



TEXTUAL AND CONTEXTUAL APPROACH TO FARAIDH SCIENCE: A CRITICAL ANALYSIS IN DETERMINING THE DISTRIBUTION OF HERITAGE BASED ON ISLAMIC SHARIA

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ABSTRACT

Islamic Inheritance law is regulated in the Qur'an in Q.S An-Nisa: 7 and An-Nisa:12. It is often regarded as a qath'i doctrine which gives no chance for ijtihad and must be accepted absolutely. The existence of the Al-Qur'an began to be challenged along with the changing times. According to liberal thinkers, Islamic inheritance law is considered a product of salaf scholars as a rule that tends to be discriminatory, for example the distribution for women who only get a half of male. The study of faraidh in fiqh books is the interpretation of scholars based on social and contextual settings where the social construction of people's lives. Thus, the provisions of the Islamic heirs need to be critically reviewed and re-analyzed by considering the contextual social development of society. This research tries to examines and observe various data sources from various books, arguments, and other written works to find out best practice of inheritance provision. This is library research in which the technique of collecting data is taken from various books, dalil, and other scientific writing. This writing is supposed to answer some critics related to inherit share for man and woman from both textual and contextual approach of faraidh.

Key Words: *faraidh, textual-contextual, sharia*

A. INTRODUCTION

A condition that cannot be rejected by humans, as found in Q.S Ali Imron: 128 is death. Furthermore, one of the problems that will arise is the inheritance, including to whom and how much will be obtained from the inheritance. Or what is commonly called *tirkah*. This has been regulated in Islamic inheritance law. The question is how to solve this problem, especially in Islamic teachings?

Islam, as a perfect religion, has regulated all aspects of human life, including matters relating to the procedures for the diversion of inheritance. The science that discusses the way of diverting and dividing inheritance based on Islamic law is *faraidh*.

Faraidh, as an Islamic inheritance legal system, of course always refers to the principles of Islamic law in general. There are 7 principles of Islamic law, namely the principles of *tauhid*, justice, invitations for the good and the avoidance of evil (*amar ma'ruf nahi munkar*), independence or freedom, equality, *ta'awun*, and tolerance.

The principle of monotheism wills and requires every human being to submit to all the commands and rules of Allah for the consequences of the role of humans as *khalifatullah* in a world that was created solely to worship Allah SWT. The principle of justice in Islamic law is basically so that humans are able to place something in the place, portion, and level of each while still based on *shari'ah*.¹ This principle is an effort to control human attitudes as explained in the Al-Qur'an at Al-Maidah: 7 that humans tend to follow lust, love, and hatred which allow humans to prioritize evil over truth. Therefore, Allah commands people to always act fairly (Surah Al-An'am: 152). The principle of *amar ma'ruf nahi munkar* is basically that Islamic law directs mankind towards good and true goals according to Allah's orders. This shows that the function of Islamic law as social engineering is in an effort to erode bad potentials and bring out good potentials in it. The principle of independence is that Islamic law is not authoritarian, but based on explanations, demonstrations, arguments and convincing statements. The principle of equality means that Islamic law does not discriminate or is only specific to certain groups, but for all humans, because one form of Islamic perfection is the universality and comprehensiveness of its teachings.

¹ Alkostar., Arjito., & Amin, M., & Sholeh. *Pembangunan Hukum dalam Pespektif Politik Hukum Nasional*. Jakarta: Rajawali Pers, (2016), hal 24

The principle of *ta'awun* is basically Islamic law requiring an attitude of help which is based on the principle of *tauhid* in an effort to increase kindness and piety.²

Inheritance is part of the Islamic legal system. This is intended to integrate the principles and values of Islamic law in Islamic inheritance rules to create a common benefit in a family. One of the things that is often debated in Islamic inheritance law in the contemporary context is the share of women's inheritance rights that are perceived to be different from the amount obtained by men in the Islamic inheritance system.³ This issue is often debated and creates conflicts in the family, so that there is an assumption that Islamic inheritance law tends to be discriminatory and gender biased. This is due to the assumption that the inheritance system in Islam is something that is taken for granted, as if there is a difference in treatment between men and women where women get half the inheritance of men. However, from the side of Islamic law it is a requirement for the values of justice and egalitarianism. This raises the question of whether the part of the rights for women in Islamic inheritance law is final and something that is taken for granted, or is it still possible to be reinterpreted, because Islamic inheritance law at that time was a social response upon social construction.⁴

The Islamic inheritance law, which was initiated by the *salaf* scholars, is now being tested by continuous social realities. The provisions of Islamic inheritance law contained in the Al-Qur'an and *Hadith* are considered *qath'i* and final rulings. Meanwhile, on the other hand, the problem of the reality of inheritance always arises along with the development of the civilization of Muslims. As a result, the textual classical Islamic inheritance law is not able to respond in a relevant and reconstructive manner to various complex problems in this modern era. This inability is due to the incompatibility of paradigms, methodologies, and concepts (understanding of the *Qur'anic* text and *Sunnah*), the inheritance of classical *ulama* products with current conditions.

² Praja, J. *Filsafat Hukum Islam*. Bandung: Pusat Penerbitan Universitas. LPPM Universitas Bandung, (2012), hal.69

³ Antonio S., & Muhammad. *Bank Syari'ah (Dari Teori ke Praktek)*. Jakarta: PT. Raja Grafindo, (2015), hal 36.

⁴ Mudzar, M., & Atho'. *Fiqh dan Reaktualisasi Ajaran Islam*. Jakarta: Yayasan Wakaf Paramadina, (2018), hal 78.

There is an assumption that the essence of Islamic inheritance law is currently giving rise to contemporary Islamic thinkers who try to re-examine or re-actualize Islamic inheritance law, which shows that Islamic inheritance law currently requires dynamism in the application of the law. This is because a new perspective is needed in understanding Islamic inheritance law so that its essence can be felt by Muslims today.

In the past, differences of opinion that resulted in conflict were experienced during the time of the Prophet's companions, as experienced by Ibn 'Abbas, one of the closest friends of the Prophet SAW, who had a conflict with Umar Ibn Al-Khattab when he had different opinions on inheritance cases even Ibn 'Abbas once invited his friends to contend with the truth (*mubahalab*) in solving the inheritance case. This shows that there are many dynamics that have occurred in the course of inheritance law from the past to the present.

The principle of Islamic inheritance law does not differentiate between men and women. All heirs, both male and female, have the same rights as heirs, but there are only differences in comparison. The emphasis in Islamic inheritance law is balanced justice, not equal justice as an heir. Because of this principle, there are many polemics and debates that sometimes lead to disputes among the heirs, differences that seem to feel the unfairness of women's rights.

Currently, there are many women's movements fighting for their right to be equal with men. Today, the role of women and men is almost the same in carrying out family economic activities. In the past, women only served in household affairs, there has been a shift in value along with the changing times. Along with the rapid development of industry in Indonesia, it has given birth to various social developments, which in the past were women only as companions for men in the household.

The increasing number of women's roles in earning a living outside the home affects the pattern of life in society. Women who used to be only male companions in earning a living have now undergone a shift. Currently, not a few women even become the backbone of the family economy. This social change made women formerly a second-class group, but now they have equal positions with men.⁵ Likewise in the distribution of inheritance assets, in the inheritance law system, Islam places an unequal division between men and

⁵ Mudzar, M., & Atho'. *Ibid*

women. It may feel that there is no justice for women. With the presence of Islam, women have the same strong right in the right to inherit property, namely since the revealed surah An-Nisa: 7, which mean: "Men have the right to inherit from their mother and father and women are also entitled to a share of the assets, the legacy of his mother, father and relatives".

B. METHOD

This Study uses library research approach. This is library research in which the technique of collecting data is taken from various books, *dalil*, *hadith*, journal and other scientific writing. This writing is supposed to answer some critics related to inherit share for man and woman from both textual and contextual approach of *faraidh*

C. THEORETICAL REVIEW

1. Faraidh is Part of Islamic Law

The terminology of Islamic law is a translation of the word Al-Fiqh Al-Islam which in western literature is called "the Islamic Law" or "the Islamic jurisprudence" which refers to *shari'ah* and *fiqh* law.

Social change often occurs in society because of developments. It really needs to be responded to by Islamic law which is expected as social engineering or social control which functions to shape social behavior. Islamic law as a product of intellectual work needs to be understood which is not limited to *fiqh*. Perceptions that are not proportional in viewing existence often lead to wrong perceptions in viewing developments or changes that occur in Islamic law. Apart from *fiqh*, there are at least three products of legal thought in Islamic law, namely: *fatwas*, court decisions, and legislation.⁶ Understanding that is not proportional in understanding Islamic law will lead to the view that Islamic law is stagnant and seems unable to adapt to the increasingly rapid developments.

Islamic law as a social institution has two functions. Firstly, as social control where Islamic law is placed as God's law as a social and social engineering control over the existence of a community. While, the second function is as a value in the process of social change where law is more of a

⁶ Aziz, A. Pembagian Waris Berdasarkan Tingkat Kesejahteraan Ekonomi Ahli Waris dalam Tinjauan Maqashid Shariah. *Journal de Jure*, 8(1), 48. <https://doi.org/10.18860/j-fsh.v8i1.3729>. 2016.

historical product placed as justification for demands for social, cultural and political change within certain limits.⁷ So that, in this context, Islamic law is required to be accommodative to the problems of the *ummah* without losing its basic principles. In addition, the dynamics of Islamic law are also formed by the interaction between the two paradigms, namely revelation and reason which encourages the development of the *ijtihad* tradition. Both paradigms are used to understand the Qur'an as the main source of Islamic law.⁸ Islamic law has a very broad aspect that covers all parts of human life, both worship and *mu'amalah*. Worship is the law regarding to how humans relate to God, while *mu'amalah* is the law that regulates to how human relations are. Thus, it will be very difficult to understand Islam without fully understanding Islamic law.⁹

Islamic law is used to protect mankind from all forms of evil and to create the benefit of mankind in this world which concerns aspects of human life. If all Islamic law is always bound by the text (*nash*) which is always confirmed with a narrow view, the context of Islamic law will experience a setback, so that it cannot fulfill the needs of human life. This view is an obstacle for Muslims in understanding Islamic law in contextual cases.

The truth of Islamic law (*fiqh*) as absolute truth is considered to have shackled the intellectual creativity of Muslims in the advancement of Islamic civilization. This disproportionate view is due to the absence of serious development research. In fact, the historical evolution of the development of *fiqh* has provided a kind of frame work for Islamic legal thought or, rather, actual working for the characteristics of the development of Islamic law itself, including in the Islamic inheritance legal system.

Inheritance law is a part of Islamic law which occupies an important position, and is even regulated directly in the Al-Qur'an because this problem can be said to be experienced by everyone. The law of inheritance is a provision that regulates property matters. If it is not regulated in detail, it will result in disputes in the family and even disputes that have very fatal consequences. Because of its importance, the Prophet SAW ordered to study *faraidh* and teach people because *faraidh* is knowledge and is easily forgotten and the first to disappear from my people ".

⁷ Rafiq, A. *Fiqh Mawaris*. Jakarta: PT. Raja Grafindo Persada, (2016), hal 98.

⁸ Qurthubi, S. *Era Baru Fikih Indonesia*. Yogyakarta: Cermin, (2019), hal 5.

⁹ Amal, A., Taufik. *Islam dan Tantangan Modernitas*. Bandung: Mizan, (2017), hal 3)

2. Critical Discourse of Islamic Inheritance Law

The concept of Islamic inheritance law continues to be in the spotlight and study until now along with the development and changing times. The criticism that always comes from liberal thinkers is that the law of inheritance is not considered to reflect justice in the practice of distributing assets. In fact, the concept of sharing assets in Islamic inheritance is irrelevant and violates modern mathematical formulations.¹⁰ This criticism is getting stronger when it is related to the facts taken place in ordinary Islamic society which has not practiced the concept of Islamic inheritance law. The concept of Islamic inheritance is considered not to reach the side of justice in today's society. Many Islamic thinkers want absolute equality of inheritance rights between men and women. One of them is Nasr Hamid Abu Zayd, who said that Islam absolutely determines the female half share of the men. According to them, Islam considers all women have no ability in the economic field and no legal prowess in the society. All of this is dominated by men, such as fathers or husbands who are based on the messages of revelation .¹¹ This provision, continued Nasr Hamid Abu Zayd, cannot be accepted and must be changed, because *ijtihad* does not stop along with the end of the revelations of Allah SWT.

Regarding the distribution of inheritance, Nasr Hamid argues that before Islam came, the Arab community adhered to a patriarchal inheritance system and considered women not having the right to acquire any inheritance at all. Then Islam changed the rules here as stated in Qur'an, "Allah instructed you about the distribution of the inheritance for your child in which the share of a boy is equal to that of two daughters ..." (An-Nisa: 11). According to him, this verse emphasizes the change in inheritance law in society which promotes women to get inheritance rights.

Moreover, the verse also emphasizes the limitation on the rights of men, because it precedes the word "*li al-dhakar*" (for men). The mention of the word "man" which precedes the word "woman" in the verse shows that Qur'an focuses more on limiting the share of male inheritance. This is because men, in the Arabic tradition of Jahiliah, acquire all inheritance

¹⁰ Shahrur, M. *Metodologi Fikih Islam Kontemporer, diterjemahkan oleh Sahiron Syamsuddin dan Burhanuddin*. Yogyakarta: eLSAQ Press, (2015), hal 327.

¹¹ Zayd, A, H., & Hamid. *Naqd al-Khitab al-Diniy*. Misr: Dar Sina, (2017), hal 105.

without limit. So, actually Qur'an slowly and surely wants to direct humans to the equal share of the inheritance between women and men. This is what is called the implied words.

One of Muhammad Shahrur's criticisms regarding Islamic inheritance law is the understanding of the term "will" which most Muslims misunderstand. According to Shahrur, inheritance law in Islam does not only use the concept of *faraidh* science, but also uses the concept of wills, even wills are more important than *faraidh* in the context of distributing inheritance. However, when it comes to the issue of wills, many scholars doubt and doubt its legality from its legal basis as in al-Baqarah: 180 which have been replaced by the explanation in An-Nisa: 11-13. The provisions of *li al-walidayn wa al-aqrabin* (parents and relatives) in surah Al-Baqarah 180 are about wills that have been changed to inheritance with fixed provisions.

In addition, from the text of the *hadith* which is narrated sequentially, "*La wasiyah li warith*" (there is no testament for the heirs), the wills by *salaf* scholars are only used as entry points for *dhaw al-arhams* or close relatives. In this context, the will is positioned under the *faraidh* in the distribution of inheritance. However, Shahrur's view is based on the *istinbat* law method with a linguistic, philosophical and intellectual approach to the Qur'an and his view of the *sunnah* instead considers and makes wills the main way of distributing inheritance rather than *faraidh* itself. In other words, according to Shahrur, wills are considered more relevant than the science of *faraidh* in this modern era.¹²

Shahrur also argues that in the practice of inheritance distribution, *salafi ulama* do not apply the principle of equality between men and women. They have actually denied the principles that have been applied by Allah SWT to uphold justice (*'adl*) and equality (*musawah*) between communities in the distribution of inheritance.

Shahrur added that actually a woman's heir is the basis for calculating and determining the share of inheritance for each party. The verse of in the Qur'an which means that the share of a son is equal to that of two daughters indicates that the share of a son is doubled that of a daughter only occurs in one case when there is only one daughter and one son. Meanwhile, if the number of daughter is more than two and the number of son is only one,

¹² Shahrur, M. *Metodologi Fikih Islam Kontemporer*, diterjemahkan oleh Sabiron Syamsuddin dan Burhanuddin. Yogyakarta: eLSAQ Press, (2015), hal 319.

these provisions cannot be applied. Instead, what can be accepted is the next verse which means, "If they are more than two women, then they will get two thirds of what he left". Therefore, the heir consisting of three girls is $\frac{2}{3}$, the son's share is only $\frac{1}{3}$ of the share.

According to Hazairin, the inheritance system is not separated from kinship. The form of kinship originates in the hereditary system which is influenced by the form of marriage. In principle, there are three kinds of hereditary systems, namely patrilineal, matrilineal, and parental or bilateral. The patrilineal and matrilineal principles will give birth to a family unit known as a clan or clan. Whereas the bilateral principle, in some societies such as Java, does not give birth to a certain kinship union and in others it creates certain kinship units called relatives (tribe). In addition, patrilineal society is maintained by marriage which is called exogamy, which is the prohibition of marrying in one clan. Furthermore, Hazairin matched the facts about the hereditary system and its characteristics with the verses of the Al-Qur'an to determine the ideal familial form.

According to Hazairin, there are at least three normative theological foundations which state that the freedom system that the Qur'an wants is a bilateral system. This is stated in Q.S An-Nisa: 23 and 24 that it is found that there is the ability to marry each other between cousins. This fact shows that the Qur'an tends towards a bilateral kinship system. Second, An-Nisa: 11 explain that all children, both boys and girls, become heirs for their parents. This is a bilateral system because in patrilineal system, principally, only boys have the right to inherit. Likewise with matrilineal, only girls have the right to inherit. Third, An-Nisa: 12 and 176 it is stated that siblings to all kinds of brothers including siblings and siblings are heirs.

In the case of Islamic inheritance law in Indonesia, Hazairin stated more, there are three inheritance systems. The first is the individual inheritance system, which its treasure can be divided among the heirs. Second, the collective inheritance system, which its legacy is inherited by a group of heirs (collectively) which is a kind of legal entity and can only be distributed among the heirs and its benefits may only be distributed to them. Third, the major inheritance system, which is characterized by only the oldest child - at the time of the death of the heir - who can inherit the assets or a number of

principal assets from a family.¹³

Meanwhile, in Qur'an, there are several verses which substantively contain elements of the individual system. An-Nisa: 7 and 33 contain principles for an individual inheritance system, namely the existence of heirs who reserve the right upon certain part (*nasiban mafrudan*), verse 8 mentions its share, and verses 11, 12 and 176 determine the portions for the heirs. Thus, Hazairin concluded that the inheritance system according to Qur'an is individual bilateral.

Hazairin's thought that tends to interpret Islamic inheritance law bilaterally is antithetical to the opinion of Sunni scholars who tend to be on the patrilineal system. In building his thoughts, Hazairin used an alternative method that he developed himself, namely interpretive reconstruction. The operationalization of this interpretation pattern is pursued by compiling all the verses of the Koran and Hadith related to inheritance, then interpreting them as a single, mutually explanatory unit. In other words, the result of *ijtihad* or legal *istinbât* carried out by Hazairin on the texts of the *Qur'an* and *Hadith* is the result of reconstruction-interpretive thinking. In the end, Hazairin's bilateral inheritance law had a major influence on the formation of Islamic inheritance law in Indonesia, in addition to the Sunni Islamic inheritance law since 1950.¹⁴

After the Hazairin era, the reformer leader or re-actualization of Islamic inheritance law in Indonesia was Munawir Sadzali, the former Minister of Religious affair of Indonesia for the period 1986-1996. According to him, in the Qur'an, there are verses revealed to the Prophet Muhammad containing shifts or even cancellations of the laws against cases occurring before. If there has been a renewal during 22 years in the legal system in society, it might be possible to have such thing for 14 centuries.¹⁵

The idea of re-actualization Munawir's was also based on the policy of Umar ibn al-Khattab. According to him, Umar had adopted many policies in the law which did not fully comply with the verses of Al-Qur'an. The

¹³ Hazairin. *Hukum Kewarisan Menurut Al-Qu'an dan Hadis*. Jakarta: Tintamas, (2014), hal 13

¹⁴ Hazairin, *Ibid*.

¹⁵ Mursyid, H. "Menelusuri Faktor Sosial yang Mungkin Berpengaruh", dalam M. Wahyuni, et. al. [ed.], *Kontekstulisasi Ajaran Islam 70 Tahun Prof. Dr. H. Munawir Syadzali*. Jakarta: IPHI dan Paramadina, 2015), hal 13

most famous case was when he pursued a policy of distributing booty of war that was not in accordance with the instructions of Qur'an (Al-Anfal: 41). This policy, according to him, was supported by Usman bin Affan and Ali bin Abi Talib.

In the distribution of inheritance, An-Nisa: 11 clearly states that the rights of boys are twice as big as those of girls. But, this has been neglected a lot by the Indonesian Muslim society directly or indirectly. When he was the minister of religion, he received reports about many deviations from the provisions rules stated in Al-Qur'an from many religious judges in various regions, including those with strong Islamic traditions, such as South Sulawesi and South Kalimantan. For example, when a person dies, the close relatives request a fatwa from the religious court to issue a fatwa in accordance with the rules of *faraidh*. However, this fatwa is not used by the society. Instead, they asked the district court to treat other distribution systems that were inconsistent with *faraidh* law. it just isn't carried out by ordinary people, but also Islamic mass organization figures who understand Islamic knowledge.¹⁶

Meanwhile, many family heads take a pre-emptive policy, they do not apply 2: 1, but share a large part of their wealth to their children equally before passing away regardless of gender on the grounds as a gift so that when they die, the wealth that is must be divided by a little, or even completely. Such small assets can be divided in accordance with the *faraidh* law so that irregularities do not occur.¹⁷

Therefore, Munawir put forward his ideas about the re-actualization of Islamic law based on the attitudes practiced by the Islamic community itself, both educated and laymen. He argued that Al-Qur'an adheres to cancel (*nasakh*). Thus, the share 2: 1 between man and woman can be overturned. Because this is based on local Arab culture or costume, these rules can be overturned by another law in accordance with the last time (new costume). As happened in Indonesia, women are no longer under the protection of

¹⁶ Sriani, E. (2018). *Fiqih Mawaris Kontemporer : Pembagian Waris Berkeadilan Gender*. 1(2), 133–147. Tawazun: Journal of Sharia Economic Law, P-ISSN: 2655-9021, E-ISSN: 2655-9579. Volume 1, Nomor 2, <http://journal.stainkudus.ac.id/index.php/tawazun/index>. September 2018

¹⁷ Ramulyo, I. *Perbandingan Pelaksanaan Hukum Kewarisan Islam dengan Kewarisan Menurut KUH Perdata (BW)*. Jakarta: Sinar Grafika, 2014), 22.

men because they are able to work alone. For the sake of the dynamics and vitality of *sharia*, he advised Muslims to re-actualize Islamic law, especially in the field of inheritance or *faraidh*.¹⁸

Meanwhile, in the reform era until now, a group of liberal Islamic thinkers has emerged who carry the idea of counter legal drafting, namely the idea of opposing the Marriage Law and Islamic Law Compilation (KHI), including criticizing the provisions of Islamic inheritance. According to their research, classical Islamic law clearly violates universal basic principles, namely: the principle of equality (*al-musawah*), brotherhood (*al-ikha'*), and justice (*al-'adl*), as well as the basic ideas for the formation of modern society, such as pluralism, gender equality, human rights, democracy and egalitarianism. Therefore, they argue that Islamic law is discriminatory, anti-democratic, outdated, formal, radical, fundamental, theocentric, hard-faced, rigid, intolerant, irrelevant, and nuanced of conflict.¹⁹

Among the Islamic laws considered discriminatory are the law of marriage and inheritance. They say that Islam which denies the right to inherit between Muslims and non-Muslims contradicts the principle of democracy or an idea that believes in the principles of freedom, equality, egalitarianism, brotherhood, justice, pluralism, and human sovereignty to make decisions regarding public affairs.

According to them, Islamic inheritance law must be returned to its original spirit, namely in the context of family (*ulu al-arham*), descent (*nasab*) and marital ties whatever its religion. They argue that inheritance sharing rules for boys and girls is discriminatory or contrary to the principles of gender equality (*al-musawah al jinsiyyah*) and social justice. This law will marginalize and discriminate against women. The law born in a patriarchal society and culture where men are always the center of power is often considered normal in interpretation upon this law. Therefore, they propose that the distribution of the inheritance rights of men and women is equal or equal, namely 1: 1 or 2: 2.²⁰ This is the condition of Islamic law that

¹⁸ Fikri & Wahidin, F. & W. *Konsepsi Hukum Waris Islam dan Hukum Waris Adat (Analisis Kontekstualisasi dalam Masyarakat Bugis)*. Al-Ahkam: Jurnal Ilmu Syari'ah Dan Hukum, 2(2). <https://doi.org/10.22515/al-ahkam.v2i2.500>. 2017.

¹⁹ Majid, N. *Fiqih Lintas Agama: Membangun Masyarakat Inklusif-Pluralis*, (Editor: Mun'im A. Sirry). Jakarta: Paramadina, (2014), hal 165.

²⁰ Riyanto. *Neo Usul Fiqh: Menuju Ijtihad Kontekstual*. Yogyakarta: Fakultas Syariah

needs special attention and study. Therefore, it is necessary to contextualize legal verses that are practical and particular in order to conform to universal values and free from past local content (Arabism).

Thus, it can be concluded that the emergence of ideas and criticisms in Islamic inheritance law cannot be separated from the paradigm and interpretive approaches adopted by the scholars. This, in general, it has given rise to several groups of different thought and even seems contradictory in the current dynamics of Islamic inheritance law. First, *ulama* who wish to consistently apply the 2: 1 inheritance sharing rules for man and woman. They think that what is stated textually in the Qur'an cannot be refuted or changed.²¹

Second, *ulama* try to renew the meaning of Islamic inheritance law itself. According to them, the law of inheritance should not be seen from the figures set, but from the spirit of justice that is stored behind that number. Thus, they do not question if inheritance sharing rule is changed. This is because women were not burdened with earning a living in the past, so it was still considered based on the principle of justice. But in recent times, women have been required to earn a living; even in certain cases they are responsible for family support. This thought does not mean to leave the textual provisions in the Qur'an, but rather to capture the spirit and moral-ethical insight of the Qur'an itself because of the Islamic inheritance law was born from a context of Arab society at that time, not laws that were taken for granted.

Third, scholars who wanted to get out of the two extreme points. They agreed with the opinion of the second-group scholars, but did not dare to carry out the transformation as they did. As an alternative solution, they implement "the grant" for dividing inheritance. In this case, they allow parents to share their assets through a grant mechanism to their children equally, and leave a small amount for the benefit of the parents' life.²²

In addition, this phenomenon shows that many Muslims have abandoned

Press, (2014), hal 271).

²¹ Santoso, H. *Idiologi Patriarki dalam Ilmu-ilmu Sosial*. Proyek Penelitian PSW UGM, Yogyakarta: UGM Press, (2018), hal 56.

²² Haries, A. *Analisis Tentang Studi Komparatif Antara Hukum Kewarisan Islam dan Hukum Kewarisan Adat*. *Fenomena*, 6(2), 217. <https://doi.org/10.21093/fj.v6i2.169.2014>. 2017

Islamic inheritance law because of their inability to understand the method of calculating inheritance. They prefer simple methods or deliberation in order to avoid conflict and maintain good family relations. In addition, the decreasing number of scholars who are experts in this field has encouraged them to turn away from Islamic inheritance law and seek other means of sharing their inheritance. This social context has been used by liberal Islamic thinkers to change the provisions of inheritance law Islam directly or not, through their own ways and methods.

3. The relationship between inheritance and livelihood in justice concept

Justice is one of the principles in Islamic inheritance law. The desired justice is a balance between the rights obtained from the inheritance and the obligations that must be fulfilled by the heirs.²³ Justice in Islamic inheritance law is not only measured by the level of equality between the heirs, but also by the responsibilities assigned to them. However, the understanding of this principle has always been a polemic until now, namely about how to put the principle of justice in the distribution of inheritance in the context of today's society.

According to Muhammad Imarah, the differences in the provisions of Islamic inheritance are not based on the gender between men and women, but based on three categories. First, the degree of kinship between the heir, both male and female with the heir who died in which each who has a closer kinship with the heir will receive a larger share. The Second is the position of the heir in terms of time or generation. The heirs having longer future will receive a larger share than the older generation, both from the male line and from the female line. For example, a daughter gets a larger share of the inheritance from the mother, where both are women, but she also gets a larger share from the father. Meanwhile, from the male line, a boy gets a larger share of the inheritance from the father. In another word, the younger generation will receive a larger share than that of older generation. The third is the dependents of assets determined by *sharia* 'which must be fulfilled by certain heirs. This category is what ultimately differentiates between men and women, as Allah SWT says, "Allah requires for you about (the distribution

²³ Zahari, A. *Tiga Versi Hukum Kewarisan Islam: Syafi'i, Hazairin dan KHI*. Pontianak: Romeo Grafika. (2015), hal 25.

of inheritance for) your children in which the share of a boy is the same as that of two daughters (An-Nisa: 11).²⁴ The 2:1 ratio does not only apply between boys and girls, but also between husband and wife, between father and mother, and between brothers and sisters.²⁵ This category distinguishes male and female inheritance. This finally triggers a lawsuit from liberal thinkers and feminist figures because it is considered discriminatory and is no longer relevant to the context of life in Islamic society today.

Referring to the opinions of Muhammad Imarah and Salah al-Din Sultan, the difference in inheritance does not indicate that Islam (Qur'an) discriminate women or violates the principle of justice, but shows a balance of human rights and obligations in inheritance that has a strong relationship with other legal instruments, such as living and wills.

There is a provision for a boy to receive two parts of a daughter because the male is a condition of equal degree of kinship and the generation (offspring) is burdened with responsibility for the maintenance and dowry of his wife, who is actually a woman, at the same time bearing his unmarried sister. Meanwhile, for the woman herself, in addition to obtaining a share of the inheritance, she also obtains the right to support from the male party (husband or brother).²⁶ In this context, men are responsible for supporting their families, in contrast to women. If the daughter is not married yet, then she is the responsibility of her parents or guardian or brother. Meanwhile, after a woman is married, she will be the responsibility of her husband (male).²⁷

Islamic law does not oblige women to spend their assets for their own interests or the needs of their children, even though they are classified as wealthy, because providing family support is an obligation imposed on

²⁴ Imarah, M. *Al-Tahrir Al-Islami li Al-Mar'ah: al-Radd 'alaa Shubbht al-Ghulat*. Al-Qahirah: Dar al-Shuruq, (2016), hal 67.

²⁵ Umam, C. *Agama Menjawab Tantangan Pelbagai Masalah Abad Modern*. Surabaya: Ampel Suci, (2017), hal 101.

²⁶ Sultan, S. *Ternyata Wanita Lebih Istimewa*. Al-Qahirah: Dar al-Shuruq, (2017), hal 170.

²⁷ Ilyas. *Kedudukan Ahli Waris Nonmuslim terhadap Harta Warisan Pewaris Islam Ditinjau dari Hukum Islam dan Kompilasi Hukum Islam*. Kanun: Jurnal Ilmu Hukum, 17(1), 173–187. <https://doi.org/10.24815/kanun.v17i1.6058.2015>.

the husband.²⁸ On the other hand, in addition to receiving a share in the inheritance, girls will receive additional assets from the dowry and income when they are married, as well as not being burdened with the obligation to support their family. So, women actually become the full owners of every property they get without any obligation to spend it so that their assets will remain intact.

Apart from the provisions of the 2: 1 inheritance section, there are actually many things that prove how Islamic law actually provides a balance between men and women in inheritance rights and a living. Even they can get a bigger share of the men have more (stable) income. According to Salah al-Din Sultan, this can happen, namely women have the same rights or even greater than men if the women have dependents and a heavy burden of life.

Women can get half the share of men if they do not have heavy burdens and responsibilities, or he is able to overcome these burdens. Provisions like this are intended to compensate for human misunderstandings (regarding the share of inheritance which has so far been considered less pro-women in order to guarantee human life and keep women away from misery. The concept of security for human life in the form of inheritance is clearly different from the concept of guarantee in the economy of modern society, because Most forms of collateral today are inseparable from usury, fraud and so on which make it *haram*.

In general, the inheritance distribution model in Islam is not intended to determine the amount of assets, but rather is an effort to solve various family economic problems. As for the rights of women in living, it includes all conditions, where religion imposes the right to support men as an obligation.

This women's right is a privilege that must be fulfilled beforehand than other rights. This shows that justice in Islamic inheritance law is not only distributive justice (which determines the share based on the obligations borne by the family), but also cumulative, that is, the share of inheritance is also given to women and children.²⁹

Thus, Islam actually guarantees equal rights and obligations between

²⁸ Shabuni, M. A. *Pembagian Waris Menurut Islam*. Jakarta: Gema Insani Press, (2016), hal 13.

²⁹ Suma M., & Amin. *Hukum Keluarga Islam di Dunia Islam*. Jakarta: Raja Grafindo Persada, (2017), hal 124.

men and women. Even the inheritance law which is considered too siding with men is actually based on gender equality. It is only daily practices that make it seem as if Islam underestimates and is even said to hinder the progress of women.

The position of women (*as ashab al-furud*) and men (*as asabah*) in Islamic inheritance is not the same. This is what causes a man in certain cases to receive a double share of the inheritance of the woman's share, because according to *sharia* man has an obligation to provide for his family, including providing for his poor sister. Meanwhile, women are not burdened with the obligation to earn a living, even though they work. This is one of the lessons or legal consequences of the difference in inheritance rights of men and women.³⁰ Moreover, as the conclusion of Salah al-Din Sultan, the conditions or things that differentiate the share of male and female inheritance, namely the 2: 1 provision, are actually very limited in number when compared to several other things or conditions that affect the distribution of inheritance, where women are more benefited over men.

The difference between the inheritance rights of men and women does not need to be debated as long as the other legal instruments are applied. The problem now is not the demand for equal inheritance rights for women who are "forced" to participate in earning a living, but how these legal instruments of income and inheritance relations are fully implemented in the current context.

D. RESULTS AND DISCUSSION

Inheritance law is one part of civil law as a whole and is the smallest part of family law. The law of inheritance is closely related to the scope of human life, because every human being will die. The legal consequences that subsequently arise, with the occurrence of the legal event of a person's death, include the problem of how to manage and continue the rights and obligations of a person who dies. The settlement of rights and obligations as a result of the death of a person is regulated by inheritance law.³¹

The fairness of the distribution of inheritance between men and women is still a never-end topic to discuss. Various views of the classics assume that it has been final, because it has been written in *An-Nisa*; 11. Changing this

³⁰ Zuhdi, M. *Masa'il Fiqhyah*. Jakarta: PT. Gunung Agung, (2018), hal 207.

³¹ Rafiq, A. *Fiqh Mawaris*. Jakarta: PT. Raja Grafindo Persada, (2016), hal 14

provision is considered contrary to *sharia*, while contemporary people see it as a rule that is contextualized according to the times. One of the emergence of the contextual problem of Islamic law is the field of inheritance, as the general public assumes that Islamic inheritance tends to be gender biased, the difference in the ratio of the division between men and women is 2: 1 which textually shows that there are advantages given to men compared to women in terms of the distribution of inheritance, as contained in the letter An-Nisa 'verse 11 which has been explained above.³²

Islam has confirmed the existence of equality between men and women normatively in Surah Al-Hujarat; 13. Thus, it causes various groups to question the position of justice and have to reinterpret Islamic inheritance along with changes in social construction on the grounds that men get rights more than women because men have greater responsibility in terms of providing a living, but that is not absolute because seeing the current conditions shift and many women are the backbone of the family.³³

There is a provision for a boy to receive two shares of a daughter because a male is burdened with responsibility for the living and the dowry of his wife, who is actually a woman, as well as to bear his unmarried sister. Meanwhile, for the woman herself, in addition to receiving a share of the inheritance, she also obtains the right to support from the male (husband or brother). In this context, men are responsible for supporting their families in contrary with the women. If the daughter is not married yet, she is in her own her parents' responsibility, guardians or brothers. When a woman is married, it will be the responsibility of her husband.³⁴

Islamic law does not oblige a woman to spend her assets for her own benefit or the needs of her children, even though she is classified as a rich, because providing family support is an obligation that is imposed on the husband (male), on the other hand, the daughter, apart from obtaining inheritance, will receive the addition of assets from the dowry and income when married at the same time is not burdened with the obligation to

³² Khisni. *Hukum Waris Islam*. Semarang: UNISSULA Press, (2017), hal 23

³³ Sadri, I., Oktariadi. *Pembagian Harta Warisan Menurut Adat Aneuk Jamee di Kecamatan Samadua Aceh Selatan*. Al-Mursalah Vo. 3 No. 2 Desember 2017 p, ISSN: 2442-7268 e 2621-8470. 2017.

³⁴ Pongoliu, H., Jafar, U., Djalaluddin, M., & Sanusi, N. T. *Eksistensi Hukum Waris Adat dalam Masyarakat Muslim*. *Jurnal Diskursus Islam*, 06(2), 361–401.2018.

support his family. So, women actually become the full owners of every property they get without any obligation to spend it so that their assets will remain intact. Women can get half the share of men if women do not have heavy burdens and responsibilities. Provisions like this are intended to compensate for human misunderstandings regarding the inheritance that has been considered less pro-woman in order to guarantee human life and keep women away from misery. The concept of guarantee for human life in the form of inheritance is clearly different from the concept of guarantee in the economy of modern society, because most forms of security today are inseparable from usury, fraud, and so on which make it *haram*.

In general, the model for the distribution of inheritance in Islam is not intended to determine the amount of assets, but rather is an effort to solve various family economic problems. The rights of women in living cover all conditions, where religion imposes the right to support men as an obligation. This women's right is a privilege that must be fulfilled before other rights. This shows that justice in Islamic inheritance law is not only distributive justice (which determines the size of the portion based on the obligations imposed on the family). However, if it is cumulative, that is, part of the inheritance is also given to women and children.

Thus, Islam actually guarantees equal rights and obligations between men and women, even inheritance law which is considered too siding with men. In fact, it is based on gender equality, but in daily practice, this rule sometimes makes Islam seem underestimates and is even said to hinder the progress of women. The difference between the inheritance rights of men and women does not need to be debated, as long as the other legal instruments are applied. The problem now is not the demand for equal inheritance rights for women who are forced to participate in earning a living, but how the legal instruments of income and inheritance relations are fully implemented in the current context.

Changes in the conditions and times greatly affect the change in the position of women and men in the social strata, where women no longer only take care of kitchen, home, and other matters, but often women work in the public sphere and often become the main support for the family economy, so this might have an influence on the pattern of life in society,

including the distribution of inheritance.³⁵

Thus it is very clear that the Al-Qur'an and Hadiths must be correct and proper in law, but humans are less able to understand the interpretations stated in the contents Al-Qur'an and Hadith. Humans also have to understand the text as well as the context.

E. CONCLUSIONS

The emergence of thoughts and ideas that criticize classical Islamic inheritance law is not without reason. As previously explained, the emergence of this critical thinking departs from the polemic of the 2: 1 (two to one) provision between boys and girls in the distribution of inheritance. This provision has generally sparked debate among scholars and Muslims themselves. First, scholars who wish to remain consistently applying the 2: 1 provision in the distribution of inheritance for sons and daughters as the argument for *qath'i*. Second, thoughts that try to renew the meaning of Islamic inheritance law by not sticking to the numbers set, but based on the spirit of justice that is stored behind that number. Third, scholars who want to get out of the two extreme points. They agreed with the opinion of the *ulama* of the second group, but did not dare to carry out the transformation as was taken by the *ulama* of the second group. As an alternative solution, they took a grant method.

³⁵ Nawawi. *Pengantar Hukum Kewarisan Islam*. Surabaya: Pustaka Raja, (2015), hal 16.

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