

## **Analysis of the Principle of Justice in the Division of Inheritance between Men and Women from the Perspective of the Civil Code and Islamic Law**

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### **Abstract**

This study aims to determine and analyze the principle of justice in the division of inheritance between men and women according to the Civil Code and Islamic Law. The research method in this writing uses a normative legal research method with a comparative law approach. Legal materials are also obtained through literature studies of laws and regulations, fiqh books and various literature relevant to the research. The results of this study indicate that civil inheritance law basically refers to the principle of justice that is ephaliter or equal. The justice applied is commutative justice where men and women have the same rights in receiving inheritance, while in Islamic law the distribution of inheritance is based on the principle of justice that regulates the rights of each party according to their roles and responsibilities in the family. The justice applied by Islamic law is distributive justice, men generally get twice as much as women. It is better if the distribution of inheritance is not only based on written law but must also consider justice for all parties, although civil inheritance law does not distinguish between genders in the distribution of inheritance, it is important to uphold the value of justice in its implementation so that there is no inequality in the distribution of inheritance.

**Keywords:** Justice, Inheritance, Civil Code, Islamic Law, Men, Women.

### **Abstrak**

*Penelitian ini bertujuan untuk mengetahui dan menganalisis asas keadilan pada pembagian warisan antara laki-laki dan perempuan menurut KUHPerdara dan Hukum Islam. Metode penelitian dalam penulisan ini menggunakan metode penelitian hukum normatif dengan pendekatan perbandingan hukum. Bahan hukum juga diperoleh melalui studi pustaka terhadap peraturan perundang-undangan, kitab-kitab fiqh serta berbagai literatur yang relevan dengan penelitian. Hasil penelitian ini menunjukkan bahwa hukum waris perdata pada dasarnya mengacu pada asas keadilan yang bersifat ephaliter atau setara. Keadilan yang diterapkan ialah keadilan komutatif dimana laki-laki dan perempuan memiliki hak yang sama dalam menerima warisan, Sedangkan didalam hukum islam pembagian warisan*

*didasarkan pada prinsip keadilan yang mengatur hak-hak masing-masing pihak sesuai dengan peran dan tanggung jawab dalam keluarga. Keadilan yang diterapkan hukum islam ialah keadilan distributif, laki-laki umumnya mendapatkan bagian dua kali lipat dibandingkan perempuan. Sebaiknya pembagian harta warisan tidak hanya berdasarkan hukum tertulis tetapi juga harus mempertimbangkan keadilan bagi semua pihak, walaupun hukum waris perdata tidak membedakan jenis kelamin dalam pembagian warisan, penting untuk menjunjung nilai keadilan dalam pelaksanaannya agar tidak terjadi ketimpangan dalam distribusi harta peninggalan.*

**Kata Kunci:** *Keadilan, Warisan, KUHPerdata, Hukum Islam, Laki-Laki, Perempuan.*

## **A. INTRODUCTION**

Inheritance refers to inherited property, heirlooms, and wills. Inheritance comes from the word "waris." The word "waris" itself refers to various rules regarding the transfer of property rights from a deceased person to their heirs. Inheritance is given to the heirs upon their death. This inheritance can take the form of movable or immovable property. Movable property can include vehicles, precious metals, certificates of deposit, and other assets, while immovable property includes houses and land.[1]

The distribution of inheritance in Indonesia, based on legal inheritance laws, includes customary inheritance law, civil inheritance law, and Islamic inheritance law. Customary inheritance law is the distribution of inheritance based on customary law, which still strongly applies to Indonesian tribes. Civil inheritance law can be considered Western inheritance law, which applies to non-Muslims. Islamic inheritance law is the distribution of inheritance based on the Quran for individuals who are Muslim. In civil law, the legal basis of which is the Civil Code or Burgerlijk Wetboek (BW), there are three conditions for inheritance, namely:[2]

- 1) People who die as heirs
- 2) Heirs
- 3) Abandoned assets

Inheritance is wealth, which can be assets or liabilities of the testator, transferred to the heirs. Islamic inheritance law stipulates that a person becomes an heir based on marriage, blood relationship, and the emancipation of a slave. Inheritance rights are granted to parents and children by blood relationship, while inheritance rights are granted to married couples. If there are heirs, they are only the husband and wife, children, mother, or father.

The government, through Presidential Instruction Number 1 of 1991, established the Compilation of Islamic Law (KHI), a collection of opinions by Islamic legal experts (mujtahids) adapted to the conditions of Indonesian society, to serve as the legal basis for the implementation of Islamic inheritance law. If there are disputes regarding Islamic inheritance law, heirs who are denied their rights can file a lawsuit with the Religious Court (PA), as this institution is trusted by the government to resolve Muslim issues, including inheritance law. Religious Courts resolve these legal cases based on Law Number 7 of 1989 concerning Religious Courts, as amended by Law Number 3 of 2006 concerning Religious Courts.[3]

The existence of the legal basis above is an effort by the government to provide facilities for the community in carrying out their religious obligations. However, many parties question whether the principle of "fairness" in the distribution of inheritance between men and women can be maintained, or whether there is a need for reform in inheritance law, whether based on the Civil Code or Islamic Law, to better reflect the values of justice and equality today. Where from the perspective of the Civil Code, although the basic principles adopted are justice and equality, in reality, women often receive a smaller share in the distribution of inheritance, especially when considering the traditions prevailing in Indonesia which are also influenced by custom. Meanwhile, in Islamic Law, although there is a clearer division between men and women, questions often arise about whether this division still aligns with the principles of justice in the modern context.[4]

In the Qur'an, Surah An-Nisa, verse 11, which reads: "Allah has ordained for you (the division of inheritance for) your children, (namely) the share of a son equal to the share of two daughters. And if the children are all daughters, more than two, then their share is two-thirds of the estate left behind. If she (the daughter) is only one, then she gets half (the estate left behind). And for the two parents, each of them a share of one-sixth of the estate left behind, if he (the deceased) has children. If he (the deceased) has no children and he is inherited by his two parents (only), then his mother gets one-third. If he (the deceased) has several siblings, then his mother gets one-sixth. (The above divisions) after (fulfillment) of his will or (and after payment) of his debt. (As for) your parents and your children, you do not know which of them is of greater benefit to you. This is God's decree. Indeed, Allah is All-Knowing, All-Wis.[5] From the background description, the author is interested in studying in more depth the topic "Analysis of

the Principles of Justice in the Division of Inheritance between Men and Women from the Perspective of the Civil Code and Islamic Law".

## **B. METHOD**

This research uses a normative juridical type of research. [6] Normative research is legal research that positions law as a system of norms, the intended normative system being the legal principles, norms, rules of legislation, agreements, and doctrines. The collection of legal materials in normative legal research uses primary and secondary legal materials. The primary legal materials used are legislation, while secondary legal materials are taken from literature, the opinions of legal scholars, books, magazines, and journals relevant to the title or previous research. The legal material collection technique used is a comparative legal approach. The author also collects literature that includes scientific works, books, and articles related to the research. The analysis of the legal materials collected by the author is then classified and analyzed to produce conclusions from the materials obtained according to the problems discussed. These conclusions or messages from the various materials that have been analyzed are used to examine and discuss the problems studied by the author in this study.

## **C. DISCUSSION**

### **1. The Principle of Justice in the Division of Inheritance Between Men and Women in the Civil Code**

The justice of inheritance distribution in the Civil Code follows two of the three theories of justice (commutative justice, distributive justice, and indicative justice) proposed by Aristotle. The two theories of justice applied in Civil Code inheritance are cumulative justice and distributive justice. Commutative justice is defined as the treatment of a person regardless of the services they perform, namely that each person receives their due.[7] The application of cumulative justice is evident in the equal distribution of inheritance without distinction of gender or services of certain parties to the first, third, and fourth classes up to the sixth degree. Distributive justice, on the other hand, is the treatment of individuals according to their services rendered, meaning that each individual receives their respective capacities and potential. The application of distributive justice is evident in the distribution of inheritance to the second class, where the father's and mother's share cannot be less

than one-quarter of the inheritance, considering their significant contributions to their children. Meanwhile, Aristotle's third theory of justice, indicative justice, is not applied to BW inheritance because it is a form of retribution for a crime committed.

In the Western concept of inheritance, the husband/wife and children/descendants of the testator hold a very special position because their presence, or one of them, excludes heirs from the next class (siblings, parents, grandparents, or uncles) from the testator's inheritance. The husband/wife and all descendants are entitled to an equal share of the inheritance. Article 852 Paragraph 1 of the Civil Code states, "... without distinction between men and women and without distinction based on prior birth." Meanwhile, Article 852 Paragraph 2 of the Civil Code states: "They inherit equal shares head by head.."[8]

The classification of heirs in the Civil Code into four groups aims to determine which heirs are prioritized in the distribution of inheritance, so that heirs of the second group cannot inherit the inheritance if heirs of the first group are still alive. This means that as long as there are still biological children of the testator or their descendants, the children of the testator's parents, siblings, or half-siblings of the testator are not entitled to inherit. Likewise, heirs of the third and fourth groups are "closed" to heirs of the second group. However, heirs of the third and fourth groups may inherit jointly in different ways, namely inheriting directly and inheriting by replacing the position of the previous heir.[9] In contrast to customary and Islamic legal systems regarding inheritance, according to the two legal systems above, inheritance or inherited property refers to the net assets of the testator, after deducting the payment of the testator's debts and other payments resulting from the testator's death. Therefore, the assets received by the heirs according to Islamic and customary legal systems are truly their rights, free from the claims of the testator's creditors.[10]

Constitutional Court Decision Number 46 regarding the Judicial Review of Law VIII of 2010 is an important turning point in inheritance law in Indonesia, particularly regarding the inheritance rights of illegitimate children. Prior to the Constitutional Court decision, Article 43 paragraph (1) of Law Number 1 of 1974 concerning

Marriage stated that:[11] "a child born out of wedlock only has a civil relationship with his mother and his mother's family, so he does not have the right to inherit from his biological father." This provision creates discrimination against illegitimate children because it automatically closes the possibility of the child having a civil relationship with his biological father, including in terms of inheritance. The application for judicial review of this Article was filed by Machicha Mochtar who fought for the recognition of illegitimate children who have blood relations with their biological father. Through this decision, the Constitutional Court stated that the provisions in Article 43 paragraph (1) are contrary to the 1945 Constitution. The Constitutional Court emphasized that "a child born out of wedlock also has a civil relationship with his biological father, if it can be proven scientifically (for example through a DNA test) and/or other legally valid evidence."

This ruling has a direct impact on inheritance law, because illegitimate children who can prove their blood relationship with their father have the right to inherit from their father, just like legitimate children. First, illegitimate children have the right to inherit from their father, provided that they can prove their blood relationship. Second, this ruling affirms the principle of justice and protection for children, as guaranteed by Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution. Third, this changes the approach to inheritance because a child's status is no longer determined solely by marriage but also by biological facts. Thus, this ruling opens up a space of justice for illegitimate children to obtain inheritance rights that were previously denied by the legal system.

## **2. The Principle of Justice in the Distribution of Inheritance between Men and Women in Islamic Inheritance Law**

Based on the explanation above, it is understood that heirs come from both male and female lines, as well as from marital relationships. This differs from the pre-Islamic era, where inheritance distribution was based on lineage or male kinship, as it was men who were able to fight to repel enemies and seize war treasures to maintain family honor. Meanwhile, women did not receive inheritance because they were not included in the family inheritance list, and instead, inheritance was passed on to male relatives, regardless of whether the woman was willing or not. [12] After the

arrival of Islam, the inheritance laws of the Jahiliyah era that discredited women were abolished and replaced by Islamic inheritance laws based on the Qur'an and the Hadith. This law explains that women are God's creatures with the same status as men who have the right to inherit property. Based on the Qur'an, Surah An-Nisa' verse 7, which means "for boys there is a right to a share of the inheritance of their parents and relatives, and for girls there is a right to a share (also) of the inheritance of their parents and relatives." inheritance from parents and relatives, whether small or large according to the portion that has been determined".

This verse contains the Islamic law of inheritance, namely:[13]

- a. For sons, there is a division of inheritance from the inheritance of their parents.
- b. For immediate male relatives, there is a division of inheritance from the inheritance of their immediate relatives, both male and female.
- c. For daughters, there is a division of inheritance from the inheritance of their parents.
- d. For immediate female relatives, there is a division of inheritance from the inheritance of their immediate relatives, both male and female.
- e. The heirs mentioned in numbers 1-4 above may receive a small inheritance, while others may receive a large one.
- f. The provisions regarding inheritance from numbers 1-5 above are determined by the laws of God.

Based on the provisions above, it can be understood that the Islamic inheritance system in Indonesia adheres to a bilateral system because inheritance to heirs consists of two directions: through the male line and the female line. When analyzing the weight of responsibility between men and women, it can be said that men's responsibilities are greater than women's. This is in accordance with Article 176 of the Compilation of Islamic Law, which states: "If there is only one daughter, she receives half the share; if two or more people together receive two-thirds of the share; and if there are daughters together with sons, then the son's share is two to one." The above article contains the legal guidelines, namely:[14]

- a. Daughters and sons are heirs of their parents. This demonstrates that the Islamic inheritance system is bilateral, meaning that the inheritance system is based on both male and female descendants.
- b. If the heirs consist of one daughter and no sons, then the daughter is entitled to half the inheritance.
- c. If the heirs consist of two or three daughters and no sons, then the daughters are entitled to two-thirds of the inheritance.
- d. If the heirs consist of both daughters and sons, then both are *ashabah bil ghair*, with one portion for the daughter and two for the sons.

The status of a male heir is *ashab bi nafsi*, whether alone or with more than one child. If accompanied by a daughter, the daughter can be considered as *ahab*. The position of a son is very strong in Islamic inheritance law; his presence can block non-primary heirs from receiving inheritance. While men receive a larger share of inheritance than women, this does not necessarily mean it is unfair. Justice is about placing things in their proper place, including giving men a larger share of the inheritance due to their numerous obligations, including:[15]

- a. Providing adequate sustenance in the form of clothing, food, and shelter for his wife and children, including household needs.
- b. Caring for other relatives or meeting their needs if they are infirm, for example, parents or sisters.
- c. Providing a dowry when marrying a woman.
- d. Providing *mut'ah* (waiting period) and *iddah* (waiting period) when divorcing his wife.
- e. Providing for the care, healthcare, and education of his children.

While women's obligations in the household are limited to non-material/non-material obligations, women actually receive many material rights, including:

- a. If a wife is married, she receives support from her husband. He covers all her living expenses, including food, shelter, clothing, and household necessities and equipment.
- b. If she is not married, her parents will provide for her until she is an adult/independent or married.
- c. If she is an adult/independent but unmarried and wealthy, all her possessions are her full property.
- d. If she is an adult/independent but unmarried and unable to afford it, her parents, brothers, or other relatives will cover all her living expenses.
- e. If she is elderly and has children but is unable to afford it, her children will provide for her needs.

From the explanation above, it can be understood that property ownership for women is individual, meaning that the property belongs entirely to the woman, and under the law there is no obligation to transfer it to another. Likewise, when a woman receives an inheritance, it is hers in full. From this statement, it can be concluded that if women receive half of a man's share, this is in accordance with the principle of Islamic inheritance law, namely balanced justice, whereby inheritance is received in accordance with one's rights and obligations.

Analyzing the concept of justice, Islamic inheritance law adheres to the concept of distributive justice (*justicia distributiva*), meaning justice that distributes wealth to each person based on their merits, or distribution according to their respective rights. Rights are granted in accordance with the obligations performed. This also applies to the distribution of inheritance shares between sons and daughters. Sons are entitled to receive a larger share of the inheritance due to their greater obligations.

The concept of distributive justice typically occurs in personal law, including civil law. Therefore, the distribution of inheritance is based on the ratio between the fulfillment of obligations and the acquisition of rights, not justice based on equality of distribution. This is what happens to Muslims who do not know Islamic inheritance laws.[16]

The provisions of Islamic inheritance law are rules of God's law that must be obeyed. Once an heir has received their respective share, they have the right to manage it. If they wish to give their share to another heir, a female heir, so that the female's share is equal to the male's, this is permissible under Islamic inheritance law, and this is called reconciliation (tashaluh).

Tashaluh refers to the distribution of inheritance based on the principle of reconciliation, whereby one heir relinquishes his share to another heir after he has determined his share. The purpose of reconciliation is to resolve disputes or disagreements between heirs. Reconciliation is permitted in Islamic law without resorting to legal channels, but through deliberation to reach an agreement. This is in accordance with the Qur'an, Surah An-Nisa', verse 128, which states: "And if a woman fears nushuz or indifference from her husband, then there is no harm for them both to make true reconciliation, and reconciliation is better (for them) even if man is by nature stingy." This verse explains the concept of peace which is used to resolve disputes and eliminate feelings of resentment. Peace may be carried out in Islamic inheritance law if it meets the requirements, namely:[17]

- a. The heirs have been informed of their share in advance based on Islamic inheritance law.
- b. Without coercion or carried out with a sincere heart, meaning the heirs are not forced or willing to have their share reduced to be distributed to other heirs, with full awareness for the benefit of the heirs.
- c. Not intended to justify what is forbidden or forbid what is permissible. This means that the distribution of inheritance must be based on God's law, not fictitious, thus avoiding prohibited acts.
- d. Not containing any element of fraud.
- e. Containing benefits and preventing harm, it is carried out for the good.

The existence of tashaluh (peace) makes Islamic inheritance law not seem rigid and textual, but can be changed in certain cases if it contains benefits and avoids harm. This is in accordance with the provisions of Article 183 of the KHI which states "The heirs can agree to make peace in the distribution of inheritance, after each is

aware of his share." If examined carefully, it turns out that peace can eliminate disputes or disputes in brotherly relationships, and this is what is desired by the objectives of Islamic inheritance law.

#### **D. CONCLUSION**

In Civil Inheritance Law, inheritance distribution is essentially based on the principle of egalitarian or equal justice. The justice applied in civil inheritance law is commutative justice. Men and women have equal rights to receive inheritance, regardless of gender. Civil inheritance law does not regulate differences in inheritance rights between men and women, so the principle of justice is realized through the equal status of heirs in the same lineage. In Islamic law, inheritance distribution is based on the principle of justice that regulates the rights of each party according to their roles and responsibilities within the family. The justice applied in Islamic law is distributive justice. In Islamic law, men and women receive a share of the inheritance based on the provisions contained in the Quran, specifically in Surah An-Nisa verses 7 to 14. Men generally receive twice the share compared to women, which is based on the greater economic responsibility of men in the family. It is hoped that the distribution of inheritance should not only be based on written legal regulations, but also consider justice for all parties. Although civil inheritance law does not differentiate between genders in the distribution of inheritance, in practice, inequality still often occurs. Therefore, it is crucial to uphold the value of justice in its implementation to avoid inequality in the distribution of inheritance. Judges should prioritize distributive justice in their decisions, considering whether men and women have equal needs. In the application of Islamic law, it is crucial to adhere to sharia principles while also wisely considering the family's social and economic circumstances. This ensures that justice is truly felt by all parties involved.

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