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## CRITICISM OF THE ISLAMIC INHERITANCE DISTRIBUTION SYSTEM PERSPECTIVE OF THE PRINCIPLE OF PROPORTIONALITY.

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ARTICLE INFO	ABSTRACT
<p><i>Article History</i> <i>Recieved Maret 2023</i> <i>Accepted Mei 2023</i> <i>Available Agustus 2023</i></p>	<p>This study is motivated by the debate about the existence of inheritance law in Islam, which is often stigmatized as a law that is not friendly to equality between men and women. This background will then be examined in this paper by offering a perspective on the principle of proportionality as the basis of Islamic inheritance law. Through the normative-doctrinal method of legal studies, this study concludes that the principles of inheritance are eclectic between the principle of proportionality and the principle of justice. This has implications for social propriety, which may differ from one period of time to another or from one community to another.</p>
<p><i>Keywords:</i> <i>Principle of Proportionality, Islamic Inheritance Law</i></p>	

**A. Introduction**

Any legal system can never be separated from the principles that guide it.<sup>1</sup> Moreover, Islamic law must be dogmatically believed to be perfect. It is not difficult to find the characteristics of Islamic law that have been introduced in such a way by experts who are concerned with the issue of Islamic legal philosophy. The characteristics that cannot be rivaled by any man-made legal system are its flexibility and compatibility with the demands of the times, so that, whether it is recognized or not, Islamic law will be able to speak across time and space.<sup>2</sup> But of course, this does not mean that Islamic law cannot be approached through human ijtihadist reasoning, since in His wisdom, He has opened wide opportunities for the creation of ratios to prove the greatness of the Shari'ah, which was prepared not only for a certain period of time and community.<sup>3</sup>

One of the issues that is still always present in the arena of debate is the issue of inheritance law. On the one hand, the law of inheritance must be accepted as it is because the status of the verse is qat'i, so that ijtihad becomes "barren". But on the other hand, the issue of inheritance is considered as one of the provisions that are not considered as absolute provisions, considering that for those who think so, the issue of qat'i-dzanni is not in the sound of the text, but in the values and objectives contained behind the text, - to borrow the thought of Najamuddin al-Thufi, the benefits behind the text must be prioritized over the nash itself.<sup>4</sup> This understanding has implications for the permissibility of reformulating the provisions of inheritance distribution as long as the objectives desired by the spirit of the verse can be achieved.

Departing from the above problems, it is necessary to examine one of the principles contained in the Islamic inheritance law system. However, it needs to be emphasized that in this paper, it only focuses on examining the theoretical principle of proportionality in terms of the share between boys and girls with a size of two to one. Thus, this paper aims to portray the location of the principle of proportionality in the Islamic inheritance law system, especially regarding the share between boys and girls. This study is important, at least to complement several studies that both examine the issue of inheritance in Islam but did not succeed in portraying the principle of proportionality as the focus of the study. The intended studies are, among others

**B. The Principle of Proportionality as a Principle of Islamic Inheritance Law**

Inheritance law, like other laws, has principles as its foundation. The word principle itself which is linguistically derived from Arabic *asasun* when coupled with the word law, means the truth that is used as a foundation for thinking and argumentation for the implementation of a law.<sup>5</sup>

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<sup>1</sup> Satjipto Rahardjo, *Ilmu Hukum* (Yogyakarta: Genta Publishing, 2002), 16.

<sup>2</sup> Yusuf al-Qardhawi, *al-Syariah al-Islamiyah Shalihah li al-Tatbiq fi Kulli Zaman wa Makan* (Qatar: Maktabah Islamiyah, 1997), 28.

<sup>3</sup> Yusuf al-Qardhawi, *al-Ijtihad fi al-Syariah al-Islamiyah* (Dhoha: Maktabah al-Nur, 1998), 23.

<sup>4</sup> Muhammad Roy Purwanto, *Dekonstruksi Teori Hukum Islam* (Yogyakarta: Kaukaba, 2009), 34.

<sup>5</sup> Mohammad Daud Ali, *Hukum Islam: Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: Rajawali Pers, 2014), 126.

In relation to inheritance law, there are several principles put forward by scholars as legitimization for its implementation. Among others are the Ijbari (compelling) principle, namely that an inheritance must be transferred to the heirs and the heirs cannot refuse the transfer of the intended property; bilateral principle, which wants everyone to receive inheritance rights from both sides both from the male line and the female line.<sup>6</sup>

The implementation of the ijbari principle in Islamic inheritance law means that the transfer of property from a deceased person to his heirs takes place according to the will of Allah without depending on the will of the deceased or his heirs. The element of coercion in the sense of terminology is seen from the fact that the heir is forced to accept the fact of the transfer of property to him in accordance with what has been determined. And this is different from inheritance according to civil law (BW), in which the transfer of inheritance rights depends on the will of the inheritor as well as the actions and will of the heirs who will inherit, not on their own.<sup>7</sup>

In this bilateral principle, it is clear that Islamic inheritance law is a critique of inheritance practices that occurred in the early days of Islam, where inheritance rights were only owned by men while women did not have access to inheritance property and were often used as objects that could be inherited. This practice is supported by the fact that during the Jahiliyah period, the reason for inheritance was based on the strongest party to fight, in this case, of course, women were not included in this category so they did not get any inheritance at all.<sup>8</sup>

Another principle that is also inherent in the Islamic inheritance system is the Individual principle. This individual principle is: each heir (individually) is entitled to the share obtained without being bound to other heirs. Thus the part obtained by the heir individually is entitled to get all the property that has become his share. This provision can be found in the provisions of the Qur'an letter An-Nisa verse 7 which states that the share of each heir is determined individually.<sup>9</sup>

Another principle that is no less important is the principle of balanced justice. In this case, it is intended as a balance between rights and obligations and a balance between what is obtained and needs and uses. Thus, the distribution of inheritance property is not based on the "gender factor."<sup>10</sup> This principle in this study is stated as the principle of proportionality which is intertwined with aspects of justice. The principle of proportionality itself means that there is a proportional balance between rights and obligations.

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<sup>6</sup> Gisca Nur Assyafira "Waris Berdasarkan Hukum Islam Di Indonesia", *Al-Mashlahah: Jurnal Hukum Islam dan Pranata Sosial Islam*, Vol : 08, No : 1, Mei 2020, 74.

<sup>7</sup> Wasdikin, "Asas Hukum Kewarisan Islam Sebagai Parameter Dalam Menyelesaikan Masalah Waris" *Al-Ahwal Al-Syakhsiyah: Jurnal Hukum Keluarga dan Peradilan Islam* ISSN: 2745-8741(p), 2746-3990 (e)

<sup>8</sup> Kasuwi Saiban, *Hukum Kewarisan dalam Islam* (Malang: UNMER, 2011), 10.

<sup>9</sup> Jamhir, "Hukum Waris Islam Mengakomodir Prinsip Hukum Yang Berkeadilan Gender", *TAKAMMUL: Jurnal Studi Gender dan Islam serta Perlindungan Anak Jamhir*, Volume 8 Nomor 1 Januari-Juni 2019, 16.

<sup>10</sup> Ibid.

In this sense, it is no exaggeration that proportionality is associated with the meaning of balance. In other words, balance means equality, comparability in amount, size, or position. In the perspective of contracts, the principle of balance emphasizes that the bargaining position of the parties must be balanced. The absence of balance in the position of the parties results in an unbalanced contract and opens up opportunities for intervention by the authorities to balance it.<sup>11</sup>

In this case, the principle of proportionality is also intertwined with the idea of justice, at least in the concept of distributive justice taught by Aristotle. In his teaching, Aristotle defines distributive justice as the distribution of goods and services according to their position. Such a definition implies an understanding of proportional distribution, in other words, the same proportion will be given to the same people, otherwise people who are not the same will certainly get a different distribution, so that everyone is treated the same for the same thing and treated differently for different things.<sup>12</sup> While commutative justice is justice that does not distinguish the position or position of individuals to get the same legal treatment.<sup>13</sup>

In relation to the principle of proportionality above, it can be said that in the Islamic inheritance system, the inheritance received by the heirs from the testator is essentially a continuation of the testator's responsibility towards his family. This is at least justified by many verses in the Qur'an such as in the Qur'an letter al-Baqarah verse 233 and al-Tahrim verse 7 which explains the obligation of a man as a guarantor for the life of his family. This responsibility is a religious obligation that he must carry out, regardless of whether the people under his responsibility need it or not.<sup>14</sup>

### **C. Criticism of the Two to One Division Formula**

The two-to-one share is the share that will be obtained by sons and daughters. Before elaborating further on this issue, it is very important to first present the number of shares to be obtained by men and women in general, although in the end this discussion - as the author has stated in the background of the problem - will be led to a specific issue, namely the two-to-one share for boys and girls.

Talking about the share of men and women in inheritance will appear at least two possibilities. The first possibility is that both get the same amount, which is the case with mothers and fathers who both get one-sixth in the event that the testator leaves biological

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<sup>11</sup> Mohammad Iqbal Rahmawan, "Penerapan Asas Proporsionalitas Dalam Perjanjian Waralaba", *NOTARIUS, Volume 12 Nomor 2 (2019)*, 913.

<sup>12</sup> Zakki Adlhiyati dan Achmad, "Melacak Keadilan dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, dan John Rawls", *Undang: Jurnal Hukum*, Vol. 2, No. 2 (2019), 418.

<sup>13</sup> Setiyowati, *Rekonstruksi Peraturan Perundang-Undangan Berbasis Keadilan* (Malang: Intrans Publishing, 2021), 26

<sup>14</sup> Rahmat Haniru, "Hukum Waris Di Indonesia Perspektif Hukum Islam Dan Hukum Adat", *AL-HUKAMA: The Indonesian Journal of Islamic Family Law Volume 04, Nomor 02, Desember 2014*, 465.

children (Qs. An-Nisa: 11). Similarly, brothers and sisters both get one-sixth in the case of a testator who does not have direct heirs (Qs. An-Nisa: 12).<sup>15</sup>

While the second possibility is that men get a larger share than the share that women will receive. This possibility occurs when the heirs are sons and daughters (Qs. An-Nisa: 11) and brothers and sisters (Qs. An-Nisa: 176). In addition, the widower will get twice the amount that a widow will get, namely half to a quarter when the testator does not leave children, and when the testator leaves children, the share that will be obtained by the widower and a widow is a quarter to an eighth (Qs. An-Nisa: 12).<sup>16</sup>

Back to the share of sons and daughters, which is explicitly stated in verse 11 of Surah an-Nisa. The translation of the verse in question is:

*"Allah has prescribed for you the division of inheritance for your children: the share of a son is equal to the share of two daughters. And if the children are all daughters and there are more than two of them, then their share is two-thirds of the property left behind. If she (the daughter) is alone then she gets half the property left behind. And for the two mothers and fathers, a share of one-sixth each of the property left behind if he (the deceased) has children. If he (the deceased) has no children and he is inherited by his mother's father alone then his mother gets a third. If the deceased has several brothers then his mother gets one-sixth. (The above distributions shall be made after the fulfillment of his will or the payment of his debts. (As for your parents and your children, you do not know which of them will benefit you more, but this is the decree of Allah. Indeed, Allah is all-knowing and all-wise)".<sup>17</sup>*

In its asbab al-nuzul, this verse was revealed regarding the wife of Sa'd Ibn Abi Rabi', as narrated by Jabir Ibn Abdillah. In the narration it is said that the wife of Sa'd came to the Prophet with her two daughters, then she said that the two daughters were the daughters of Sa'd who died on the battlefield while accompanying the Messenger at the time of the battle of Uhud. The woman complained to the Prophet about the treatment of the uncle of her daughters who took all of Sa'd's inheritance. So in this case, the verse was revealed by Allah<sup>18</sup>

What needs to be highlighted from the above-mentioned verse is the two-to-one division formula between the shares of sons and daughters. Various legal wisdoms are put forward to reinforce the fairness and balance in the two-to-one formula. One of the reasons for this is that women's needs are always met because their maintenance is the responsibility of men, and even after marriage, a woman's maintenance is borne by her husband.<sup>19</sup>

<sup>15</sup> Amir Syarifuddin, *Op. Cit.*, 25.

<sup>16</sup> *Ibid.*

<sup>17</sup> Departemen Agama RI, *al-Quran dan Terjemahnya* (Mamlakah al-'Arabiyah: Khadim al-Haramain al-Syarifain, T.th), 116.

<sup>18</sup> Al-Wahidi, *Asbab al-Nuzul* (Beirut: Darul Kutub, 1991), 97.

<sup>19</sup> Zaitunah Subhan, *al-Quran dan Perempuan: Menuju Kesetaraan Gender* (Jakarta: Kencana, 2015), 312.

The next reason is related to the fact that there is no obligation for a woman to give alms to others while men have responsibilities towards their families and relatives. This means that a man's expenses and financial burden would be greater than that of a woman. Also, after marriage, it is the man who has the obligation to pay the dowry in addition to other needs related to the fulfillment of his wife's nafakah.<sup>20</sup>

The same reason is explained in the translation of the Quran by the team of the Ministry of Religious Affairs of the Republic of Indonesia. In it, it is stated that the male share is twice the female share because the obligations of men are heavier than women, such as the obligation to pay the bride price and provide maintenance.<sup>21</sup> This reason is more or less the same as the view of the famous Indonesian tafsir expert, Quraish Shihab. In his view, the double number of parts obtained by men when compared to the number of half the parts obtained by women in the end will be the same even women who will actually get more when compared to men. By basing it on a mathematical view, Quraish further explains that the man's double share will decrease when he has to bear the obligation of maintenance and the obligation to pay dowry, while the woman's share will remain intact and may even increase when she has to receive maintenance and dowry from the man.<sup>22</sup>

Of course, on the one hand, the reasons put forward above can be justified. If indeed the reason why boys get more shares than girls is due to the responsibilities they carry, including in terms of providing maintenance and dowry, on the one hand it is quite logical considering that it is normal when someone gets a reward according to the results of his achievements. But on the other hand, the above reasons can also be questioned for their consistency, because there is a distribution formula that equates the shares of men and women, namely mothers and fathers both get one-sixth in the event that the heir leaves biological children (Qs. An-Nisa: 11). Similarly, brothers and sisters both get one-sixth in the case of a testator who does not have direct heirs.<sup>23</sup>

Based on the description above, what the system of inheritance distribution in Islam actually wants to present is the aspect of justice and proportionality associated with the roles and responsibilities that will be carried out, not located on the size of each gender. Because it is very dependent on roles and responsibilities, it is possible that the inheritance distribution formula can change according to the situation and conditions that require it.

To strengthen the above view, it can be examined through thoughts in the existentialism philosophy school, which is commonly distinguished between humans as essences and roles and responsibilities, careers, social positions and others as existences.<sup>24</sup> Humans as essences are no different from other creatures created by God.

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<sup>20</sup> Zaitunah Subhan, *al-Quran dan Perempuan*, 312.

<sup>21</sup> Depag RI, *Op. Cit.*, 166

<sup>22</sup> M. Quraish Shihab, *Perempuan* (Jakarta: Lentera hati, 2010), 289.

<sup>23</sup> Amir Syarifuddin, *Op. Cit.*, 25.

<sup>24</sup> Ali Maksum, *Pengantar Filsafat: Dari Masa Klasik Hingga Postmodernisme* (Yogyakarta: Ar-Ruzz Media, 2008), 363-368.

However, through existence, humans can become the human beings they want to be. With reference to this philosophical understanding, it is not correct to say that responsibility is a patent thing that applies on a taken for granted basis.

From this side too, the obstacle to reconstructing the pattern of distribution of inheritance property because it is often stated as a qat'i verse and thus - as expressed by Abdul Wahhab Khallaf - can no longer be an area of ijthadi.<sup>25</sup> This doctrine of qat'i-ness can also be debated. Indeed, there are provisions about nash that are qat'i and dzanni, but to determine the area of both is a matter of ijthadi. As usual with ijthadi matters, of course, the truth is relative.

To declare the issue of qat'i and dzanni as an ijthadi area, the views of Masdar Farid Mas'udi can be put forward. According to him, the term Qat'i-Dzanni is never mentioned in the Qur'an and al-Sunnah, so it is purely a creation of the scholars in the discipline of fiqh as a shortcut to avoid a heated debate about muhkam and mutasyabih verses. Thus, the term muhkam-mutasyabih has more connotations to non-legal verses, while Qat'i-Dzanni has more connotations to legal verses.<sup>26</sup>

Similarly, regarding the terms muhkam and mutasyabih, both are also ijthadi areas so that it becomes a debate among scholars. As Yusuf al-Qardhawi explained by quoting the book "Aqawil al-Tsabit" written by Shaykh Mar'i. In his description of the meaning of Muhkam-Mutasyabih, various definitions are presented as follows. Muhkamat means clear, mutasyabihat is the opposite; Muhkamat is that which cannot be interpreted and has only one meaning, while mutasyabihat is that which contains several meanings; Muhkamat is that which cannot be interpreted, while mutasyabihat is that which cannot be known except by interpreting it first; Muhkamat is a word that is not repeated, while mutasyabihat is stories and parables; Muhkamat is that which can be known by those who are knowledgeable, while mutasyabihat is that which is known only by Allah; Muhkamat is the letter muqata'ah at the beginning of the letter, while mutasyabihat is that which is not the letter muqata'ah; Muhkamat is a verse that can be known even with interpretation, while mutasyabihat is known only by Allah, like the letter muqata'ah; Muhkamat is that which does not have various possibilities, while mutasyabihat is that which contains various contradictory possibilities. Mutasyabihat can appear in the form of musytarak (containing many meanings) such as al-Qar' which means chaste or menstrual, as well as the word al-lams which means touching and having marital relations.<sup>27</sup>

#### **D. Proportionality of Islamic Inheritance Distribution**

From the previous descriptions, it clearly shows that the system of distribution of inheritance in Islam does not lie in the size of the sex of each heir but emphasizes more on the functions that will be carried out, so that thus, the formula for distributing

<sup>25</sup> Abdul Wahab Khallaf, *Ilm al-Ushul al-Fiqh* (Beirut: Dar al-Kutub Ilmiah, 2007), 173.

<sup>26</sup> Masdar Farid Mas'udi, "Memahami Ajaran Suci Dengan Pendekatan Transformatif" dalam, *Polemik Reaktualisasi Ajaran Islam* (Jakarta: Pustaka Panjimas, T.th), 184.

<sup>27</sup> Yusuf al-Qardhawi, *Akidah salaf dan khalaf, (terj)*, (Jakarta: Pustaka al-Kautsar, 2006), 23.

inheritance can be different from one period to another based on the level of needs and responsibilities that will be carried out by each heir.

This is made clearer by referring to the concept of distributive justice proposed by Aristotle. In this case, each heir will get the amount of inheritance in accordance with the duties and responsibilities he will carry out. In other words, the greater the responsibility, the greater the amount of inheritance he will receive. It is possible that women have greater responsibilities than men. This is because, in reality, there are countless women who contribute to the family economy, as well as a woman's intellectual abilities. All of this rejects the doctrine of male superiority over women, which implies that the amount of inheritance for a woman is less than that of a man.<sup>28</sup>

The principle of proportionality that is the basis of the analysis in this article is based on sociological reality, so that it can reconstruct the distribution pattern that has been stipulated in the provisions of inheritance law. This is because it can be stated that the division of inheritance known in the Islamic inheritance law system is a sociological reality that is also in accordance with the conditions of Arab society when the Qur'an was revealed. This means, even though the text of inheritance is understood as *dalalah qat'iyah*, but if in terms of its implementation it contradicts the values of justice that develop in people's lives, it is not impossible, *ijtihad* on it is still relevant so as to produce a legal formulation that is implementative.<sup>29</sup>

It must be recognized that the value of justice that develops in community life, which in *fiqh* rules is commonly expressed as *adat*, can be qualified as a legal provision that cannot be overridden. It is very common to know the rule that states that *al-adat muhakkamah*.<sup>30</sup> In line with this rule, the inheritance verse is also a legal rule that is in accordance with the socio-historical conditions of Jahiliyah Arab society in the 7th century AD, so it is not surprising that the legal formulation that emerges is a legal formulation that is in line with patriarchal social conditions.<sup>31</sup>

So in order to produce a division of inheritance that is in line with the principle of proportionality, at least two things can be considered. First, in the distribution of inheritance, it is necessary to consider the benefits that will be obtained for the heirs. In this case, it will certainly be more useful for the inheritance left by the testator if it is given to the heirs who are more in need. Second, what needs to be considered is the role of the heirs towards the testator while the testator is still alive. The greater the role shown by the heirs, the greater the share of the inheritance that will be obtained.<sup>32</sup>

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<sup>28</sup> Musdah Mulia, *Eksiklopedia Muslimah Reformis* (Tangerang: Baca, 2020), 713.

<sup>29</sup> Imron Rosyadi, *Rekonstruksi Epistemologi Hukum Keluarga Islam* (Jakarta: Kencana, 2022), 301.

<sup>30</sup> Al-Burno, *al-Wajiz fi Idhah Qawaid al-Fiqh* (Riyadh: Maktabah al-Risalah, 1998), 45.

<sup>31</sup> Mulia, *Eksiklopedia Muslimah*, 713.

<sup>32</sup> Rosyadi, *Rekonstruksi Epistemologi*, 302.



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