

DISHARMONY THE CONCEPT OF LEGAL PROPERTY BETWEEN MIGRATION LAW, ISLAMIC LAW COMPILATION, AND ISLAMIC LAW

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ABSTRACT

The purpose of this study is to examine and analyze the disharmony law concept of the common property between Marriage Law, Compilation of Islamic Law and Islamic Law. Approach method in this research is empirical juridical. The types of data used were the primary and secondary data. The analyzing data used descriptively qualitative. The results of the study found that the occurrence of disharmony of the concept of common property law between the Marriage Law, Compilation of Islamic Law, and Islamic Law. So that the occurrence of Injustice for Women with Livelihood in the Concept of Joint Property in Indonesia. Therefore, it is necessary to harmonize between Law no. 1 Year 1974 and Compilation of Islamic Law (KHI) Article 97 chapter on property in marriage.

Keywords: Disharmony, The concept of common property, Justice

A. INTRODUCTION

Law Number 1 Year 1974 has embodied the principles contained in Pancasila and the 1945 Constitution and has accommodated all the living reality in today's society in accordance with the development and demands of the good times according to social reality as well as reality in the implementation of Customary Law or Religious Law and his confidence.¹

On the other hand, Islam as a religion and a source for science today is experiencing a very rapid development. This is seen by the numerous study conducted on various aspects of Islam, ranging from the problems of theology, fiqh, studies of hadith, study of how the text should be interpreted in the Qur'an. Interestingly, the study was not only conducted by individuals, institutions established specifically for it also began to show its existence, even large Islamic organizations such as NU² and Muhammadiyah³ participated in the activity, and that need to be underlined is that the efforts made all lead to renewal (tajdid) so that Islam is expected to be able to provide answers to the development of an increasingly advanced era, with certainly not just let go of the basics of Islamic morality itself.

Without exception, this renewal effort is also done in the field of law, especially inheritance law. Renewal of inheritance law is done, especially regarding the issue of the distribution of the amount of inheritance, in order to give more sense of justice for the heirs. Thus, for example, Munawir Syadzali tried to throw the idea of the need for re-actualization of inheritance law especially concerning the Al-Qur'an An-Nisa Verse 11 which regulates the part of the inheritance of female children half of the boys, which according to Munawir Syadzali, it is less effective.⁴

The idea of Munawir Syadzali is based on the idea of reality that in many areas whose inhabitants of Islam are found various deviations from the provisions of the Qur'an. Thus, there are many decisions in religious court relating to the inheritance distribution system based on the Qur'an are in reality not obeyed by the parties. This phenomenon is not only visible in justice

¹ Hilman Hadikusuma, *Hukum Perkawinan Indonesia, Menurut Perundangan, Hukum Adat, Hukum Agama*. Penerbit Mandar Maju. Bandung, 2007. page.5-6

² Among NU began the introduction of "social Fiqh" pioneered by KH. Sahal Mahfudh and Masdar F.Mas'udi who tried to deconstruct terhadap fiqh reality generally. Such deconstruction is done by using the method of "maintaining good old property and taking on new and better things" (al-muhafadzatii ala al-qadim al-shahih mi al-akhdu hi al-jadid al ashlah) The concept of this social fiqh among NU began to be accepted when in 1984 held "halqalah" (sort of sarasant of the Kyai). See more Marin Van'Bruinessen, ML, Tradisi Relasi-Relasi Kuasa, Pencarian Wacana Baru, LKis, Yogyakarta, hal 220-234.

³ While in Muhammadiyah there is the tradition of the Tarjih Assembly that is the tradition of legal evil by way of research and comparison of disputed problems from various opinions of the experts (fuqaha) and the existing argument, then taken stronger opinion or argument, more see Slamet Warsidi, *Fiqh Indonesia Dalam Tantangan*. FIAI UMS, Surakarta. 1991, page 43.

⁴ Munawir Syadzali, *Reaktualisasi Ajaran Islam, Dalam Panji Masyarakat*, No. 543 21 Juni 1987, page 54,

alone, the leaders of Islamic organizations, as well as many scholars who argue what has been determined in the Qur'an letter an-nisa paragraph 11 is felt less to meet the sense of justice.⁵

Actually long before Munawir Syadzali threw the idea, Hazairin had done the same study, but Hazairin did not do it openly, but scientifically studied in studying law. Hazairin⁶, as an Islamic intellectual and an expert in inheritance law, has long tried to reinterpret and reconstruct the concept of Islamic inheritance law. According to him there is a contradiction between the concepts of inheritance held by the patriarchal-patterned Muslims with the bilateral concept⁷ which is the will of the system of Islamic inheritance. The holding of the *patristialistic* concept in the system of Islamic heritage by the Sunnis, according to Hazairin it is inseparable from the influence of Arab culture in the past. The same is also made by Munawir Syadzali by initiating an inheritance distribution system based on the principle of justice that is 1: 1 for men and women.⁸

Munawir Syadzali tried to make the idea of the necessity of re-actualizing the inheritance law especially concerning the Qur'an of the letter of verse 11 which regulates the inheritance for the daughter is the half from son, Munawir Syadzali finds that it is less effective⁹. The idea of Munawir Syadzali is based on the idea of reality that in many areas whose inhabitants of Islam are found various deviations from the provisions of the Qur'an. Thus, there are many religious decisions related to the division of inheritance based on the Qur'an are, in fact, they are not obeyed by the parties. This phenomenon is not only visible in justice alone, the leaders of Islamic organizations, as well as many scholars who argue that what has been determined in the Qur'an letter an-nisa paragraph 11 is felt less to meet the sense of justice.¹⁰ Hazairin has done the same, but he did not do it openly, but scientifically studied in studying law. Hazairin¹¹, as an Islamic intellectual and an expert in inheritance law, has long tried to reinterpret and reconstruct the concept of Islamic inheritance law. According to him there is a contradiction between the concepts of inheritance held by the patriarchal-patterned Muslims with the bilateral concept¹² which is the will of the system of Islamic inheritance. The holding of the *patristialistic* concept in the system of Islamic heritage by the Sunnis, according to Hazairin is inseparable from the influence of Arab culture in the past. The same is also made by Munawir Syadzali by initiating an inheritance distribution system based on the principle of justice that is 1: 1 for men and women.¹³

The common property is explicitly not regulated in the family system of Islam, hence the practice of law it has been shown to tend to base on custom or customary law existing in society. This is supported by some opinions of customary law scholars. Vandijk¹⁴ for example argues that "all possessions acquired during marriage are mutual livelihoods and by themselves become common property institutions commonly called shari'a treasures." This opinion is almost similar to the opinion of Ter Haar¹⁵ who said that in a general sense joint property is the goods obtained by husband and wife during marriage.

The Supreme Court ruling of November 9, 1976 1448 K / Sip / 1974 said that since the enactment of Law no. 1 In 1974, property acquired during marriage became a common property, so that at the time of divorce the common property is shared equally between ex-husband and wife. The discriminatory nature of the legal system in view of this common property, this is because the joint property in principle eliminates the requirement of the participation of the wife to work in realizing the common property, stating that the property acquired during marriage is considered as joint property and joint income, - search results of the husband or his own wife.

⁵*Ibid*, hal 55

⁶Hazairin, *Hukum Kewarisan Bilateral Menurut Al-Qur'an*, Tintamas, Jakarta, 1982. page12

⁷The bilateral concept in this inheritance system is understood as a line system both from the father and mother side, both occupying the same position without having to take precedence. This concept is certainly different from the concept of Patrilineal where the descendants of the father (men) are preferred, whereas in the matrilineal system on the contrary, you prefer the maternal lineage (woman) in the system of inheritance division

⁸Munawir Syadzali, *Op Cit*, dan lihat juga Munawir Syadzali, *Reaktualisasi Ajaran Islam*, Dalam Polemik Reaktualisasi Ajaran Islam, Pustaka Panjimas, Jakarta, page 1-11.

⁹Munawir Syadzali, *Reaktualisasi Ajaran Islam*, Dalam Panji Masyarakat, No. 543 21 Juni 1987, page 54,

¹⁰*Ibid*, hal 55

¹¹Hazairin, *Hukum Kewarisan Bilateral Menurut Al-Qur'an*, Tintamas, Jakarta, 1982. page12

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¹⁴R. Vandijk, *Pengantar Hukum Adat*, Penerjemah Mr. A. Soekardi, Penerbit Vorknik Van Hoeve, Bandung, Page 39

¹⁵Ter Har, *Asas-Asas Dan Susun Hukum Adat*, Penerbit Negara Pradnya Paramita, Jakarta 1960, Page193.

There are many misconceptions surrounding women's rights in Islam. The purpose of this article is to shed some light on the basic rights of women in Islam in the context of marriage and divorce. This article is only to be viewed as a basic outline of women's rights in Islam regarding marriage and divorce.¹⁶

Against such practice, as well as regulated in the compilation of Islamic law¹⁷, the researcher see that this does not meet the principles and principles of justice upheld in Islam, so the researcher think it is necessary to reinterpret the verses relating to the problem of inheritance, especially those concerning the issue of wealth which the wife acquires during her marriage. If the wife's right to her livelihood is not properly sealed, it is a waiver of the wife's rights. Abandonment of the right of wife is one form of injustice. The injustices supported by the concept of the legal system, should be changed so that the legal purpose of giving justice can be achieved. Moreover, the main purpose of Islamic marriage law is absorbed in marriage law, among others, to provide legal protection for women who generally are in a weak position. Based on the above background, the researcher is very important to investigate deeply about the disharmony of the concept of common property law between the Law of Marriage, Compilation of Islamic Law, and Islamic Law.

B. RESEARCH METHODS

Approach method that used in this research is approach of law science¹⁸. In the perspective of legal science, the method of legal research according to Ronhy H. Soemitro is divided into two major parts of normative legal research and sociological law research¹⁹. The same thing was done by Soerjono Soekanto by dividing normative legal research and empirical/sociological law research²⁰. Further, Sutandyo Wignjosoebroto divided the type of legal research into the first, doctrinal legal research that is normative deductive, and empirical judgmental. While the second type of research is non-doctrinal legal research that has the characteristics of both quantitative and interpretative-qualitative²¹. However, this division should not be strictly dichotomous and therefore unnecessary to be contradicted, so the use of both means is necessary to obtain good and comprehensive results²². Therefore, the approach used in this research is a combination of normative approach and sociological approach, better known method of "socio-legal research". Method of data collection in this study consists of: literature study (library research) and field studies (field research). Library study was conducted by conducting a review of literature related to research objects, scientific magazines, as well as articles that discuss the subject of research. While field research is intended research conducted by using questionnaire (questioners), as well as structured interviews. Among other things are the judges in the Religious Courts, the *ulama* who mastered in the field of inheritance law, and the justice seeker community in the field of inheritance. On the other hand, the literature study was conducted in the library of the Religious Courts of Semarang and the Religious Courts of Semarang. Data analysis was descriptive qualitative.

C. RESEARCH RESULT AND DISCUSSION

In principle, Law No. 1 of 1974 on Marriage and Compilation of Islamic Law acknowledges and applies the concept of common property that is all the wealth acquired during the marriage period automatically becomes a common property. A strict statement also limits the common property by not entering into it the property brought by each of the spouses as well as those obtained specifically such as inheritance or grant or gift. Thus, according to Law No. 1 of 1974, all property acquired during the marriage period becomes a joint property, except the property carried by each of the spouses before marriage takes place and special income such as inheritance and grant. Thus, Law No. 1 of 1974 recognizes the right of each husband and wife to manage their property and for common property. It requires a second agreement to take legal action against the joint property.²³

¹⁶ Imani Jaafar-Mohammad Charlie and Lehmann, *Women's Rights in Islam Regarding Marriage and Divorce*, Journal Of Law And Practice, Volume 4, Article 3, 2011, Page 1.

¹⁷In the compilation of Islamic law the issue of sharing of common property is regulated in article 97 which substantially halves the common property, and if a divorce dies, then half the joint property becomes the right of a couple who live longer (article 96), further see Chapter XIII Article 85-97 Compilation of Islamic Law.

¹⁸Tahir Azhari, *Penelitian Agama Islam: Tinjauan Disiplin Ilmu Hukum*, dalam Deden Ridwan (Editor), *Op Cit*, hal 205-215. Bandingkan juga pendapat ini dengan pendapat Abdullah. Kelib tentang metodologi penelitian fiqh, yang melihat adanya kesejajaran antara fiqh dengan ilmu hukum analitik (*analytical jurisprudence*) atau ilmu hukum murni (*pure science of law*), Abdullah Kelib, *Op cit*, hal 5.

¹⁹Ronny H. Soemintro. *Metodologi Penelitian Hukum Dan Jurimetri*, Penerbit Ghalia Indonesia, Jakarta, 1990. Page 9.

²⁰Soerjono Soekanto, *Metode Penelitian Hukum*, Rajawali Press Jakarta, 1984.

²¹Sutandyo Wignjosoebroto, Makalah Penataran Pada Penataran Lanjutan *Pendekatan Ilmu Sosial Dalam Kajian Hukum*, Fakultas Hukum UI, Cibogo, 15-26 Oktober 1993.

²²According to Muladi the use of both ways in a complementary research plan is necessary, in order to create legal certainty without overriding substantive justice and usefulness. see Muladi, *Tripartite Missions Program Doctor (S3) Ilmu Hukum Universitas Diponegoro*, Disampaikan Pada Acara Kuliah Umum Mahasiswa Program Doctor (S3) Ilmu Hukum Universitas Diponegoro, Semarang, 29 Januari 2004, page 8

²³Dedi Susanto. 2011. *Kupas Tuntas Harta Gono Gini*. Yogyakarta. Pustaka Yustisia.. page 150-151

It is urgent to understand the above rule, that what is meant by "treasures gained during marriage" is the property produced by the husband, because Islamic marriage law only specifies the husband as a treasure seeker in marriage in his position as head of the household. The position of the head of the household will continue as long as a man is in marriage, so that every step of his search for property is legally considered a joint treasure. Likewise, the position of a housewife who is not obligated to seek property, remains as long as a woman becomes a wife, so that the income or possessions acquired becomes his own, even if it is obtained in marriage period. This concept should be the basis for establishing common property when inheritance issues occur.

The concept of living is what can change in society, starting from the needs of married life to the collection of property for the future. Sociologically, the community may impose limits on the concept of living up to only the fulfillment of household needs, health, housing, clothing, food and maintenance of children. In the modern concept includes the educational needs of children in the future, as well as secondary and primary needs. But in its development, all the property produced by the husband is considered a joint treasure, because of the wife's role in carrying out his duties as a housewife.

The point of the problem is when it comes to the property the wife gets who works to help her husband. Some legal decisions assume that what is meant by joint property is all the property gained during the marriage, regardless of who produced it. Supreme Court dated November 9, 1976 Number 1448 K / Sip / 1974 said that since the enactment of Law No. 1 of 1974 on Marriage states that, property acquired during marriage into joint property, so that at the time of the divorce the common property is shared equally between the former husband and wife. Judges still see the law only as a scheme of action set in the text.

The concept of kinship in Islamic family law is a very important issue to determine who is entitled to be an heir. Ontologically the term relatives derived from the Arabic language "qorib" Javanese people often call it karib relatives meaning "the people closest". The concept of kinship in society comes from the epistemology of leadership in society, about who is entitled to lead in a society, resulting in a system of *patrilineal*, bilateral/parental and matrilineal descent. On the other hand, the concept of kinship in the Qur'an is general, and can use the existing kinship interpretation in society. In Al-Qur'an Surah An-Nisa verse 7²⁴ and Surah An Nisa verse 33²⁵ are called three main principles in the relationship of inheritance, namely:

- a. Walidaini, the relationship of children with parents. This provision is very clear to regulate the relationship of children and parents as walad, the only child, so that adopted children and stepchildren do not belong to be heirs;
- b. The relative, the close relationship with the deceased, detailed in the next verses (11, 12 and 176) becomes the relationship of blood²⁶ and the relationship of semenda²⁷;
- c. The loyalty of the oath, the brotherly relationships that are legally arising from the oath of loyalty to be brothers, to each other's family members and to each other inheritance. The nature of this relationship is because of the promise of mutual responsibility to the families left by the dead, so it is only natural that those who still live in the covenant also inherit the property of the deceased.

The concept of common property and the property of the husband and wife are not stated explicitly in the Qur'an, but are explicitly stated in the Inheritance Signs that distinguish between the husband's property and the property of the wife. For example, Surah Annisa: 12 can be drawn several lines of law that indicate the existence of the property of wife and husband's property, namely:

- a. Legal line S. Annisa Clause: 12 a. : And unto you (husbands) half of the treasures left by your wives, if they have no children;
- b. Legal line S. Annisa Clause: 12 b. : if they do not have children. If your wives have children, then you get a quarter of the property left behind;
- c. Legal Line S. Annisa Paragraph: 12 c: Wives get a quarter of the property you left behind if you did not have children; and
- d. Legal line S. Annisa Clause: 12 d. : If you have children, then the wives earn one-eighth of the property you left behind.

Philosophically, the line of law 12 a, 12 b show the value of the wife in front of the husband as the heir if they die. The position of the heir to an heir is higher or exalted, because an heir receives a treasure flow from the heir, so an heir must be respected for causing an increase in the welfare of his material life. The above provisions in Islamic law are called Faroidh, or a definite part that has been established as the acquisition of an heir. A woman who has died as a wife is exalted before her husband by Al Quran becomes a Heir.

The law line 12 establishes the property of the wife: of the property left by your wives ", this means in the statement there is an underlying concept, a concept of ownership of individual property, affirmed by the statement. In the above verse precisely the ownership of the individual is highlighted, while the common ownership is not mentioned or explained, so it can be understood that the main concept in the relationship of husband and wife property is individual, each conceptualized to own property as an

²⁴ For men there is a right of a part of the treasures of the Mother-Father and his relatives, and to the women there is a part right of the treasures of the Mother-Father and his relatives, whether little or more according to the predetermined portion.

²⁵ For each treasure from the treasures left by Mother and Father and relatives, We made the inheritors. And (if any) those whom you have sworn allegiance to them, then give them their portion. indeed Allah watches all things..

²⁶ Father, mother, brothers (Qur'an Surat Annisa : 11, 12 dan 176).

²⁷ Husband or wife (Qur'an Surat Annisa : 12).

inheritance to another when he dies . The problem then is how the concept of individual ownership can be realized in a marriage if there is a rule that all the property produced during the marriage by both husband and wife is a common property From where the concept of common property whereas the Qur'an does not mention it.

With the divorce, the togetherness or unity of the marriage property becomes halted and the time comes for separation and division. With respect to joint property, Law Number 1 Year 1974 through Article 37 determines:

Article 37

"When marriage breaks up due to a divorce, joint property is regulated according to their respective laws".

The definition of each law according to the explanation of Article 37 is religious law, customary law and other laws.

Further provisions concerning joint property Article 96 and Article 97, which states that:

Article 96

1. If a divorce dies, then half the joint property becomes the right of a couple who live longer; and
2. The sharing of joint property of a husband or wife whose wife or husband owes the debt must be suspended until there is an essential death or legal death on the basis of the decision of the Religious Courts.

Article 97

The divorced widow or widower is each entitled to one half of the common property as long as no other is specified in the marriage agreement.

In practice, court decisions always refer to article (1) letter (f) Compilation of Islamic Law, as follows:

Letter (f). The property in marriage or *Shirkah* is the property acquired either individually or with a husband and wife as long as the marriage bond takes place hereinafter referred to as joint property, without questioning being registered on behalf of anyone;

This provision has contained a wide interpretation of the meaning of common property which in Islamic law is called as *Shirkah*. The meaning of *shirkah* itself relates to a fellowship whose respective rights and obligations have been predetermined. In practice the judges only pay attention to the article without looking at other provisions in the KHI as follows:

Article 47

- (1) At the time or before the marriage takes place the two prospective bridegrooms may enter into a written agreement authorized by the Registrar of Marriage on the position of property in the marriage;
- (2) The agreements referred to in paragraph (1) may include the mixing of property and the separation of their respective livelihoods as long as it is not contrary to Islam; and
- (3) In addition to the provisions of paragraphs (1) and (2) above, it may also specify the authority of each treaty to enter into a mortgage bond on personal property and common property or property of the company.

Article 48

- (1) In the case of a marriage agreement concerning the separation of common property or property of the company, the agreement shall not eliminate the obligation of the husband to fulfill the needs of the household; and
- (2) If a marriage agreement does not meet the provisions of paragraph (1), it is deemed to continue the separation of joint property or *shari'a* property with the obligation of the husband to bear the cost of household needs.

Article 49

- (1) Mixing agreements of personal property may include all property, whether brought to the marriage or to each obtained during the marriage; and
- (2) Notwithstanding the provisions of paragraph (1), it may also be agreed that the mixing of personal property brought at the time of marriage takes place, so that this mixing does not cover personal property acquired during marriage or otherwise.

In addition to what is presented based on the Compilation of Islamic Law (KHI) above then as a comparison material will be done also based on the Islamic legal view of women's livelihood in the concept of common property.

The human life is a series of relationships / interactions are made consciously, both between humans with other human beings, between humans with nature, and humans with God. In contrast to the interaction between animals, what happens is instinctive interaction, is biological instinct without any other means of governing that relationship, whereas in humans, biological instincts must be governed by law so that there is no clash between instinct drives themselves. Therefore the law is not always the same or in accordance with the human biological instinct, because the law plays a role to control / supervise as well as provide a way out to achieve instinctive impulse is not exceeded²⁸. The setting of human life in interaction is called law.

²⁸Q.S:55:8 "Lest you exceed the limit of the balance; Q.S.7: 31 Son of Adam, wear your beautiful garments in every mosque, eat and drink, and do not overdo it. Lo! Allah loveth not the excesses; and Q.S.2: 190: And fight in the cause of Allah those who fight you, but do not transgress, for Allah loves not those who transgress.

According to Satjipto Rahardjo²⁹ man does not start life with him by making the legal system, but rather build a society, then from a common life called society that was born law. Society is a container all the activities of its members. So the first homework is to build a life together over the individual members of its members. The first capital to build a life of mutuality is the mutual trust between its members. Without that capital there is only a collection of humans living in a geographical region.

Shuki Friedman, explains that Our law and society approach to Islamic law enables us to rely on less decisive evidence, using a flexible understanding of law and its place in society.³⁰

Society is built on the basis of trust³¹, namely the existence of a trust and mutual need between each member. The fabric of trust in the community has different foundations in shaping the community. Satjipto further states that the community as a togetherness is built on the basis of trust and mutual need. In the meantime, the (modern) law is built upon the period of legislation, procedures, bureaucracy and systems. Nevertheless, in the wake of numerous proposals, a sophisticated institute, such as modern law, can not completely evict the relationship of trust between legal actors. Thus we can juxtapose the society as a natural order with the law made intentionally (artificial).

Islamic law is included in an artificial law, because it does not happen naturally. Islamic law is given. Although Islamic Law as divine law is not always rigid, as it is divided into two levels ie, Revelation (in Islamic law called Shari'a) which cannot be changed and the Details of Revelation (in Islamic Law referred to as Fikih) which can largely change to suit the situation and the condition of society (ie on the part of muamalah).

Shari'a, the law of the God, the law is the Revelation (divine clarity) of what is best for man according to God as the creator. Law is God's guidance, inspired by human obedience to God. Justice is not measured from the sense of human justice, but from a sense of human obedience³². It is this sense of obedience that makes the law that God decides to be just. The lack of or even the absence of a sense of obedience makes man think law is unjust. The law in this level is a sure guarantee of life in the afterlife. People's beliefs understand it as legal certainty.

The law is also synonymous with the 'straight path' so called as Shari'a. According to Ibn al-Manzhur who has collected the notion of the expression in the original Arabic language in his book *Lisan al'Arab*³³. Sharia language has several meanings. Among its meanings is *masyra'ah al-mâ* (water source). The only source of water they do not call *syari'ah* unless the source is very abundant water and not endless (dry). According to ar-Razi in his book *Mukhtar-us Shihah*³⁴, the word *syari'ah* is originally from *syara'a* verbs, this word can mean *nahaja* (taking), *awdhaha* (explaining) and *bayyan-al masalik* (showing the way). While the word *syara'a lahum-yasyra'u-syar'an* means is *sanna* (set). Medium according to Al-Jurjani, Shari'ah can also mean the school and *thaqah mustaqimah*/the straight path. Thus, Sharia has many meanings in many languages³⁵. While the meaning of *syari'at* by term is "*maa anzalallahu li 'ibaadihi minal ahkaami 'alaa lisaani rusulihil kiraami liyukhrijan naasa min dayaajjirizh zhalaami ilan nuril bi idznihi wa yahdiyahum ilash shiraathil mustaqiimi*"³⁶. That is, the laws (rules) revealed by Allah swt. through His glorious apostles, to men, that they should go out of darkness into the light, and get guidance into a straight path.

²⁹ Satjipto Rahardjo, *Hukum dan Perilaku*, Kompas Media Nusantara, 2009.

³⁰ Shuki Friedman, *Mazalim Courts And Their Development A Test Case For The Practical Influence Public Law In Islam*, Journal Of Islamic Law Review, Vol.12, No.1. June 2016, Page.120.

³¹ *Ibid.*

³² Q.S 4:13 "(Those laws) are the provisions of God. Whoever obeys Allah and His Messenger, surely Allah puts it into the heaven that flows in the rivers, and they abide therein; and that's a big win. From the sociological point of view of Indonesian Islamic society, changing its paradigm against Islamic law, from a religious paradigm that sees Islamic law as only part of the Islamic religion in Indonesia, it becomes a wider legal paradigm that sees Islamic law not only as part of Islam also part of Indonesian National law. The change is inseparable from the philosophy of Islamic law that requires the adjustment of Islamic law to the problem of society with various methods of approach in establishing the law (*ijtihad*). Methods of approach in *Ijtihad* are: *Ijma* ', *Qiyas*, *Istidal*, *Al masalih al mursalah*, *Istihsan*, *Istishab*, and *Urf*, fulfilling the various needs of the Islamic community regarding the law. Change is a provision that must occur, both in nature and in nature, where humans are included. Not to mention the changes that occur in human society towards a better direction. The concept of change in a good direction in Islamic philosophy is called the *Hijrah* which is the opposite of destruction and "stagnation". 'Stagnation' according to Islam is a vanity that is contrary to the purpose of human life to achieve the happiness of the hereafter. Philosophically, the universe is created not in stagnancy or futility, but rather towards a beneficial change for human beings. Therefore, in Islam, *Hijrah* becomes the ultimate symbol for humans against the Progressivism of human behavior in society.

³³ Ibn al-Manzhur, *Lisân al- 'Arab*, juz I page175.

³⁴ Ar-Razi, *Mukhtâr ash-Shihah*, page 294.

³⁵ Al-Jurjani, *at-Ta 'rifât*, page 167.

³⁶ Imam al-Qurthubi, *Tafsîr al-Qurthubi*, juz XVI page 163.

Fiqh, ie the details of sharia law made with ijthad or a genuine effort to discover the law of something, using the established method.

Fiqh is³⁷:

Kullu maa yushdiruhusy syari'u linnaasi min awamiro wa nudhumin 'amaliyyatin tunaddhimu hayatahumul ijtima 'iyata wa 'ala qottihim ba'dlihim li ba'dlin fiihaa watuhaddidu a'malahum wa tashorru faatihim

All is set apart 'for human beings, whether in the form of orders or rules of amaliah (acts of i'tiqad) that govern their social life and relationships with each other and limit their behavior.

The main form of Islamic law in the sense above, is the command and rule of amaliah or deeds. Thus there is no form of prohibition, because in essence the prohibition is a command to leave an act. The law is imbued with human obedience to God, so disobedience to the command to abandon the deeds in which it contains harmony for others is a crime to be punished. Thus from the definition above can be seen there are two forms of law or syari, namely;

1. Amr, the legal form as commandments; and
2. Nudhumin amaliyyatin, or amaliyah rule, that is the rule for deliberate acts or i'tiqad.

The law of God that is in the Qur'an and Hadith is applied through the thought of the jurists as commanded in the Qur'an S.3 (Ali Imran): 23

Do you not pay attention to those who have been given a portion of the Book (the Torah), they are called to the Book of God so that it may set the law between them; then some of them turn away, and they always turn their backs (the truth).

And the Qur'an S. 4 (Annisa): 58

Indeed Allah hath commanded you to fulfill the commandments to which it is entitled to receive, and (enjoin you) when establishing the law among men so that ye may judge equitably. Verily, Allāh is the best teacher for you. Allah is the Hearer, the Seer.

The law, established by jurists (fukoha) by means of Ijthad, is called Fiqh, while the provisions of the law which are in the Qur'an and the Hadith, which are the basis for establishing the law (Fiqh) are called Shari'ah.³⁸

In the field of inheritance, the law regulates the transfer of material rights of the deceased to the heirs, namely on the basis of what the community entitle the heirs to have the right of the deceased. This is the basis of what is then called the Basic of the Inheritance. To know the basis of this inheritance society must stand on the law of life, and pull it into the Legal Foundation of Inheritance, so that the rules of law are compatible with each other.

In the framework of Islam, there are three main joints that become the teachings of Islam, namely Aqidah, Syariat and Ahlak³⁹. The three joints are integrated with each other. However, the three joints relating to the law are the Shari'a⁴⁰. In the Shari'a there are two aspects / side of legal studies, namely worship and muamalah. This means that every Shari'a can be seen from these two sunglasses, ie from the side of worship and from the side of muamalah as well. The sides of worship are related to the kinship of God, while the muamalah facet / side muamalah associated with the willing of fellow human. The affiliations associated with the human act of seeking God's mercy are merely called Worship, while the Kaedahs associated with human deeds to seek the solemnity of their fellow human beings are called Muamalah. Although in essence both are integrated into an integral part,

³⁷ Hashbi Ash Shiddiqy, Tengku Muhammad, *Pengantar Fiqh Muamalah*, Hal 5.

³⁸ In Indonesia, today there are two approaches in establishing the Shari'a (Pure Islamic Law drawn directly from the Qur'an and Hadith), namely the approach of power and the approach of law. Those who use the power approach aim to establish an Islamic state so that sharia can be enforced. In the New Order era, such groups developed underground or tacit, as opposed to government policy directly. Along with the growth of the Reform Order, the group has become more and more visible and violent in the name of Islamic law enforcement. While the legal approach developed along with the increasing knowledge and legal awareness of the community, so emerged political elite who fight for the enforcement of Islamic law through the legal system in Indonesia. This struggle runs in accordance with the ideology of the Indonesian nation and the state power system of Indonesia as a state of law, so that some people do not feel the struggle to enforce Islamic law through the field of law. The birth of several legislation which appoints and as the basis for the enactment of Islamic Law (Shari'a Islam which has been adapted to Indonesian society) is not realized by all circles of society as the enforcement of Islamic Shari'a, but only considered as an alternative in solving the problem. Whereas academically the phenomenon of change is the phenomenon of the enforcement of Islamic Shariah through a legal approach that is done deliberately and has the aim to enforce the Shari'a in accordance with the ability of the Indonesian people in general.

³⁹ Daud Ali, Muhammad, Prof, SH, *Hukum Islam, Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia*, PT Radja Grafindo Persada, Jakarta, 1990, page 29.

⁴⁰ Sharia literally means the path taken, *Ibid*, hlm. 30.

namely that the order of worship always contains aspects of muamalah and vice versa in the muamalah order always contains aspects of worship. In this position Islamic law can be regarded as a scheme of truth and order of human life in general. Law as a scheme⁴¹ is a law as it is encountered in text or legislation or laws formally deliberately rationalized. The law is still very idealistic because it is a clue of the truth, so the law is identical with the truth. As for the order, law is the method of life carried out by society.

The result of the research, The Verses of Inheritance in Islamic inheritance law is the rationale that God revealed to man as a straight path. In its characteristic as a straight path the main character of the Qur'an is the rail or frame for all thoughts in that field, which means that all thoughts can be legit so long as they do not come out of the line of thought established in the Qur'an. The Qur'anic law of inheritance is precise, clear, unambiguous, and detailed. There is hardly any room for any confusion over the matter.

Israr Ahmad Khan, explains that The Qur'an declares this law as sacred and obligatory as any other provisions known as hudud. Execution of the Qur'anic law of inheritance in its original spirit serves as boon, otherwise bane. Human society needs peace for its overall development.⁴²

The main basis of the idea of inheritance in the Qur'an is as follows:

1. Regarding the right of inheritance

- a. For men there is a right of inheritance from the treasures of mother-father and relatives.
- b. For women there is a right of inheritance from the treasures of mother-father and relatives.

This thought spawned two clear lines of law, the first being the legal line connecting men or women to their deceased parents in inheritance relationships. This law line is only linear downward, not upward, so only relates to a child who has inheritance rights to the estate of the deceased parents. This relationship can only be interpreted as a legal line between the child and the relics of his parents, which gives birth to inheritance rights for boys and girls. The arrangement that comes out of the rails is not justified, for example if there is an Islamic society which prescribes that a girl has no inheritance rights, it is a deviation of heresy (exit), out of the rails, but vice versa if there is which stipulates that: in addition to boys and girls there are other heirs with equal rights to the child, this arrangement is still in the provisions rail. The basis of this idea is the legal protection of the interests of boys and girls. Theoretically, the legal protection of the inheritance of the child does not abolish the inheritance rights of the other heirs as long as it is not specified in the Qur'an.

This thought forms the basis for equality between men and women in Islamic inheritance law, as well as the value of the virtues of the heirs of the child in addition to other heirs. This value is ideal for all societal systems, and does not favor one of the existing kinship systems in society, for example: patrilineal, bilateral or matrilineal. In the sense, this value does not change the existing kinship system, although this value is closed to local interpretation. Protection to the position of a child becomes the most important element, whether children born in marriage or children born outside marriage.

A basic provision, essentially is not limited by formal law, but by any other ground rule in that field. The law line in the Qur'an does not mention the status of a protected child in inheritance, only mentioning the term "walad" which means a child in the blood relation, not a child in a legal relationship. Because it is precisely in children in legal relations, there is another rule that is, cannot be inherit if not have blood relation⁴³. For example is the official adopted child.

The second thought is the line of law that connects men and women with their relatives. The meaning of kin/aqrobu in this case is proximity, which is a term with open interpretation, which then is given a restriction on the next verse, namely:

- a. Mother-Father has inherited relationship with her son's treasures;
- b. Husband has inherited relationship with his wife's treasures;
- c. The wife has inherited relationship with her husband's treasures;
- d. Brothers have inherited relationships with their relatives' treasures; and
- e. Sisters have inherited relationships with the relics of their relatives.

This restriction does not rule out the entry of other heirs to inheritance, as has been specified in some hadith and jurisprudence, for example, for grandparents, uncles and grandchildren.

Ontologically the term relatives derived from the Arabic "qorib", Javanese people often call it a close relative meaning "the people closest". The concept of kinship in the Law of Inheritance of Islam is a very important issue to determine who is entitled to be an heir.

⁴¹ Satjpto, *Ibid.*, page 15

⁴² Israr Ahmad Khan, The Qur'an Of Inheritance An Analysis Practicccally Relevant Issue, Journal Of Islamic Law Review, Vol.12, No.1. June 2016, Page.15

⁴³ Adopted Child.

The concept of kinship in society comes from the epistemology of leadership in society, about who is entitled to lead in a society, resulting in a system of patrilineal, bilateral / parental and matrilineal descent. While the concept of kinship in the Qur'an is given, whose interpretation is adapted to the community kinship system. In the Qur'an An Nisa verse 7⁴⁴ and An Nisa Verse 33⁴⁵ are called the three main principles of inheritance, namely:

- a. Blood line relationship straight up and sideways. This provision is very clear to regulate the relationship of children and parents as walad, the only child, so that the adopted child and stepchild does not belong to the heir. While on a straight line to the sampin gives you a brother as an heir;
- b. Relationship of semenda⁴⁶, and
- c. The loyalty of the oath, which is the brotherly relationship which is legally arising from the oath of loyalty to be a brother, to win each other's family members and to each other inheritance. The nature of this relationship is because of the promise of mutual responsibility to the families left by the dead, so it is only natural that those who still live in the covenant also inherit the property of the deceased.

2. Degrees of the Heirs.

From the above principles can be drawn thought about the heirs degree⁴⁷, in the sense of degree of closeness between heirs with heirs, namely:

- a. The first degree: Boys and girls;
- b. The second degree, Mother and Father;
- c. The third degree, husband or wife; and
- d. Fourth degree, brother and sister.

Boys and girls are equitable heirs and do not affect each other's predetermined gains, but their existence affects other heirs, both in terms of their share of earnings and inheritance.

3. The Heirs

Thoughts about property in the Verses of Inheritance are as follows:

- a. Inheritance can be distributed after deducting Debt and Testament;
- b. Acquisition of the inheritance shares of the heirs shall consist of: a definite fixed portion (Faraidh) and an open or fixed portion of peninggalan property after deducting Faraidh (asobah);
- c. The prescribed portion of the beneficiary in the form of a comparative gain shall be given to a daughter who inherits not with a son, husband or wife, father and mother, and sister;
- d. The open or part of the rest after deducting the above section is given to boys, fathers and brothers;
- e. If the female heirs inherit together with equal male heirs, they earn the remaining portion by comparison of 1 to 2 for women and men; and
- f. Calculation of heritage treasures inherited with the above provisions.

4. Common Property In Islamic Law

The concept of kinship in the Law of Inheritance of Islam is a very important issue to determine who is entitled to be an heir. Ontologically the term relatives derived from the Arabic "qorib", Javanese people often call it a close relative meaning "the people closest".

The concept of kinship in society comes from the epistemology of leadership in society, about who is entitled to lead in a society, resulting in a system of patrilineal, bilateral / parental and matrilineal descent. The concept of kinship in the Qur'an is general, and can use interpretation of kinship that exists in society. In the Qur'an An Nisa verse 7⁴⁸ and An Nisa Verse 33⁴⁹ are called the three main principles of inheritance, namely:

⁴⁴For men there is a right of the inheritance of the mother and father, and to the woman there is a right of the inheritance of the mother and father of her relatives, whether small or large according to the predetermined portion..

⁴⁵ For each treasure from the treasures left by the mother of the father and the close relatives, We made the inheritors. And (if any) those whom you have sworn allegiance to them, then give them their portion. Indeed Allah watches all things.

⁴⁶ Husband or wife (Qur'an Surat Annisa :12).

⁴⁷ View the terms of obtaining the Beneficiary in QS : IV : 11, 12 & 176.

⁴⁸For men there is a right of the inheritance of the mother and father, and to the woman there is a right of the inheritance of the mother and father of her relatives, whether small or large according to the predetermined portion.

⁴⁹ For each treasure from the treasures left by the mother of the father and the close relatives, We made the inheritors. And (if any) those whom you have sworn allegiance to them, then give them their portion. Indded Allah watches all things.

- a. Walidaini, the relationship of children with parents. This provision is very clear to regulate the relationship of children and parents as walad, the only child, so that adopted children and stepchildren do not belong to be heirs;
- b. Relatives, the close relationship with the deceased, detailed in subsequent verses (11, 12 and 176) become blood relations⁵⁰, and the relationship of semenda⁵¹; and
- c. The loyalty of the oath, which is the brotherly relationship which is legally arising from the oath of loyalty to be a brother, to win each other's family members and to each other inheritance. The nature of this relationship is because of the promise of mutual responsibility to the families left by the dead, so it is only natural that those who still live in the covenant also inherit the property of the deceased.

Thus Law no. 1 year 1974 and Compilation of Islamic Law (KHI) Article 97 chapters on property in marriage need to be reconstructed as well.

D. CONCLUSION

In principle, the husband must seek and provide for his family, and the wife is obliged as a housewife, child care and so forth. On the basis of this construction, the treasures acquired in marriage become common property. In fact, in the reality of living in society, many wives are working for a living, so it is interesting to examine the different proportions in the division of property, such as divorce. While the law is rigid, each gets half. This construction is the foundation of the sense of justice, so the need for reconstruction refers to the balance shifted to the wife. The wife has more rights than the treasure property. The result of the study found that the occurrence of disharmony of the concept of common property law between the Law of Marriage, Compilation of Islamic Law, and Islamic Law. So that the occurrence of Injustice for Women of Livelihood in the Concept of Joint Treasure in Indonesia. Because of the need for harmonization between Law no. 1 Year 1974 and Compilation of Islamic Law (KHI) Article 97 chapter on wealth in marriage.

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⁵⁰ Father, mother, and brothers (Qur'an Surat Annisa : 11,12 dan 176).

⁵¹ Husband or wife (Qur'an Surat Annisa : 12).

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