

The Existence of *Mèkol-Nyo'on* Formula in Tradition of Inheritance Division in Madura

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Abstrak:

Tradisi pembagian harta waris masyarakat Madura mengenal istilah formula *mèkol-nyo'on* atau formula 2:1. Namun, keberadaannya sekarang sulit ditemui dalam implementasinya, meskipun istilah tersebut masih sangat melekat dalam ingatan setiap individu sampai sekarang. Penelitian ini menggambarkan tradisi apa saja yang sudah menggantikan kedudukan formula *mèkol-nyo'on* dan mengapa hal tersebut bisa terjadi pada masyarakat Madura yang dikenal sangat religius. Penelitian ini mengambil lokasi di Kabupaten Pamekasan yang *notabene* mayoritas penduduknya Muslim. Dengan pendekatan deskriptif-sosiologis, penelitian ini menyimpulkan bahwa tradisi formula *mèkol-nyo'on* sudah digantikan dengan formulasi berbeda, yang lebih mementingkan kebaikan dan kemaslahatan semua ahli waris tanpa membedakan jenis kelamin, dengan standar utama kesetaraan dalam kesejahteraan ekonomi dan kemanusiaan antara sesama saudara dalam keluarga, di mana laki-laki dan perempuan memiliki kesempatan yang sama.

Kata Kunci:

Mèkol-nyo'on, tradisi warisan, hukum warisan Islam

Abstract:

The tradition of the inheritance division in Madura knows a term namely *mèkol-nyo'on* formula or formula 2:1. However, nowadays, the existence of that formula is very difficult to find in its implementation, although it still very sticks in each individual mind until now. This research describes what kind of traditions that have replaced the *mèkol-nyo'on* formula and why it happens in Madurese society whom are well known as very religious society. This research takes place in Pamekasan Regency where most of the populations are moslem. By implementing sociological-descriptive approach, this research concludes that the tradition of *mèkol-nyo'on* formula has been replaced by the different formula, which emphasizes more on the goodness and benefits to all the heirs regardless of gender. with the main standard of equality in economic prosperity and humanity among fellow brothers in the family, where men and women have the same opportunity.

Keywords:

Mèkol-nyo'on, inheritance tradition, Islamic inheritance law

Introduction

It can not be denied that Madurese society is always be an interesting part for all people to do a research from various aspects, whether it is in social, economic, culture, education, and etc. Up to now, there are many research about Madurese society that have been executed, either by madurese themselves as *insiders*, or by researchers outside the community of madurese society as *outsider researchers*, in which their research related to the various social side, culture, religion, characteristic, and living pattern of madurese society.¹

Pamekasan, as one of regencies in Madura Island, is not significantly different from other madurese society in general. The geographical position and administrative roles of Pamekasan as the residence center of Madura give special attraction to the researcher to be used as the object of the studies, in every aspects, including its law-social aspect, Pamekasan society can be studied from Islamic law perspective and customary law or tradition. The approach from study of law can provide a positive contribution to the

development of the treasury of the legal studies nationally in this country.

Next, from approach to the study of law, a researcher is able to enter into the various aspects that are very wide. One of the aspects of law study in Pamekasan is inheritance law. The study of the inheritance division in Pamekasan society's tradition is very interesting to discuss. Either it is viewed from the perspective of Islamic inheritance law or from the perspective of the customary inheritance law. In this case, we can take an example about the tradition of Pamekasan society in the inheritance division. In the tradition of Pamekasan society, it is found some patterns in inheritance division. Including the division of inheritance which is done when the heir is still alive, after the heir passes away, and there is also twice distribution, i.e. before and after the heir died.

In the inheritance tradition of the old Pamekasan society, there was a term of inheritance division namely *mèkol-nyo'on* formula, to give a comparison of the inheritance between men and women. the men' part is described by the term *mèkol* (shoulder) and the female' part is *nyo'on* (carry on the head), where that term is assumed adapting from the provision of islamic law, i.e. the division formula 2:1 as presented in Qs. al-Nisâ' (4): 11 in which cut of that verses: *Yûshîkum Allâh fi awlâdikum li al-dzakar mitslu hadd al-un-tsayayn* (Allah thus commands you concerning [the inheritance of] your children: the share of the male is like that of two females. The formulation of 2:1 as according to al-Qur'an above is frequently found as the same reason of *fiqh* scholars, that is a reason about the bigger

¹ Some researchers who have studied about Madura Island with the results of their individual research can be seen as follows: Huub de Jonge, *Madura dalam Empat Zaman, Pedagang, Perkembangan Ekonomi, dan Islam, Suatu Studi Antropologi Ekonomi* (Jakarta: PT. Gramedia, 1989), Mien A. Rifai, *Lintasan Sejarah Madura* (Surabaya: Yayasan Lebur Legga, 1993), Martin van Bruinessen, *Kitab Kuning, Pesantren dan Tarekat* (Bandung: Mizan, 1999), Latief Wiyata, *Carok, Konflik Kekerasan dan Harga Diri Orang Madura* (Yogyakarta: LKiS, 2002), Helen Bouvier, *Lebur, Seni Musik dan Pertunjukan dalam Masyarakat Madura* (Jakarta: Yayasan Obor, 2002), Mien A. Rifai, *Manusia Madura* (Yogyakarta: Pilar Media, 2007), and etc.

need of women are on the men's shoulders.²

In this era, that term has been seldom to find in practice. The tradition which is to divide equally between male and female, and even, females receive bigger part than male heirs do. For example, male only gets one plot of land. While, female gets one plot of land plus other building or a house. So, generally, in Pamekasan society the inheritance division is not based on *farâ'idl* law, but based on regional customary law.³

The pattern of the inheritance division by using *mèkol-nyo'on* formula such as some cases above are still able to be found in Pamekasan society until now, because that formula is derived from the understanding of the religious thought which is then acculturated with the tradition of Pamekasan society whom is very religious. Not then left it at all while keeping bear title of the religious side of Pamekasan society is still very religious up to now. Empirically, it can not be denied that in the inheritance division cases, the tradition of the inheritance that previously appears in tune with religious values, has been disappeared along with the emergence of the inheritance traditions which according to the society are more practical and more beneficial.

The questions are: how could it happen in Pamekasan society, how is the tradition of the inheritance division in the society of Pamekasan Madura which is more widely used, and why the division by

using formula which does not follow the *mèkol-nyo'on* concept is preferred to be chosen by Pamekasan society. Therefore, this research tries to find the relevance to answer the anxieties above, especially to describe the tradition of the inheritance division and the disappearance of *mèkol-nyo'on* formula in the tradition of Pamekasan society. Besides that, the research about the inheritance tradition in Pamekasan is very rare to do by other researchers. There are only some results of the previous research that are substantially different. For instance, the result of Dian Yulianti Ningsih's study⁴ that describes the inheritance tradition in Panglegur Village, Tlanakan, Pamekasan. It describes the process and the decision of the inheritance division seen from Islamic law perspective, the similar study is done by Rofiatul Hasanah.⁵ She studied about the portion that is received by son and daughter which is in fact that the bigger portion is received by daughter, the society's argumentation about that decision, then reviewed by Islamic law on such division pattern. Eka Susilawati⁶ also studied to ensure the implementation of the Islamic inheritance law in Religious Court of Pamekasan and the constraints faced by the judges of religious court in im-

² Muḥammad 'Alī al-Shābūnī, *al-Mawâriṭs fī al-Syarī'at al-Islāmiyah fī Dlaw' al-Kitāb wa al-Sunnah* (Egypt: Dār al-Ḥadīṭs, n.d.), 18-9.

³ Soegianto, ed., *Kepercayaan, Magis, dan Tradisi dalam Masyarakat Madura* (Jember: Penerbit Tapal Kuda, 2003), 59.

⁴ Dian Yulianti Ningsih, *Tradisi Pembagian Harta Warisan di Desa Panglegur Kecamatan Tlanakan Kabupaten Pamekasan* (Undergraduate Thesis, STAIN Pamekasan, 2012)

⁵ Rofiatul Hasanah, *Pembagian Harta Warisan Anak Laki-laki dan Anak Perempuan di Desa Padelegan Kecamatan Pademawu Kabupaten Pamekasan Ditinjau dari Hukum Islam* (Undergraduate Thesis, STAIN Pamekasan, 2014)

⁶ Eka Susylawati, "Penerapan Hukum Waris Islam dalam Perkara Waris di Pengadilan Agama Pamekasan", *al-Ihkam: Jurnal Hukum dan Pranata Sosial* 9, no. 2 (December, 2014): 315-37.

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plementing Islamic inheritance law when deciding the inheritance disputes.

All the researchs above are more normative-descriptive, either Islamic law perspective or the law and regulations that are applicable in Indonesia. There is no previous research that observes carefully about the benefit aspect of the heirs according to the tradition that has long lasted and how Pamekasan society interpret the process of the inheritance division, thus it results the construction of the inheritance tradition that is considered more ideal based on the situational demand and the economical condition of their family without bounded by the normativity of religious texts as in this study.

Research Method

This research is executed by using descriptive-analysis. It describes and analyzes comprehensively the *mèkol-nyo'on* tradition in the inheritance division in the society of Pamekasan Madura, by focusing on the existance of the tradition of the inheritance transition according to Islamic law, which is already acculturated to the customs and traditions of the society.

By relying on data from cases of the inheritance divisions in the society, I studied intensively about the background and existence of the tradition of inheritance division of the Pamekasan society, either individually or in group that carries out directly the inheritance division.⁷ I met the heirs and *pewaris* (the heir) that are alive who has shared his properties, finding the cases that have happened, and examine the texts related to the inhe-

ritance division, especially the cases that have been resolved administratively and or by positive law in the court.⁸ The researcher comes to "field" to observe about the phenomena of the inheritance division in natural condition and not in the manipulative inheritance divisions.

Descriptive research is very relevant if it is supported by the qualitative approach as an approach that results data in written words or oral data from the respondents being observed.⁹ Therefore, the researcher is able to see the growing phenomena as a unity that is not tied to one variable or a certain hypothesis. This method is to facilitate him in finding double issues, and makes himself close to the subjects being observed, and also to be more sensitive and more adaptable to the influence of the phenomena happen in the society.

Source of the data are in the form of words and actions obtained from the subjects of inheritance, whom consist of the individuals from the Pamekasan society, either an heirs (*al-wârits*). They are individuals or group of people who had experienced in receiving and/or in giving the estate, and the phenomena that occur related to the inheritance division. In addition, those data were also obtained from religious figures and local community leaders, such as the chairman of the MUI Pamekasan, the chairman of the brance of NU in Pamekasan, community leaders, and clerks of court. It is done to obtain the data about the dynamic of the Islamic inheritance law and customary

⁷ Sumadi Suryabrata, *Metodologi Penelitian* (Jakarta: Rajagrafindo Persada, 2006), 80.

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⁸ Imron Arifin, ed., *Penelitian Kualitatif dalam Ilmu-Ilmu Sosial dan Keagamaan* (Malang: Kalimasahada, 1996), 57.

⁹ Lexy J. Moleong, *Metode Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2008), 4.

inheritance law in Pamekasan society. Whereas, the written data are obtained from documents, pictures, books, and etc.

The process of collecting the data in this research is conducted by using three techniques as follows:

1. In depth Interview,¹⁰ namely an indept interview to the heirs (*al-wârits*), and the heir (*al-muwarrits*), religious leaders, community leaders, village officials, in the form of open-ended interviews (open interview), remembering that the data that want to be obtained by the informants are unlimited.¹¹ The interview¹² is conducted to obtain the data that are associated with the tradition of the inheritance division in the society of Pamekasan Madura, and their reasons in dividing their inheritance to the heirs.
2. The observation on the cases of the inheritance division process in the society of Pamekasan Madura. It is done by the researcher to observe directly the reality in the society about the process of the inheritance division, so that he can obtained the data.¹³

3. Documentation,¹⁴ is observing the documents relate to the tradition of the inheritance division in Pamekasan society, especially those who ask for the decision through the Religious Court (PA) or the District Court (PN).

The process of the data analysis is done by applying some steps, as follows: (1) Data reduction, is one step in analyzing the collected data and arranged systematically and highlighted the main points of the problem, then the essence of the data can be found; (2) Data display. of course, the collected data are very much, thus it can causes the difficulties in drawing the whole data or in make the conclusion. To overcome those difficulties, the researcher anticipates it by creating model, mappings, tables, and diagrams, so that the overall data can be mapped into the detailed parts; and (3) Data Heuristic, is finding the differences and taking the similarities of the collected data in which then are able to do a comparison between the themes which relate to each other.

The Tradition of the Inheritance Division in the Society of Pamekasan, Madura

Basically, the tradition of the inheritance division in the society of Pamekasan is very diverse. From the research data that have been collected, can be mapped generally into three patterns. *The first*, the society that shares inherited property when the heir is still alive, either by the appointment, transfer, or by testament. *The second*, those who share the inheritances after the heir passes away. Actually, if it is returned to the Islamic law, the

¹⁰ Deddy Mulyana, *Metodologi Penelitian Kualitatif, Paradigma Baru Ilmu Komunikasi dan Ilmu Sosial Lainnya*, 6th edition. (Bandung: Remaja Rosdakarya, 2008), 180.

¹¹ Setya Yuwana Sudikan, "Ragam Metode Pengumpulan Data", in *Metodologi Penelitian Kualitatif, Aktualisasi Metodologis ke Arah Ragam Varian Kontemporer*, 7th edition. ed. Burhan Bungin, (Jakarta: Rajagrafindo Persada, 2010), 100.

¹² Suharsimi Arikunto, *Prosedur Penelitian, Suatu Pendekatan Praktek* (Jakarta: Rineka Cipta, 1993), 197, and Sudarwan Danim, *Menjadi Peneliti Kualitatif* (Bandung: Pustaka Setia, 2002), 130.

¹³ Soejono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1996), 207.

¹⁴ Moleong, *Metode Penelitian Kualitatif*, 169.

second model here is suitable as the inheritance process. *The third*, those who share the inheritance twice, it is shared when the heir is alive and after he/she passed away if there are remaining prosperity(s) that has not been shared yet. Because the main focus of this study is only the tradition of *mèkol-nyo'on*, therefore, the researcher only presents the corresponding data, i.e. the process of division after the heir died.

This pattern has many variants, for example, the most prominent is the equal division among the fellow children of the deceased, called the deceased's children and not the heirs, because I rarely finds the heirs whom involve the other heirs outside the group of children even though they are still alive.

Generally, Madurese society prefer to use a consensus in resolving any problems, in Rustam Efendi's family, a heir from West Pademawu Village, the inheritance division is done some years after the heir death by gathering all of the relevant parties. The inheritance is sometimes only one plot of the land while the house is commonly given to the widow (the heir's wife) whom is alive. The division is done through a consensus that was initiated by the oldest son. Related to this case, in the division of the inheritance, the inheritance is divided equally based on the the agreement regardless of gender.

The equal division is carried out by the society is not without any consideration, but for the conformity of all parties among the heirs, especially for the women whom are jobless or still self-employed, So the inheritance they got that are equal with the men heirs can be used as capital for the continuation of

their lives in the later days. Those reasons are what make the majority of the society in Pamekasan dividing their inheritance by customary way and based on the traditions of each family.

From the understanding side, the majority of the Pamekasan society have comprehend about the inheritance division according to *farâ'idl*, but in the implementation, this way is avoided because it is considered less advantageous materially. For instance, the X is a heir, and when his position according to Islamic inheritance law is very advantageous for him, then the division is done according to the Islamic inheritance law, on the contrary if it is not profitable for him, he will ask the equal division. Although, he really understands about *farâ'idl*. Thus, based on the explanation from Rustam Efendi, the heir from East Pademawu Village, Pademawu Subdistrict, Pamekasan, the motive behind the division of the inheritance that occurs in the Pamekasan society is materialistic motive (economy).

From the direct investigation into the center of the society, the equal inheritance division is not done by one family only, but the same cases are almost done by all of the society, It was all done with purpose and intention which are almost the same, namely the reason and the purpose of humanity and mutual help among the members of his family. When most of people are very obsessed to take immediate possession of the estate, and obtained their parts as much as possible, differ from some of the Pamekasan society such as Abdul Razak's family, a heir from Blumbungan Village, Larangan Subdistrict, Pamekasan Regency. In this family, the inheritance division is done by putting forward the family integrity of all

brothers. Appreciating each other among fellow brothers in the extended family of Pamekasan society is still held strongly as a hereditary tradition and it should be developed, in the middle of hard challenge of globalization that is marked by the high consumerism, so that requires every individual has stocks and enough capital assets to fulfill their necessity of life.

Helping each other especially to our relatives and families is very good act in the tradition and is very recommended by Islam, It is seen in the case of the inheritance division as done by Kamaruddin, a heir from Laden village, Pamekasan, who shares his inheritance to all his daughters, while his sons who have been relatively well established in economy do not received parts at all. However, in this case, the inheritances that he has are not too much and it is only few plots of land, but the refusal to receive some part of the inheritance should be noted.

More simple and straightforward with the inheritance estates that are not too much also become fundamental reason, then the brothers do not fight each other in receiving the inheritance and can result the benefit for all, Moreover, There is not a little bit of disagreement and the disputes concerning the issues of inheritance in the society, in which if it can not be controlled can cause the relative relationship broken.

Besides the case of the equal divisions, in the society of Pamekasan Madura is also met some cases of the inheritance division by giving the bigger part to the daughter, especially if she is the youngest daughter. It is the same with the previous one, the inheritance division is done some years after the death of the inheritance heir and shared through con-

sensus among the brothers. The case was the deceased is Muhally's father, Muhally is a heir from Tlanakan Village, Panglegur Subdistrict, Pamekasan. The deceased left inheritance in the form of a plot of land is about $\pm 22 \times 32$ m² and there was also one unit of house. The inheritances are 5 children, with details are 2 sons, and the rest are 3 daughters. The division of the land is divided equally, except for the youngest daughter. Besides she received a plot of land, she also gets one unit house. All family members agree to be shared equally, although there are still constraints especially about the youngest children who get more.

Inheriting a larger part to the female heirs than male heirs is quite special. Moreover, the reason is based on the living prosperity of the family and the custom of helping each relatives one another. There is a wiseword of Madurese which is similar with the principles above "*trè-tan sakerrak ta' kennèng porop dhunnya saghunong*" (a brother can be irreplaceable with the prosperity that are very much though). The principle like this is hold on by the society of Pamekasan Madura, especially the heirs whom become the informants of this research.

The other pattern of the inheritance division after the heir died is the division without considering whether the part is bigger or smaller between men and women. As experienced by Affan who stays in Kowel Village, Pamekasan. The inheritances are 2 plots of dry lands and four unit of houses. Because those are in the form of land and building, therefore, those inheritances are not divided exactly the same, but divided based on its form. The sons are 3 men, each of them gets one unit of house, one unit remaining is for his fa-

ther (the ex-husband of the inheritance heir) who stayed there. So, four units of houses have been completely divided. While 2 daughters, each of them received one plot of the land around the house. For them, it is not important which one has the higher prices between the house price or the land price, the most important thing is there is a direction from their parents that the division is like that, all of the children *sam'an wa thâ'atan* (listen and receive). The process of the inheritance division is done in the kinship situation led by parents. All of the heirs agree with it, and also for the portion of the men and women. Therefore, the division of property is considered complete and final. In terms of wide, the land size given to the female heirs are wider than the width of the building, although the prizes may not be more expensive. House prices can be more expensive than the land despite its size is two fold.

Until this research is done, the house certificate or the inherited land are still occupied by the heir, he is the husband of the heir, it means all of the properties which have been divided becomes *use rights* and not *property rights* for a while until (may be) until the heir died. However, the inheritance division is already clear and there is no more change, because at the time of the inheritance division, there are some witnesses also present. Yet, related to the management of the inherited land and buildings that have been distributed to each of the heirs have become an individual responsibility. By means, it is up to them whether will be renovated or rebuilt. All of the heirs are given the freedom, as well as for the heirs who have received the inherited land.

The worry comes from the men, whether their sisters accept the part that is just a plot of empty land. So, even though the inheritances are already divided like that, the daughters may receive it just because their obedience to their father, So, in the process of the inheritance division, they do not protest and look like just receive it. However, according to Islamic inheritance law, this way has been appropriate.

In the case above, the inheritance division is not equally divided but based on their father's decision although actually he is included as one of the heirs if it is referred to the Islamic inheritance law. Back again to the reason of why all of the heirs receive that such division, the conformity factor and the obedience factor to the parents are put forward more than just receiving part of the inheritance division of their parents. This such attitude is appropriate with the characteristic of Madurese which is in general, they are hard worker and never give up, and also reluctant to receive voluntary gift from other people.

The inheritance division in the society is also rooted from the tradition that develops in the society, so that the division is often done in accordance with the agreement and the economic condition of each heirs. If, accidentally, the economical condition of the sisters *lebbhi melas* (their economy is weaker), they are commonly given a larger part or take the similar part as received by male heirs. Even, the male heirs do not take any part at all. This phenomena happen in the process of the inheritance division done by Abdul Aziz's family, a citizen of Palesanggar Village, Pegantenan Subdistrict, Pamekasan.

For instance, if the children consist of men and women and the daughters whom are economically weaker than the brothers, so that all of the brothers agree not to take part at all from the whole properties include the inherited land and building of their parent. All of them are given to the daughters whom accidentally also stay in that parents' inherited house. All houses and lands belong to the parent and commonly certified on behalf of the sisters, so they live in a row in one location lined up to the west and face to the south and form a *tanèyan lanjhang*.

Another pattern is the inheritance division based on the Islamic inheritance law purely. Although this pattern has been rarely to find, the inheritance division referred to Islamic inheritance law must be admitted that it still running with the ratio formula 2:1, means 2 parts for the man and 1 for woman. The division formula 2:1 is well known by the society of Pamekasan, Madura as *mèkol-nyo'on* formula.

My observation on the case in research related to the *mèkol-nyo'on* formula contrast with practice in the field. For example, what has been undergone by H. Ahmad Satoyan, a citizen of Pamoroh Village, Kadur Subdistrict, Pamekasan. The child (orphan) and wife of the deceased are not given a part at all that previously had been divided according to Islamic law. All the properties in the form of agricultural land is managed by the oldest child of the deceased, he is H. Ahmad Satoyan without giving any part to his brother and his step mother.

Thus, it can be drawn a temporary conclusion that the pattern of the inheritance division in the society of Pamekasan found some formulations which in

general can be grouped into three part: *The first*, the society tradition that divides (shares) the inheritance equally among the heirs, especially the heirs of the *bu-nuwwah* group (children), regardless the male heirs' portion and the female heirs' portion. *The second*, the formula which gives a larger share to the girls with various reasons. *The third*, the share of male heirs is bigger than to the women heirs, that close to the ratio 2 : 1 between men and women although the size is not exactly the same. From some formulations above, the first formula and the second formula are more dominant in Pamekasan society, while the third formula is rarely to find.

The Theoretical Implication: the Fading of the Existence of Mèkol-Nyo'on Formula

The empirical reality about the inheritance division in the society of Pamekasan as explained in the previous part shows that almost all of the society do not use the *mèkol-nyo'on* Formula, either it is as tradition that has run so long or in term of the society's understanding as part of Islamic law that has been well known as the division based on *farâ'idl*.

The formulation of *mèkol-nyo'on* in the inheritance tradition of the Pamekasan society is essentially identical with the formulation of the Islamic inheritance division, therefore, there must be possibility that the formula appeared at the same time of the entry of Islam to Madura, it is about in the 15th M century for the western region of Madura (Bangkalan-Sampang), and in the 16th M century for the east region of Madura (Pamekasan-Su-

menep).¹⁵ In the context of Pamekasan society, actually there is strong correlation between implementing the Islamic inheritance law that accumulated in the *mu'â-malah* law with the understanding of the society whom do not apply it perfectly, although in certain parts, which are mainly related to *furûdl* (the heirs' part), for example, there are those who give the female heirs a larger portion than male heirs, and some others share it equally by the reason of the social condition that have changed between the society's need with the formula and the detailed law provision in sharia law in general.

For most of Pamekasan society, *mèkol-nyo'on* formula is viewed no longer meet the elements of the actual benefit. In the midst of a culture that has been growing for a long time regarding to the wedding preparation, the parents usually aware of their obligations, so they give their properties to the children whom are going to marry, especially if those who will get married so on are daughters, parents provide all of the household tools, but not with the son who will get married to. So, the daughter gets more special attention.¹⁶ As a result, to adjust to the children's financial needs, another approach in understanding the normative rules to be an alternative bid to bridge, to open new thought in the field of inheritance law is a necessity that must be done immediately, because it is one chain of human interpretation over the global messages written in the text of the Qur'an and hadith in order to explore the hidden meaning im-

plied in it. That is called in Islam, as *istinbâth al-ahkâm*.

Opening a new perspective on the understanding of religious teachings earn 3 penny at one tail being inevitable of social change of society, include Pamekasan society. Some of the factors of the occurrence of social changes such as population, physical habitat, science and technology, or the structure of the cultural society, the process can be driven by the progress of the education system, the attitude of tolerance to the behavioral deviations, the system of open social stratification, level of people heterogeneity, and sense of dissatisfaction with certain conditions of life.¹⁷ According to Bruce J. Cohen,¹⁸ the social changes are caused by several factors, namely the geographical conditions, the progress of science and technology, religion/belief and ideology, and the existence of its inhabitants. As a consequence, if there is a change in society in a certain field, it will influence the others, including the legal field.¹⁹

The social changes in every aspect also consequences to the legal changes in order to respond to the presence of problems in the community, especially in its correlation to the function of the law itself, as a social engineering and social control. In the first function, the law roles are to create the social structure changes and to ask the society to move more forward in managing their life. While in the second function, the law is considered as maintaining of social stability and con-

¹⁵ Halim Soebahar, *Moderenisasi Pesantren, Studi Transformasi Kepemimpinan Kyai dan Sistem Pendidikan Pesantren* (Yogyakarta: LKiS, 2013), 25.

¹⁶ Latif Wiyata, *Carok, Konflik Kekerasan dan Harga Diri Orang Madura* (Yogyakarta: LKiS, 2002), 46.

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¹⁷ Soerjono Sukanto, *Beberapa Permasalahan dalam Kerangka Pembangunan di Indonesia* (Jakarta: UI Press, 1975), 139-40.

¹⁸ Bruce J. Cohen, *Intruduction to Sociology* (New York: Mc Graw Hill Book Company, 1979), 205-07.

¹⁹ *Ibid.*, 160.

trolling the rate of society changes in order not to get out of the provisions that have been outlined by the law. In implementing the second function here, there must be an affinity between the function of the law that should tie and control the behavior of the society life with the change of society that is very dynamic and constantly demanding the law to conform itself to the era.²⁰

To respond the public's understanding of Pamekasan against the Islamic inheritance law or they call it as *mèkol-nyo'on* tradition, which then prefer to use another way in the division of their inheritance, could have been caused by the change of the public order that is very dynamic.

The effort to understand the Islamic law based on the condition through a variety of approaches including *ijtihad* in history of Islamic law is not a new thing, and does not only occur at the conceptual level, but it has often happened since the era of companions in various legal cases, either it already exists in the *qur'an* and the *sunah*, which are still considered fail to give the benefits to the society, or the cases which do not have the the legal force.

Even The Prophet Saw himself justifies and legalizes the use of human mind as the source of Islamic law which is not found in the *nas* of the *qur'an* and *sunah*, as stated by a prophet' companion Mu'adz ibn Jabal when the Prophet peace be upon him points him as the judge in Yaman, He said that he will do *ijtihad*. What he said is the answer of the ques-

tion that is questioned by the Prophet peace be upon him.

In the next period, at the *Khulafâ` Râsyidîn* era, the *ijtihad* activity used to be done, not only limited to the completion of the legal cases that do not exist in the *Qur'an* and *hadith*, but also sometimes cases that have been written in the *Qur'an* and *sunah*, A compenion, Umar ibn al-Khaththâb ra, is a compenion who is very close to the Prophet, he was appointed as caliph to replace Abû Bakr ra. He became the caliph when the Islamic world has undergone many changes caused by the widespread of the area and the Islamic territory, as a result the problems that arise are more complex than before.

Because of the complexities of the problem above, Umar often make a policy that is not always the same with his predecessors, the Prophet saw and Abû Bakr ra, and often shifted from the provisions of al-*Qur'an*. For example about the division of the war spoils (*ghanîmah*).²¹ Distribution of zakat to *muallaf* (Muslim convert), the divorce, the sale of *umm al-walad*, the punishment for the thief, the punishment for *zinâ* (adultery), *ta'zîr*, and etc.²²

The policy taken by Umar is not run without obstacles, there are some oppositions from the other compenions. Umar

²¹ The division of the war spoils (*ghanîmah*) in al-*Qur'an* surah al-Anfâl (8): 41 explained that the rest of the treasure is given to the fighters who fight in it after taken a five to sympathize the orphans, the poor, and etc. Also, the form of the spoils in the form of movable and immovable property, which previously all the form of the spoils was given to them. However during the leadership of Umar ra., he refused to share the spoils as before. Munawir Sjadzali, *Ijtihad Kemasyarakatan* (Jakarta: Paramadina, t.th.), 38.

²² *Ibid.*, 39-42.

²⁰ Soerjono Dirjdo Sisworo, *Sosiologi Hukum: Studi tentang Perubahan Hukum dan Sosial* (Jakarta: Rajawali, 1983), 147.

as a companion who have ever undergone *tasyrî'* process is considered had deviated from the text of the Qur'an, whereas actually in the above cases of 'Umar is put forward *maqâshid al-syarî'ah* aspect than the literal text, and he has predicted that *mashlâhah* (the beneficial side) must be put forward rather than its normative text.²³

The explanation above shows that actually the present generation has a lot of examples and justification for the use of common sense in understanding Islam and its law order, to be implemented in daily life according to the needs and benefit of mankind with the principle that the implementation of Islamic law can be changed and be different over the time and place changes. Thus, there should be effort to re read the concept of islamic law that has been codified and spoiled not to change it at all. By the reason, changing Islamic law means changing the law that have been set by *syarî'ah*.

In Indonesia, many philosophers of Islamic law also offer alternative solutions to overcome the impass of the law understanding, include the formulation of the inheritance division. Munawir Sjadzali illustrates some cases, one of them is about the part of men and women in the Islamic inheritance law. According to him, the ratio 2:1 between men and women in the Qur'an can not be understood textually, moreover the reason is a man gets a larger inheritance because he should feed his wife, and will give dowry to his fiance, and should responsible to his family as the family leader, as understood textually by many Islamic scholars.

The Sjadzali's elaboration surely affirm that he does not receive just the way the verses used by the nas of the Qur'an related to the formulation of the inheritance division, especially about the formula of 2:1 between men and women, time is running out and of course many changes has happened, maybe the culture of marriage also follow the development of the times and the customs in the society which always change. According to Sjadzali, recently, in the Indonesian Islamic community, the dowry has been considered just as formality, it is no longer in the form cash or other valuable things. It also happens in Pamekasan society, now husband and wife are working together to earn a living to fullfil the needs of their family.

Therefore, accoding to Sjadzali, the marital (husband-wife) relationship is not "take and give relationship", but the equal relationship based on mutual cooperation to help each other in fulfill their daily needs. Then Sjazali gives an example about his own children whom most of them are working together to support their family.²⁴ When such condition has occured, according to Sjadzali, the reason that the men receive twice larger than part of women is not relevant anymore to be applied on an absolute basis.

Huzairin also proposes almost the same thing about the concept of inheritance law which is relevant to the society. He creates teoretical conception about inheritance that is very famous, it is bilateral inheritance which is used dominantly in Indonesia.²⁵ His conception co-

²³ Aksin Wijaya, *Menggugat Otentisitas Wahyu Tuhan* (Yogyakarta: Safiria Insania Press, 2004), 32.

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²⁴ Sjadzali, *Ijtihad Kemanusiaan*, 61-2.

²⁵ Damrah Khair, "Hukum Kewarisan Islam di Indonesia: Suatu Kajian Pemikiran Hazairin", *Jurnal Analisis X*, no. 44 (June, 2002), 90.

mes from the relatives system that is mostly embraced by Indonesian society, it is the system of relatives patrilineal (the father), matrilineal (mother's line), and parental or bilateral (from the father's line and mother's line equally). According to him, the relatives system which is most widely embraced by Indonesian society is the system of bilateral relatives, a relatives system that is lined from both parents (father and mother), as a result, there is no difference between men and women in term of inheritance division.²⁶

If seen from the tendency of Indonesian society in general, according to some research, the implementation of Islamic inheritance law is put forward more on the textual understanding and the formal legality of sharia law that is considered injustice. The Indicator is the majority of the people around 88,18% of the inheritance disputes are resolved through the District Court (PN), which is definitely the court system is done by using the system of customary law.²⁷ Therefore, the attempt to interpret the verses of inheritance needs to be done contextually, so that the formula of male part and female part can be seen in different form, i.e sharing the inheritance for women is at least half of the men. So, giving women more than half of the men part does not contradict with the Qur'an.²⁸

The various ideas in understanding the concept of formula of 2:1 as the provision of the Qur'an or tradition of Pame-

kasan society with *mèkol-nyo'on* formula influence the understanding of Pamekasan society, so that the tradition that has been built by their ancestors based on the Islamic concept in this era has begun to fade and replaced by other tradition that is based on the benefits of all heirs. So, it is not wrong if Pamekasan society uses the tradition of the inheritance division that has been commonly used by them, they do not use the provisions of the Islamic inheritance law or that have been covered as the *mèkol-nyo'on* formula.

In term of giving the inheritance to women that is larger or equal to the men occurs in the Pamekasan society, and leave the *mèkol-nyo'on* formulation, it can be shown some of the reasons proposed by Pamekasan society, one of them is humanity reason and mutual help to the brother, besides social-cultural reasons. In this case, although in one side it contradicts textually to Islamic law and *mèkol-nyo'on* formula, however it should be viewed from the beneficial aspect to be achieved, that is the benefit in term of economy for all the family, including the heirs, although they are females. Thus, in the real context, they requires the division to all the heirs should be equal or give more to the women.

There is strong rationalization belongs to the society of why the division is not based on the *mèkol-nyo'on* provision, in which the equality of the chance in life to search for economical welfare together not only individual. Therefore, the male heirs try to do it without removing his individual obligational side as the family leader in each family.

The *ratio-legis* stated in *mèkol-nyo'on* formula in determining that the

²⁶ Hilman Hadikusuma, *Hukum Waris Adat*, 7th edition (Bandung: Citra Aditya Bakti, 2003), 23.

²⁷ Afdol, *Kewenangan Pengadilan Agama Based on UU No. 3 Tahun 2006 dan Legislasi Hukum Islam di Indonesia*, 2nd edition (Surabaya: Airlangga University Press, 2009), 53.

²⁸ *Ibid.*, 54.

men' part should be double than women' part is because men should be responsible for their family. This such reason for the community is considered no longer relevant in real life. The reality in the Pamekasan society, although the men do not receive twice more than the women get, they remain to be responsible to their family. It means, as a man, is to do his responsibly as the family leader must not injure his sister(s) by giving her the lesser portion than his.

Therefore, the ratio 2:1 between man and woman as stated in Qs. al-Nisá' (4): 11 and 176 must be understood in different context, it means, that provision is applied in the context of male heirs whom are not independent yet. So, they still need more capital to support his family. In another context, for example the male heirs have been lived independently in economy, while the female heirs do not, so the provision of those verses must be returned to according to the needs, in order to meet the two elements of the benefit simultaneously, they are the benefit for the male heirs and the benefits for female heirs. especially in the balance of welfare between fellow brothers. Moreover, if the properties which are left behind by the inheritance heir is only in the form of land, which is commonly in East Madura, it is just calcareous soils that are definitely not fertile.²⁹

The Understanding above is in harmony with what was stated by Afdol with the his *recoin* theory,³⁰ states that the share to the women is at least a half of the men's part. If in another occasion they are

given more than half of the male part, as for example the same or even more than the male part then actually it does not violate the provisions of Islamic law.

Likewise with the concept of contextualization proposed by Munawwir Sjadzali. According to him, Now, the society has already changed, the relationship of men and women in the family is no longer a relationship of giving and receiving, but equally working together to support their family. Therefore, the provision of 2:1 is not in line with the Indonesian society in general.³¹ The division with the ratio of 2:1 is also no longer used by the Pamekasan socioety because of some reasons that are almost the same. The Pamekasan society is famous as strong character, never give up, tenacious, hard worker, and likes to defend his self-esteem. Such characteristics are naturally inherent and transformed from exposure to the natural physical environments that are infertile and dry.³²

Thus, the tradition of the inheritance division that is mostly implemented by the Pamekasan society is in line with the provision of the Islamic inheritance law, if it is seen from the results of the effort to reinterpret the texts in the Qur'an, especially about the provisions of the inheritance division that manages the female part is a half of the male part, eventhough without using the *mèkol-nyo'on* formula.

The social cultural also becomes a part that completes the *ratio-legis* on the basis of not doing the inheritance division based on the *mèkol-nyo'on* formula. The

²⁹ Hélène Bouvier, *Lèbur, Seni Musik dan Pertunjukan dalam Masyarakat Madura* (Jakarta: Yayasan Obor, 2002), 21.

³⁰ Afdol, *Kewenangan Pengadilan Agama*, 63.

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³¹ Sjadzali, *Ijtihad Kemanusiaan*, 61-2.

³² Mien Ahmad Rifa'i, *Manusia Madura, Pembawaan, Perilaku, Etos Kerja, Penampilan, dan Pandangan Hidupnya Seperti Dicitrakan Pribahasanya* (Yogyakarta: Pilar Media, 2007), 162.

society explained that they prefer to use formula that is considered more fair than *mèkol-nyo'on* formula. because the customs which run for a long time and has been done heriditarily is considered less fair.

In the case of not implementing the *mèkol-nyo'on* formula which is seen similar with the the Islamic inheritance law in the Pamekasan society is not purely same with the provisions existing in the Islamic law, then translated into the inheritance division in the society. Actually it can not be interpreted that what have been done by the society contrast with the Islamic inheritance law, however, it is just the impact of efforts to interpret the provisions of Islamic inheritance law that is normative-textual which then its result is applied in the form of tradition, whether intentionally or unintentionally. So that, although it is not exactly the same with *mèkol-nyo'on* formula or the Islamic inheritance law, it cannot be considered as a violation of the provisions of the sharia, because there is another contexts that become the reason. Therefore, when it is viewed contextually, what became the inheritance division of the Pamekasan society can be said still Islamic, although no longer *mèkol-nyo'on*. It is a tradition comes from the society' customs according to the causes and cultural factors that influence it, as the results of the interpretation of Islamic inheritance law.

Moreover, if it is seen from the background of the provision of 2:1 between the men and women in the inheritance division because the men have to be responsible for their family, they must pay dowry, they must support the family'

needs, and other reasons.³³ If that ratio-legis is seen from the context of the tradition of Pamekasan society, it has not been relevant, because, economically, the men in Pamekasan are more advance than the women, while the women are tend to be retarded. It means, In the tradition of Pamekasan society, supporting the family's need is no more deepen on the their parents' inheritance, but in another side, the women will be also responsible for the bigger needs in the family, they are their parents. This is where the correlation of what is done by the Pamekasan society with opinions stated by Syaltût that family law should regulate the provisions with kinship ways.³⁴

The efforts in understanding and studying of all the laws in the Pamekasan society certainly lasted long enough, even though it is not arranged in written form yet, because it is precisely the uniqueness of that legal tradition; although it is not in written form as other positive law, but its implementation in the society is very strong, this cases may be caused by the nature of the Islamic law which is transcendent, and at the social level can not be separated from the changes and developments that became the basic character of social life (*immanen*).³⁵

Conclusion

The tradition of the inheritance division in Pamekasan society has been undergone many changes, from which is

³³ Muḥammad 'Alî al-Shâbûnî, *al-Mawârîts fî al-Syarî'ah al-Islâmiyah*, 18-9.

³⁴ Maḥmûd Syaltût, *al-Islâm 'Aqîdah wa Syarî'ah* (n.c.: Dâr al-Qalam, 1966), 257.

³⁵ Musahadi HAM, *Continuity and Change, Reformasi Hukum Islam* (Semarang: Walisongo Press, 2009), 15.

previously based on the understanding of Islamic thought acculturated to the culture and traditions of a society. One of them is the *mèkol-nyo'on* formula. The *mèkol-nyo'on* tradition in the society of Pamekasan Madura is same with the formulation stated in the Qur'an, that is the formual of 2:1 between the part received by the male heirs and female heirs. The existence of *mèkol-nyo'on* formula in the tradition of the inheritance division in Pamekasan society is already seldom to find in its implementation, not to say it has been faded at all. It can also be said that the *mèkol-nyo'on* formula has been reduced into the new formula which also adapt to the sharia provisions through the understanding that put forward more on the context of normative text.

The various rationalizations following the emergence of the new formulations in accordance with its spirit, to prove that avoiding the *mèkol-nyo'on* formula is not without reasons, one of the reasons is the equality level of the gender (egaliter) between male and female, the humanity reason between family's members, the equality of the rights to get a good life and chance to get economical welfare, and helping each other to live together in an extended family, with the equal and proportional division of the parent's inheritances.[]

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