

Discrimination Against Women In Case of Inheritance: Analysis of the Settlement of the Case of al-Gharawain

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Abstract - The Qur'an and Sunnah have explained in detail the degree or what part will be received by an heir, especially the QS. Al-Nisa' verses 11, 12 and 176. However, in the settlement of Gharawain's problem, Jumhur Ulama chose a solution that came out of the general provisions in the verse, to fulfill the will of that time tradition, that the father (men) Of female mothers). The clergy asserted that the meaning of "tsulutsu (one-third)" in the verse is understood by the meaning of tsulutsu al-baqiy (one-third of the remaining property after the division of the husband's or wife's share)." In this way, there has been discrimination against the mother, Receive twice as much portion of the mother's portion, so the mother of a woman is considered unworthy of receiving more inheritance rights from father, a man, so the mother's right here, should be reduced, even if it violates the verse *zahir*.

Key Words: *Discrimination, women, inheritance, gharawain*

1. Introduction

Basically the Qur'an and Sunnah have explained in detail about the level or what part will be received by an heir, especially the QS. Al-Nisa' verses 11, 12 and 176. These verses are understood by scholars with a common understanding, meaning that verse is a verse that is easily understood and impossible to be understood in other meanings. For example the verse explains that a daughter gets $\frac{1}{2}$, if she is alone, or the mother's part is $\frac{1}{3}$ if the heir does not have children.

However, in solving certain problems, such as the Gharawain problem, the grandfather's inheritance with you, the *musharaka* problems and the *aul* and *rad* issues, Jumhur Ulama opted for a solution that came out

of general terms in verse or Hadith. According to them, if the question of inheritance was resolved in the normal way, something strange and inappropriate happened during that period, for example in Gharawain's case, if divided in the usual way, it turns out that the mother gets a share ($\frac{2}{6}$) Father ($\frac{1}{6}$) as' *asabah*. Jumhur Ulama, unable to accept a "Mother" who is a woman, gets more from a "father" who is a man, this is considered odd. On that basis, ultimately the Jumhur Ulama tries to think of ways to make the father more out of the mother's part, and the solution is to change the meaning of "tsulutsu (one-third)" in the verse understood by the meaning of "tsulutsu al-baqiy (one third of the rest of the property after Divided by husband or wife)." In this way, father finally gets twice as much share of the mother's part.

The way in which the Jumhur ulama in solving the Gharawain problem is seen, is very gender biased, in which the mother, as a woman is on the severely disadvantaged side, even though Allah has determined her right. This is probably, because the socio-cultural influence of Arabic heritage of ignorance is still very thick, where women are seen to have a lower position than men. However, ironically, Jumhur Ulama's thinking in the classical era, then continued to be a reference and followed by the scholars today. Even in Indonesia, the opinion of the cleric was chosen and confirmed in the Compilation Book of Islamic Law in Indonesia, precisely in Chapter III, article 178 paragraph 2.

2. General Provisions In Islamic Inheritance System

2.1. Definition of Islamic Inheritance Law

In discussing the definition of Islamic inheritance law, there are two terms that match the sense of *al-*

faraidh and *al-mawaris*. Therefore, before explaining the definition of Islamic inheritance law, it will first explain the meaning of *al-faraidh* and *al-mawaris*.

In terms of etymology, in Arabic, *al-faraidh* (الفرائض) is the plural of *fariidhah* (فريضة), meaning parts that have been confirmed in levels. (Al-Mahalli t.th.134) *الفرائض* is the plural of which is derived from the word *فريضه*, *فريضه* Which means *taqdir* (provisions). (Sabiq 1987,427)

The definition of *faraidh* according to *syara'* is a predetermined part for the heirs. (Al-Mahalli t.th.134) While understanding the science of jurisprudence arrives *faraidh* are interlocking with the division of the inheritance, knowledge of how the calculations can pass on to the division of property and knowledge about the parts that are required of inheritance to each owner the right to inheritance. (Rahman 1981,32)

Al-Mawaris is the plural of *ميراث* that treasures those who had died were inherited by their heirs. *Lafaz miras* (ميراث) is *masdar* of said *Warisa* (ورث), *yarisu* (يرث) *irsan* (ارثًا), has an idea: The migration of something from one person to another or from one people to another people. Something that is more common than the treasure that is the science, greatness and glory. (Al-Shabuni 1988, 40) On the other hand people who left the property was called *Mawaris* (مورث), while those eligible for inheritance is called *Inheritance* (وارث). (Al-Shiddieqy 1973, 17)

While understanding *al-Mawaris* according to the terms, the *fukahak* dissent, such as *al-miras* notion propounded by Muhammad Ali Al-Shabuni following: Definition of *al-mawaris* according to terms are: The migration of the property of the deceased to the heirs who are still alive, whether he left it in the form of movable and immovable property rights according to Islamic Shari'ah. (Al-Shabuni 1988, 40)

DR. Badran Abu al-Ainaini Badran, in his book, suggests *al-miras* as follows:

الميراث شرعا: حق قابل للتحرر يثبت لمستحقه بعد موت من كان له ذلك لقرابة أو زوجية أو ولاء.

"Miras according to *syara'* is the right received are certain parts that remain for the person entitled to receive it, after the death of the heir. And that right is due to kinship, marriage or wala'. (Abu al-Ainaini Badran t.th.,11)

While Prof. DR. H. Amir Syarifuddin expressed the notion of Islamic inheritance law is as follows: "The law of inheritance of Islam is a set of provisions governing the manner of transition of the right of a deceased person to a living person, whose provisions are based on the divine revelation contained in the Qur'an and the explanations given by the Prophet Muhammad SAW." (Syarifuddin 1984,43)

Mean while Wirjono Prodjodikoro, as quoted by Abdullah Siddik, put forward the definition of inheritance as follows: "The inheritance is a matter of whether and how various rights and duties concerning one's wealth at the time of his death will turn to others who are still alive". (Siddik 1984, 41) Based on the above understanding, either the meaning of *al-faraidh* or *al-mawaris* is about the estate of a deceased person. Thus the definition of Islamic inheritance law is a set of rules governing how to transfer the property of a deceased person to a living person as an heir, in which the provisions are based on Islamic shari'ah.

2.2. The Basic Law of Islamic Inheritance

Islamic inheritance law is sourced to the Qur'an, hadith, *ijma'* and *ijtihad*.

2.2.1. Al-Qur'an

The first source of Islamic inheritance law is the Qur'an which is basically contained in several verses from the Word of Allah SWT. Among the verses of the Qur'an are surah al-Nisa 'verses 7, 8, 10, 11, 12, 13, 14, 33, 176 and surah al-Anfal verse 75.

2.2.2. Hadith

Hadith is the second legal source of Islamic inheritance law that explains the things that have not been explained in the Qur'an. Like the following hadith:

عن ابن عباس رضى الله عنهما قال: قال رسول الله صلى الله عليه وسلم اختلفوا الفرائض باهلها فما بقي فهو لأولى رجل ذكر. متفق عليه

Meaning: Hadith from Ibnu Abbas r.a. Rasulullah SAW. Said: "Give faraid (the part that has been determined in the Qur'an) to the *erhak* receive it and the rest give to the nearest male family." (al-Kahlani t.th.,98)

عن اسامة بن زيد ان النبي صلى الله عليه وسلم فقال: لا يرث المسلم

الكا فر ولا يرث الكا فر المسلم . منفق عليه

Meaning: Hadith from *Usama bin Zaid*, Prophet SAW. Said: a Muslim does not accept the inheritance of the heathen (not Muslim) and the infidels also do not accept the inheritance of a Muslim. (HR *Muttafaqun 'Alaih*). (Jamil of-Kahlani Lth, 98)

عن ابن عمران بن حصين ان رجلا اتى النبي صلى الله عليه وسلم فقال : ان ابن ابني مات فمالي من ميراثه فقال : لك السمس رواه احمد و ابو داود والترمذى.

Meaning: Hadith from *'Amran bin Hushain*, a man came to the Prophet SAW. And said: my grandson has died, what am I getting from his treasure? So the Prophet replied: for you 1/6. (Ahmad, Abu Daud and Tirmidhi) (David 1952, 110)

The first Hadith above contains about the command to hand over the inheritance to the rightful person who is his heir. Then after being distributed to all the heirs it turns out his property left, then the rest of the property is given to the family of the nearest man. While the second hadith explained that because of religious differences that is a Muslim with a non-Muslim or otherwise, should not be mutually inherited. The third hadith explains the division of the inheritance that grandpa acquired, if grandchildren died while his father was absent, the grandfather got 1/6

2.2.3. Ijma' and Ijtihad

Basically the source of inheritance is the Qur'an and the Hadith of the Prophet (s), but in practice there are problems that are not explained in detail in the Qur'an or Hadith, thus opening the opportunity for the scholars to berijtihad in completing the problems of inheritance that arose in their day.

Ijma' and ijtihad are the further sources of the law after the Qur'an and Hadith which serve to explain what has not been explained in the authentic texts. In this case the Companions, the Imam of the School and other Mujtahids have a very important role to solve the inheritance problems that have not been explained by the Qur'an and Hadith. As Fatchur Rahman explains the following:

- a. Regarding the status of the brother who inherited along with the grandfather, there is no explanation in the Qur'an. The Qur'an only explains the status of the brothers together with the father or together with the boys who in both of these circumstances

they get nothing, because they are veiled, except in the case of the fact they have a share. According to most opinions of friends and priests of the school quoting *Zayd ibn Thabit*, the brethren received the legacy part of *muqasamah* with grandfather.

- b. The status of the grandchild whose father had earlier died than the grandfather who inherited the stock together with his father's brother. According to the provisions, they get nothing because of being shaken by his father's brother. But according to the Egyptian Testament Law which rested from the *ijtihad* of the *mutaqaddimin* ulama, they were given a part based on the wills of the mandate (Rahman 1981, 33)

Based on the above explanation, it is clear that God provides a vast opportunity for the human mind to dig up the law in order to solve the problems that arise by keeping guidance to the lines that have been described by Allah and the Apostle.

2.3. The Legal Principle of Islamic Inheritance

In Islamic inheritance law there is a principle of inheritance concerning the procedure of transition of property of the deceased person to the living person, namely: the principle of *ijbari*, bilateral principle, individual principle, fairness principle of balance and inheritance principle solely due to death.

2.3.1. Pillars and Terms of Inheritance

In Islamic law there are three main elements that become harmonious of inheritance, namely: a. The heir (*muwarris*) is the one who dies and leaves the property or right that the heirs can possess, whether the death is inherently or in a *hukmi* manner, that is to die on the basis of the judge's verdict. b. The inheritance (*maurus*) is anything left by the heirs who can legally turn to his heirs. c. Heirs or heirs are the ones who are entitled to the inheritance left by the deceased either by kinship with the *nasab* (hereditary), marriage and *wala'* (liberating slave) paths.

2.3. Problem Gharawain and Settlement According Jumbuh Ulama

2.3.1. Understanding Gharawain

Gharawain is the name given to two inheritance problems that the composition of his heir consists of; husband, father and mother and wife, mother and father.

The problem of *gharawaini* is also known by the name of *Umaryatani* problem, because this problem is a matter once decided by Umar (Al-Mahalli, t.th., 143) which was then accepted by the majority of friends and followed by Jumhur Ulama. Some literature gives the name *gharawaini* problem with the name *gharibaini* which also means two miraculous or strange problems.

Gharawaini comes from the word *gharwu* or *gharan* which means strange, surprising (Al-Munawwir 1984, 1004). So *gharawaini* problem means two strange problems. This *gharawaini* problem first appeared in the time of Umar bin Khatab.

2.3.2. Finishing *Gharawain* Problem According to Jumhur Ulama.

2.3.2.1. If the heirs consist of husband, mother and father (*Umaryyah I*).

If a person dies and leaves an heir; Husband, mother and father, then part of each heir is according to the provisions of the Qur'an and Hadith is:

- Husband receives $1/2 = 3/6$ (because the testator does not leave the child).
- Mother = received $1/3 = 2/6$ (because the heir does not leave the child).
- Father = as 'asabah.

Thus, the number of parts husbands and mothers is $1/2 + 1/3 = 3/6 + 2/6 = 5/6$. Means the rest of the treasure is $1/6$. In accordance with the provisions, then 'asabah get the rest of the property after given the mother and husband, which is $1/6$.

2.3.2.2. If the heir consists of wife, mother and father (*Umaryyah II*).

If a person dies and leaves an heir; Wife, mother and father, then part of each of the heirs according to the provisions of the Qur'an and Hadith are;

- Wife receives $1/4 = 3/12$ (because heir does not leave child).
- Mother receives $1/3 = 4/12$ (because heir does not leave child).
- Father = 'asabah = $5/12$

Thus, the number of parts of the wife and mother is $1/4 + 1/3 = 3/12 + 4/12 = 7/12$. Means the rest of the treasure is $5/12$. In accordance with the provisions, then the 'asabah get the rest of the property after given the mother and wife, ie $5/12$.

Actually the completion of the division of inheritance for the two above case forms has been completed, since it has been divided in accordance with the provisions of the Qur'an and Hadith. However, after paying attention and comparing the amount of inheritance received by mom and dad, it appears that the mother's part is larger than the father's part. It made Umar and some friends feel a bit strange and odd, because how can a mother, whose daughter receives more part of the father, who is a man. Instead, the father should get more from the mother, or the male should get twice the female part. This is where the problems arise which then lead to differences of opinion scholars.

To solve the problem of *Gharawaini*, both first and second, in order for the father to have a greater share of the mother's part, Umar wished by turning the understanding *فلأُمِّهِ النِّسْفَ* (then the mother got a third), the meaning (*النِّسْفَ*) one third here is not one-third of all (*Tsulutsu al-baqiy*) after being distributed to *dzu al-furud*, that is husbands, so that the parts change, that is;

- Husband gets $1/2 = 3/6$
- Mother gets $1/3$ of the rest of the property; $1/3 \times 1/2 = 1/6$
- Father as 'asabah gets the rest of the property, ie $1/3 = 2/6$

Thus, the father as an *asabah* gets $2/6$, twice the mother's part is $1/6$.

Then, the result of *ijtihad* Umar in deciding the matter of *Gharawain I*, followed by the Companions, such as: Zaid bin Thabit, Usman ibn Affan, Ibn Sirrin, Ibn Mas'ud and Ali, onwards became the opinion chosen by Jumhur Ulama, such as; Hasan, Sufyan al-Tsaury, Malik, Abu Hanifa and Shafi'i. The friend who disagrees with Umar's method is Ibn Abbas, he argues that in the settlement of this *gharawain* case does not require *takwil*, because the guidance of the Qur'an and Hadith has been clear, and no matter if it turns out the mother's part more than the father.

Meanwhile, Ibn Sirrin argues for the settlement of the second *gharawain* case disagrees with Umar, but agrees with Ibn Abbas (*Hzm t.th., 260*) Because in the second case the father has got more from the mother, though not twice the share mother.

However, in other narrations it is explained that **Abdullah** disagrees with Umar. It is as narrated by Ibrahim al-Nakha'i that according to Ali bin Abi Talib, in this case **Gharawain** mother gets 1/3 of all amount of property, not 1/3 of the rest of the property.

As for the basis of Umar's *Ijtihad* here, as Amir Syarifuddin explains in his book, it is merely to avoid the greater part of the mother from the father's part. (Syarifuddin 2008:97) Even Ibn Qudamah in *al-Mughni* states that the right of the mother should not be greater than the right of the father. (Qudamah 1970, 279) This is also reinforced by Ibn Mas'ud in his statement narrated by al-Musayyab bin Rafi 'from Sofyan al-Tsauri and from his Father and from Waki' that: "God does not show me the excess of the mother from father". (Hazm t.th., 260) The result of *ijtihad* Umar is felt to meet the rules that have been in effect that the male portion is twice the female portion.

In addition, Ibn Rushd in his book *Bidayah al-Mujtahid* explains that the reason of *Jumhur Fukaha* in the matter is that when the heirs are only fathers and mothers, the mother as *dzu al-furud* gets a third of the treasures and the father *asabah* spends the rest of the estate, i.e. 2/3. So it should be so in this *Gharawain* case, where father gets twice the mother's part. So, as if they think that more maternal acquisition from the father's part is a departure from the basic rules. (Rusyud 2007, 392)

Nevertheless, there are scholars who disagree with Umar's settlement method above, namely Ibn Abbas. According to him, in the matter of this *Gharawain*, the mother still receives 1/3 of the total property, in accordance with *zahir al-Nisa'* verse: 11:

لَمْ يَكُن لَهٗ وَلَدٌ وَوَرِثَهُ اَبَوَاهُ فَلَا مَهْرَ لَهَا مِنْ مَّا تَرَكَ

(If the deceased had no children and he was inherited by his mother (alone), his mother got a third). Meanwhile, the father as *asabah* is based on the Prophet's instructions in the hadith which reads:

عن ابن عباس رضي الله عنهما قال : قال رسول الله صلى الله عليه وسلم ا لحقوا الفرائض باهلها فما بقي فهو لأولى رجل ذكر . متفق عليه

Meaning: Hadith from Ibnu Abbas r.a. Rasulullah SAW. Said: "Give *faraid* (the part that has been determined in the Qur'an) to the *erhak* receive it and the rest give to the nearest male family". (HR. *Muttafaq 'Alaih*).

Thus as '*asabah*' father here only receives the excess of treasure after being distributed to *dzu al-furud* how much it is, i.e. 1/6. Then Ibn Abbas's opinion is further supported by Shuraih al-Qadhi, Daud Zahiri and other scholars of the *Zahiriyyah* school, such as Ibn Hazm. (Hazm t.th., 260-261)

As for the reasons expressed in reaching the opinion of *Jumhur Ulama* is, as Ibn Hazm explained the following:

- Resolving the issue of inheritance outside the provisions is a violation of the guidance of Allah and the Prophet Muhammad.
- With regard to Ibn Mas'ud's statement of the mother above, Ibn Mas'ud does not know about the virtue of the mother of the father, as is the Prophet's Hadith about the question of a person who is most worthy to receive the goodness of his *shubbah*'s salutation? The Apostle answered 3 times "your mother". For the fourth time, the Prophet replied "your father". Thus, this Hadith rejects what Ibn Mas'ud expressed.
- Based on the explanation narrated by *Ikrimah*, that Ibn Abbas has sent him to meet Zaid bin Thabit to inquire about the inheritance of husband, mother and father. Zaid replied; Husband gets 1/2, mother gets 1/3 of the rest of the treasure. Then Ibn Abbas asked; Is Zaid's answer based on his own opinion or on the basis of the book of God? Zaid replied: It is my own opinion, that mother should not be more than father. Responding to that, Ali said: "if there is a verse related to Zaid on that opinion, of course he will reply that" I say so is based on God's Book. So, instead of saying it based on my opinion.
- The inconsistency of Umar and Ibn Mas'ud, because in the case of inheritance if the heir consists of; 1 boy, mother and father. The solution is mother and father both got 1/6. Why do not they make a fuss about it? (Hazm t.th., 261-262)

Observing the solution of the *Gharawain* problem by Umar bin Khatab above which was followed by *Jumhur Ulama*, seems understandable and considered logical, because 'urf at that time did so. At that time, cultural influences before Islam were still very strong. Before Islam came, women were treated very badly, considered disgrace, contempt and not dignified. Women have no rights and they are treated like goods.

As Allah described in the Qur'an about the reaction of the Arab community of Jahiliyah when hearing the news of the birth of his daughter, their faces are red, because they are very shy and angry. They are wavering between allowing the daughter to live, risking to bear the family's disgrace, or burying the girl alive, in order to cover the family's disgrace. (Surat al-Nahl: 58-59) In this case Umar is one Never did such a nasty thing, before Islam.

Then Islam came to lift the dignity of women. Islam sees men and women have the same degree, which distinguish only their faith only. But on the other hand, Islam regulates that men are female leaders. So also in the household, the man is the head of the family who has the obligation to give a living and protect his family. Culture at the time, women have not had a role like women today. In the past, women played more role in the house only and not many who do economic activities, let alone as the backbone of the family in the problem of living.

Then, if the other reason is taken as the basis of Umar's decision which is then followed by Jumhur Ulama, when it says the meaning of $\frac{1}{3}$ (فألمة الثلث of the total property) to $\frac{1}{3}$ of the rest of the property is as follows:

- Because of this gharawain problem, if not ditakwilkan, then the mother exceeds the father. This is considered strange, awkward and inappropriate at the time.
- With the ditakwilkannya meaning $\frac{1}{3}$ (tsulusu) from the treasure to $\frac{1}{3}$ of the rest of the property, then the father will get more parts, even two parts of the mother.
- This takwil is done because the composition of the heirs is not as mentioned in sura al-Nisa' verse 11.
- Ibn Mas'ud's statement narrated by sofyana al-tauri, that: "God does not show me the excess of the mother of the father", although in this case, it is as if Ibn Mas'ud forgot about the hadith which explains the virtue of the mother of the father.

Thus it can be concluded that Umar's decision in this gharawain problem, seems very discriminatory. However, this opinion is chosen by Jumhur Ulama of classical age and Jumhur Ulama next. In fact, in Indonesia who tend to have a cultural culture or 'urf

different from the Arabs, choose Jumhur Ulama's opinion in the settlement of this gharawain case, as in the Compilation of Islamic Law in Indonesia, precisely in Chapter III, article 178 verse 2.

Therefore, for today if the opinion of Jumhur Ulama is applied in solving the gharawain problem, there will be parties who are not happy, feel aggrieved because their rights are reduced. Therefore, it is necessary to reformulate Islamic jurisprudence, especially in this matter of inheritance settlement. According to the author, for the present time, simply by re-apply the will of the verse zahir. Therefore Ibn Abbas's opinion seems more in line with the 'urf that applies to Muslims today, if it is' the urf used as an excuse in the adjective verse.

According to the authors are not the instructions of Allah and His Messenger in the Qur'an and Hadith in the matter of the provisions of the right of each heir (furud al-muqaddarah) is very clear and Muslims are obliged to follow these provisions. However, due to the influence of the social and cultural conditions prevailing in the Arabian Peninsula at that time-of a very strong patrilineal and male domination, when confronted with the "gharawain" issue, Jumhur Ulama who adopted the thought of Umar bin Khatab There is an awkwardness, because father, a man, gets less inheritance than a mother, even though it is a provision of nash, then they try to find a way by turning the meaning of the mother's part $\frac{1}{3}$ treasure with the meaning of $\frac{1}{3}$ the rest of the property (tsulusu al-Baqi).

3. Conclusions

From the above discussion it can be concluded that:

- The method used by Umar in his ijtihad about this gharawain problem is the takwil method, in which he turns the meaning of zahir nash $\frac{1}{3}$ (tsulusu) from the treasure to $\frac{1}{3}$ of the rest of the property.
- Umar's decision followed by Jumhur Fukaha in this gharawain issue tends to discriminate against women, especially mothers. This can be seen from the reasons underlying his thinking as follows:
 - When the heirs are only fathers and mothers, then the mother as dzu al-furud gets a $\frac{1}{3}$ share of property and father as asabah spends the rest of the property, ie $\frac{2}{3}$. So it

should be so in this Gharawaini case, where father gets twice the mother's part.

- 32.2. It is a deviation from the basic rule if the mother more than the father.
- 32.3. This takwil is done because the composition of the heirs is not as mentioned in sura al-Nisa' verse 11.
- 33 Umar's decision followed by Jumhur Fukaha in this gharawaini matter was strongly influenced by the 'urf or social and cultural conditions prevailing in the Arabian Peninsula at that time which was patrilineal and the dominance of a very strong male.

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