it is permissible to make modifications or adjustments to the provisions that have been clearly outlined by the Qur'an. (Munawir Sjadzali, 1995). Because it is related to the sociological dimension in the form of the economic structure of society. Therefore, the quantity of distribution can and may change based on the principle of justice and adjustment to the sociological dimension. (Tutik Hamidah, 2011)

Apart from the reasons above, that the provisions for the division of inheritance in the Qur'an, including the distribution of a 2:1 formula for sons and daughters, do not discriminate against women at all because of the sociological and economic context. This means that the division of inheritance with the 2:1 formula must be reinterpreted by taking into account changing conditions and new awareness among women. (Asghar, dd). Even worse, wills are prioritized over inheritance, because they have the potential to achieve justice and have effectiveness in the use of assets and the development of social and family relations. (Muhammad Syahrur, 2008). Seeing the fundamental differences of justice in inheritance law above, this paper is intended to describe and analyze the concept of justice in Islamic inheritance law to answer contradictory arguments in determining the form of justice in terms of theology, economy, and social.

METHOD

The research in this study uses a qualitative descriptive type of research method with an approach that is based on the normative juridical aspects contained in various provisions and legal basis of inheritance according to the Civil Code, KHI and Maqashid Syariah relating to the principles or principles of justice in implementation. inheritance. In this study, the author uses several instrumental data collection tools as literature study media in assessing and reading a phenomenon that occurs related to inheritance law in Islam.

RESULT AND DISCUSSION

1. The Concept and Implementation of Justice

Discussing the law is discussing the relationship between humans, discussing the relationship between humans is discussing about justice. Thus discussing the law means discussing justice as well. In the legal discussion, it is not only discussing the formal form of law, but also seeing the law as an expression of the ideals of community justice. (Satjipto Rahardjo, 2006)

The notion of fairness or justice has a long history of thought. The theme of justice is a major theme in law since ancient Greece. The nature of justice in a legal perspective can be seen from two main meanings, namely in a formal sense and in a material sense. Justice in the formal sense demands that the law be generally accepted, while the material demands that every law must be in accordance with the ideals of community justice. (E. Fernando M. Manullang, 2007)..

Aristotle divides justice into two kinds:

a. Distributive justice

Distributive justice or *justitia distributive* is a justice that gives to each person based on their services or distribution according to their respective rights. This justice plays a role in the relationship between the community and the individual. Justice here does not mean equality but comparison.

b. Cumulative justice

Cumulative justice or *justitia cummulativa* is justice received by each member regardless of merit. Cumulative justice plays a role in exchange and plays a role in relationships between individuals. (R. Soeroso, 2007)

John Rawls conceptualizes justice as fairness, which contains the principles that free and rational people who wish to develop their interests should get the same position when they start. (John Rawls, 2006)

Meanwhile, according to Hans Kelsen, justice is a certain social order under its protection, efforts to seek the truth can thrive in society, because justice is a common good. (Hans Kelsen, 2009)

Justice in law is determined by its purpose. Therefore, justice in Islamic law is different from positive law. Because the purpose of the two laws is different.

Justice in Islamic law depends on justice that has been determined by Allah SWT, because it is impossible for humans to know justice correctly and precisely. In Islamic law, faith precedes understanding, because it has been determined that everything that Allah (swt) decrees must be just. Meanwhile, justice in positive law is completely dependent on human reasoning. Therefore, it is included in the realm of legal philosophy, and because of that the notion of justice always changes from one society to another, depending on the flow of legal philosophy adopted by the community. (Bustanul Arifin, 1996).

In language the word fair means equalizing, balancing, straightening. (Atabik and Zuhdi, 1996). In the Big Indonesian Dictionary, the word fair means impartial, impartial, appropriate, adhering to the truth and not arbitrarily. (KBBI, 2005) Justice is not only limited to human relations with Allah SWT. however, justice also applies to human relations with humans and the rest of God's creation.

Justice for humans leads to various definitions of justice which are not impossible between one human society and another, which differs in interpreting legal justice. In other words, the flexibility of justice products is absolutely necessary in the heterogeneity of humans and their environment, while the estuary of justice to God is a legal product that still places God in accordance with His proportions as God, and human activities in the effort to formulate legal goals in the form of justice also remain in the corridor of worship. to him.

Law as a means of achieving justice can only be said to be effective if there is a combination of substantive justice values between legal messages (Qur'an and Hadith) and society as people who are directly burdened with the law (mukallaf). According to Hazairin, the main area of legal justice is the relationship between Muslims and the basic guidelines for decision-making in Islam. A legal decision is said to be fair if it departs from the guidelines of the Qur'an and Hadith and does not conflict with the principles of justice in general, because the attachment of Muslims to the basic guidelines for decision making has a fundamental influence on the lives of Muslims individually and socially.

The ultimate goal of law is justice. In relation to Islamic law, justice that must be achieved must refer to the main guidelines of the Islamic religion, namely the Qur'an and Hadith. This means that the descent of justice through legal channels must start from two aspects and lead to justice in two aspects as well. It is said to start from two aspects because Islamic guidelines in the form of the Qur'an and Hadith, on the one hand, must be able to blend with the guidelines for the principles of justice in general according to humans on the other side. The initial task that is then faced is the effort to formulate the Qur'an and Hadith so that they are able to appear in accordance with the principles of justice in general.

Justice in Islam is a harmonious blend of law and morality, Islam does not aim to destroy individual freedom, but controls that freedom for the sake of harmony and harmonization of society which consists of individuals themselves. (Abdul Ghofur Anshori, 2005).

2. Inheritance Law in Indonesia

The problem of inheritance that applies in Indonesia until now is still diverse (plural), still does not have a legal unit that can be applied to all Indonesian citizens. The diversity of inheritance law can be seen from the distribution of inheritance law to:

- a. Inheritance law contained in the Civil Code (KUH Perdata/BW), Book I Chapter XII s.d. XIII from articles 830 to d. Article 1130. In BW there are four groups of heirs who take turns entitled to inheritance, namely the first group as the strongest group which will cover the rights of the second group to the fourth group. If the first group does not exist, then the inheritance rights move to the second group, and so on.
- b. Inheritance law contained in customary law, namely in the section on customary inheritance law. Customary law generally relies on normative social rules in a concrete way of thinking that has become a tradition of certain communities. One of them, the Minangkabau community who divides inheritance with customary law which is substantially the main source of customary law itself is Islamic law. Therefore, it is stipulated in the doctrine of "Adat based on Syara', Syara' based on the Book of Allah".

c. Inheritance law contained in Islamic inheritance law, the method of distribution purely refers to the doctrines of Islamic teachings contained in the Qur'an and Sunnah as well as the consensus of scholars.

BW inheritance law applies to Chinese and Europeans, customary inheritance law applies to native Indonesians, while Islamic inheritance law applies to native Indonesians who are Muslims and Arabs (who are Muslims). (Suparman Usman, 2002).

For one group of Indonesian citizens, namely Arabs, it can be said that for them in general the inheritance regulations from Islamic law apply, because their customary law is generally the same as the law in force in Arab countries, where Islamic law is fully or almost fully enforced.

The Indonesian people who adhere to various religions and beliefs have a form of kinship with different hereditary systems. These different hereditary systems affect the inheritance system in that society. Among native Indonesians there is not a single-family trait, but in various regions there are various family systems that can be classified into three groups, namely: (Muhibbin and Abdul Wahid, 2009)

a. The patrilineal system is a family system that draws the lineage of the male ancestor. In this system the position and influence of men in inheritance law is very prominent.

b. The matrilineal system is a family system that draws the lineage of female ancestors. In this system the male is not the heir to his children. Children become heirs of the female line or mother line because their children are part of the mother's family, while the father is still a member of his own family.

c. The parental or bilateral system is a family system that draws lineage from two sides, both from the father and the mother. In this system, the position of boys and girls in inheritance law is equal and equal. This means that sons and daughters are the heirs of the inheritance of their parents. (Habiburrahman, 2011).

According to Hazairin, an expert on customary law who is quite respected and has great concern for Islam, that in Indonesia there are three inheritance systems, namely:

a. The individual inheritance system is characterized by the fact that the inheritance can be distributed among the heirs, as in the bilateral society in Java and in the patrilineal society in the Batak.

b. The collective inheritance system is characterized by the fact that the inheritance is inherited by a group of heirs who are a kind of legal entity in which the property - which is called an inheritance - may not be distributed among the heirs, and its ownership may only be distributed to them, as in matrilineal society in Minangkabau.

c. Mayorat inheritance system in which the eldest child at the time of death of the heir has the sole right to inherit the entire inheritance, or the sole right to inherit a number of principal assets from one family, as in the shifting patrilineal society in Bali (the majority rights of the eldest son) and in the land of Semendo, South Sumatra (the majority rights of the eldest daughter). (Suparman Usman, 2002).

The family system that will be determined in inheritance in Indonesia is the parental system or *ouderrechtelijk*. This system will unify the inheritance law from customary law and Islamic law which elevates the principle of equal rights between men and women. (Beni Ahmad Saebani, 2015)

From the explanation above, it can be seen that the inheritance laws that apply in Indonesia for Indonesian citizens are as follows:

- a. For native Indonesians, in principle, customary law applies, which exists in various regions and is closely related to three family characteristics, namely patrilineal traits, matrilineal traits, and parental/bilateral traits.
- b. For native Indonesians who are Muslim in various regions there is a real influence from inheritance regulations and Islamic law.
- c. For Arabs generally all Islamic law applies.
- d. For the Chinese and Europeans, the legacy of *Burgelijk Wetboek* applies (Book II titles 12 to 18, chapters 830 to 1130). (Muhibbin and Abdul Wahid, 2009).

Thus, in Indonesia there are three kinds of inheritance law, namely customary law, Islamic inheritance law, and inheritance law from *Burgelijk Wetboek* (BW). Islamic inheritance law and national inheritance law have become laws that apply positively, meaning that Muslims who want to distribute inheritance should use Islamic inheritance law as regulated in the Compilation of Islamic Law.

Islamic law, although Muslims may choose the law to be used. These rights are called option rights. All inheritance laws that can be used as legal references have a close juridical relationship because the three sources of law that apply in Indonesia, namely customary law, Islamic law, and BW are stipulated as legal and formal law. It's just that in customary law the rules are left to the people who use it because customary law is closely related to local culture with different circumstances. As for Islamic inheritance law and BW, the distribution is formally explained by the applicable law. (Beni Ahmad Saebani, 2015).

3. The Concept of Distributive Justice in Islamic Inheritance Law

One of the subsystems of Shari'ah law which until now remains doubtful, sued and even sometimes blasphemed by some people is mainly related to the lack of justice in inheritance law. Especially with regard to the rules of section 2: 1 (read: two to one), with the intention of two parts for male heirs, and one part for female heirs. This thought is carried over to contemporary sociological – empirical – pragmatic thoughts because the focus on one side is faced with the fact that there are many cases of women having a higher profession and salary. Meanwhile, at the same time, the science of *faraid* in certain cases, especially related to the rules of section 2: 1 for men and women as mentioned earlier, is considered irrelevant to the conditions and demands of the times. (Muhammad Amin Suma, 2013)

As a general rule, it is taken from the standard "*liddzakari mitslu hazzil untsayaini*" for men, twice the share for women. At first glance, it seems that this provision shows a lameness that offends a sense of justice. (Anwar Harjono, 1987).

This 2:1 comparison problem is indeed a bit complicated because it involves the issue of qath'i and dzanni. (Sri Suhandjati, 2002). In the science of ushul fiqh, the notion of qath'i refers to the meaning whose understanding of that meaning has been determined and does not contain takwil and there is no opportunity to understand other meanings. In other words, it contains a convincing, definite and absolute meaning. While the notion of dzanni refers to a meaning, but it is still possible to interpret or turn away from this meaning and other meanings intended from it, in other words it contains something relative, conjecture, and unconvincing. (Abdul Wahhab Khalaf, 1994)

Based on the Double Movement theory initiated by Fazlur Rahman, we can see that the substance of inheritance law is justice because before Islamic inheritance law came in terms of the distribution of inheritance. At that time, women were never given the slightest share of the inheritance, in fact they were used as inheritance that could be divided. Efforts to reconstruct is not a taboo subject, because the historical and social background of the text's descent is different from today's. This different culture has existed since the early days of Islam when the Qur'an was revealed, even more so now that each generation faces different situations due to differences in time and geography. (Fazlur Rahman, 1985). In addition, we can also search through the maqashid al-tasyri method developed by al-Syatibi which states that the shari'ah aims to realize the benefit of humans in the world and in the hereafter. (Ibrahim son of Moses, tt)

Therefore, by combining the theory of maqashid al-tasyri 'and justice as the substance of Islamic inheritance law, it is possible that the rule of section 2:1 outlined in Islamic inheritance law is applied to 1:1.

CONCLUSION

The difference in the distribution of assets between the Civil Code and the KHI is very visible on the part of children and relatives. Article 852 of the Civil Code clearly states that without gender, they inherit the same parts. The division of the Civil Code is commutative in terms of assessing fairness, which is equal in share regardless of position and needs. Meanwhile, Article 176 of the KHI states that if there are girls together with boys, the share of boys is two to one with girls.

The same is written in the word of Allah SWT, QS. An-Nisa: 11, because KHI refers to the source of Muslim law. KHI in the distribution of inheritance is individual which in terms of equity the share of property must look at the position of the child, the duties of the child and the future needs of the child, in this case the male and female. Compilation of Islamic law is also distributive, meaning that the share of the inheritance is in accordance with the position and duties assigned to the heirs or heirs. Even though in practice the practice of dividing Islamic inheritance in society, the share is equalized regardless of the position of men and women with prior deliberation.

REFERENCES

- Abdul Ghofur Anshori, *Filsafat Hukum Kewarisan Islam Konsep Kewarisan Bilateral Hazairin*, (Yogyakarta: UII Press, 2005).
- Abdurrahmān al-Jazari, *al-Fiqh 'ala Mazhab al-Arba'ah* (Beirut: Darul Kutub al-'Ilmiyah, 2003), Vol. 1,
- Al-Baghawi, *al-Ma'ālim al-Tanzil fi Tafsīr al-Quran*, al-Muhaqqiq Abdurrazak al-Mahdi, (Beirut: Darul Ihya' Turats al-Arabi, 1420 H), Vol. 1, .
- Amina Wadud Muhsin, *Wanita di Dalam al-Quran*, terj. Yaziar Radiant (Bandung: Pustaka, 1994),

- Anwar Harjono, *Hukum Islam Keluasan dan Keadilannya*, (Jakarta: Bulan Bintang, 1987),
- Sri Suhandjati Sukri, *Bias Jender dalam Pemahaman Islam*, (Yogyakarta: Gama Media, 2002),
- Abdul Wahhab Khallaf, *Ilmu Ushul Fiqh*, (Semarang: Toha Putra Group, 1994),
- Asghar Ali Engineer, *Hak-hak Perempuan dalam Islam*, terj, Farid Wajidi dan Cici Farikha Assegaf, (Yogyakarta: Yayasan Benteng Budaya, t.th),
- Atabik Ali & Ahmad Zuhdi Muhdlor, *Kamus Kontemporer Arab-Indonesia*, (Yogyakarta: Yayasan Ali Maksum, 1996).
- Bustanul Arifin, *Pelebagaian Hukum Islam di Indonesia*, (Jakarta: Gema Insani Press, 1996).
- E. Fernando M. Manullang, *Menggapai Hukum Berkeadilan*, (Jakarta: Kompas, 2007).
- Fazlur Rahman, *Approach to Islam Religious Studies*, review essay dalam Rich and C. Martin, *Approach to Islam in Religious Studies*, (Tempe: The University of Arizona, 1985).
- Habiburrahman, *Rekonstruksi Hukum Kewarisan Islam di Indonesia*, (Jakarta: Kencana, 2011).
- Hans Kelsen, *Teori Umum Tentang Hukum dan Negara*, terj. Raisul Muttaqien, (Bandung: Nusa Media, cet. Ke-6, 2009).
- Ibrahim al-Maslamī, *al-Mawârits fi al-Islam* (Kairo: Muthabiul Ahram alTighariyah, 1989).
- Ibrahim bin Musa al-Syathibi, *Al-Muwafaqat fi Ushul al-Syari'ah*, Jilid. 1, (BeirutLibanon: Dar al-Kutub al-Ilmiyah, t. th).
- John Rawls, *Teori Keadilan; Dasar-Dasar Filsafat Politik untuk Mewujudkan Kesejahteraan Sosial dalam Negara*, terj. Uzair Fauzan & Heru Prasetyo, (Yogyakarta: Pustaka Pelajar, 2006).
- Moh. Muhibbin dan Abdul Wahid, *Hukum Kewarisan Islam Sebagai Pembaharuan Hukum Positif di Indonesia*, (Jakarta: Sinar Grafika, 2009).
- Muhammad Amin Suma, *Keadilan Hukum Waris Islam dalam Pendekatan Teks dan konteks*, (Jakarta: Raja Grafindo Perkasa, 2013).
- Muhammad Syahrur, *Metodologi Fiqh Islam Kontemporer*, Terj Sahiron Syamsuddin & Buhanuddin, (Yogyakarta: eLSAQ Press, 2008),
- Munawir Sjadzali, *Kontekstualisasi Ajaran Islam* (Jakarta: IPHI/PARAMADINA, 1995),
- R. Soeroso, *Pengantar Ilmu Hukum*, (Jakarta: Sinar Grafika, cet. Ke-7, 2007),
- Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, cet. ke-6, 2006),
- Suparman Usman dan Yusuf Somawinata, *Fiqh Mawaris (Hukum Kewarisan Islam)*, (Jakarta: Gaya Media Pratama, cet. ke-2, 2002).
- Tim Penyusun Kamus Pusat Bahasa, *Kamus Besar Bahasa Indonesia*, ed. Ke-3, (Jakarta: Balai Pustaka, 2005).
- Tutik Hamidah, *Fiqh Perempuan Berwawasan Keadilan Gender* (Malang: UIN Maliki, 2011).
- Zamakhshari, *al-Kasyaf 'an Haqâiq Ghawâmid al-Tanzîl*, Vol. 2, (Beirut: Darul Kutub al-Arabi, 1407 H), Vol. 2.