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The Influence of Positivism and Empirism in The Enforcement of Islamic Inheritance Law in Indonesia

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ABSTRACT

Positivism and empiricism are modern paradigms become the basic guidelines for the schools of legal philosophy, namely legal positivism and legal realism. However, the current condition in Indonesia is dominated by the paradigm of legal positivism so that everything must be by written law. The practice of inheritance division that is always based on the concept of 2:1 as in the Compilation of Islamic Law is felt to be incompatible with community justice. The purpose of this research is to enrich the study of the positivism and empiricism paradigms as a renewal of Islamic inheritance law in Indonesia. The benefit of this research is to inform that the integration of positivism and empiricism in law will produce competent law enforcement. This research is a normative research with a conceptual approach and data sources in the form of literature and data analysis techniques, namely evaluation. The results of this research are; (1) The factor that causes judges in Indonesia to use the judicial restraint approach excessively as a characteristic of legal positivism is the legal culture of the application of the civil law legal system. (2) The solution to the problem offered is to borrow Fazlur Rahman's double movement theory, namely historical contextualisation by taking universal values from the norm. Therefore, it is time for judges to be free to move to realize moral justice within the limits set by the Constitution and the Law on Judicial Power.

Keywords: *Positivism; empiricism; realism; inheritance;*

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INTRODUCTION

Empiricism and positivism developed by philosophers in Europe marked the emergence of the enlightenment movement in Europe. The existence of these two paradigms shook the previous paradigm, namely the absolute domination of the church and curbing the freedom of thought of European society. Empiricism and positivism succeeded in bringing European society out of the darkness of believing in things beyond human reason . (Sundaro, 2022) Then both of them developed in various aspects of community life, one of which was in the field of law. These two paradigms are always used in the world of law, especially in deciding cases in court. These

two paradigms have given birth to many legal schools with their own characteristics. The two legal schools that are very influential in the world are legal positivism and legal realism. Both paradigms came from Europe, but Dutch colonialism at that time meant that these paradigms are still used by Indonesia today. (Huijbers, 2016)

Positivist thinking which always emphasizes that something must be based on facts and measurable has inspired legal science that law is considered to exist if it is in accordance with existing facts in society and can be stated in written products. Therefore, in the world of justice, written legal products are always used as guidelines for legal certainty. Teaching legal certainty in written products is designed so that problems can be predicted. (Ferdiansyah, Winata, Nurhasanah, Triansyah, et al., 2023) However, the teachings of positivism in the development of legal science are always seen as being in conflict with its predecessor, namely empiricism. This empiricist paradigm in legal science gave birth to a legal philosophy called legal realism. The teaching of legal realism which is based on existing experience always rejects the rigid legal certainty teachings of positivism. According to empiricism, law must always be based on the reality that exists in society, because written legal products will gradually, if not updated, result in not meeting the needs of society, and this written law could even be used as a tool. by the Ruler to legitimize his power because political influence is so strong. (Wardani, 2023)

This positivist and empirical thinking has influenced various branches of law, one of which is the inheritance of Islamic law in Indonesia. The problem here is regarding the 2:1 distribution of inheritance between men and women as stated in Article 176 of the Indonesian Law Compilation (KHI). This is a new problem because currently there are no longer any differences between men and women, everyone has equality in various fields, unlike in the past where men were in all matters of life and women were under their control. Even a 2:1 distribution of inheritance is considered unfair if daughters have the heart to care for their parents while sons don't care at all. (Cahyani, 2016) The thing that gets the most attention here is the antinomy of legal certainty and justice that lives in an always dynamic society. The influence of legal positivism in this case is regarding legal certainty, this is because the paradigm focuses on clarity of norms and the best implementation based on these norms. This is different from the influence of legal realism which views that judges cannot obey the law absolutely because they must study, follow and understand the values that live in society as stated in Article 5 of Law Number 48 of 2009 concerning Judicial Power. (Mochtar & Hiariej, 2023)

In fact, courts in Indonesia often make decisions based on applicable law as the basis for their decision making. This is because Indonesia adheres to the judicial restraint approach which is part of legal positivism thinking. Judicial restraint is an approach in assessing interpretation by referring to the law which is the product of the law maker. (Boediningsih & Wijaya, 2021) With this approach, the division of inheritance between men and women is 2:1 as stated in Article 176 of the Compilation of Islamic Law (KHI) which results in a mismatch with the ethical and moral values

that exist in society. . Therefore, the freedom of judges in determining the legal basis needs to be implemented so that judges not only apply the law but also uphold justice in society. Thus, legal realism is never realized in society, law is only seen as a norm that places great importance on legality or something that is measurable. Given the antinomy resulting from the influence of legal positivism and legal empiricism in the field of Islamic inheritance law, it is very important to examine the main ideas of the two schools of legal philosophy which originate from positivism and empiricism and relate them to the implications for inheritance law. inheritance law 2:1 in Indonesia.

Based on previous investigations, several studies discuss the influence of the positivism and empiricism paradigms on legal science as well as the problem of dividing inheritance 2:1 between men and women. First, research by Ega Ferdiansyah and friends (2023) discusses the influence of the legal positivism paradigm in reforming the legal system in Indonesia. (Ferdiansyah, Winata, Nurhasanah, & Triansyah, 2023) Second, research conducted by Akhmad Khubby Ali Rohmat and friends (2022) discusses the influence of positivism in law enforcement in Indonesia. (Rohmat, Bagus, Partiah, Kholinnur, et al., 2022) Third, research conducted by Indra Rahmatullah (2021) discusses the influence of the legal realism paradigm in business law enforcement. (Rahmatullah, 2021) Fourth, research conducted by Made Oka Cahyadi Wiguna (2023) discusses the influence of legal positivism on legal science and law enforcement in Indonesia. (Wiguna, 2023) Fifth, research conducted by Faradista Nur Aviva (2023) on the influence of legal positivism and legal utilitarianism on law enforcement in Indonesia. (Aviva, 2023)

Sixth, research conducted by Muhammad Johan Yafie and Ahmad Zahro (2023) regarding the distribution of inheritance assets equally between men and women in Lanji Village, Kendal Regency. (Yafie & Zahro, 2023)Seventh, research conducted by Mardani (2023) regarding the practice of dividing inheritance using the concept of takharuj, namely the freedom of heirs to reject the part of the inheritance that they actually received. (Mardani, 2023) Eighth, research conducted by Ita Ma'rifatul Fauziyah and Yunitasari (2022) regarding the implementation of equal distribution of inheritance between men and women from a gender equality perspective. (Fauziyah & Yunitasari, 2022) Ninth, research conducted by Saprika Datumula and Syaifullah MS (2022) regarding the concept of justice in dividing inheritance 2:1 between men and women. (Datumula & MS, 2022) Tenth, research conducted by Nurul Aulia and M. Iqbal Irham (2022) regarding the concept of fairness in dividing inheritance 2:1 between men and women from a feminist perspective. (Aulia & Irham, 2022) This article is different from previous research because this article discusses the influence of the positivism and empiricism paradigm in Islamic inheritance law, namely the problem of dividing inheritance between men and women as much as 2:1.

The aim of this research is to explore the basic paradigm of legal positivism and legal realism regarding the 2:1 division of inheritance law in Indonesia and to attempt to reconstruct the legal reforms carried out in Indonesia. This is very important because the Compilation of Islamic Law which is the legal basis for dividing the inheritance of Indonesian Muslims is relatively old, namely more than 30 years. In fact, during this period of time there have been major social changes in society, especially at the beginning of the 21st century, there has been the influence of globalization in various fields of people's lives. The benefit of this research is to be able to provide information to readers that the antinomy between legal certainty from the teachings of legal positivism and the reality of the values or morals that live in society from the teachings of legal realism can be integrated into good law in the sense of being able to serve the needs of society based on needs. era, both completely and substantially. This can be achieved by updating written laws which are always carried out following social developments in society so that they are not rigid in their application.

METHOD

The focus of this research is the influence of the positivism and empiricism paradigms on the flow of legal philosophy, namely legal positivism and legal realism. Then it will focus on the influence of legal positivism and legal realism on the division of Islamic heritage in Indonesia, namely 2:1 between men and women. It should be noted that the legal positivism paradigm is very influential in Indonesia because Indonesia is influenced by the Continental European legal system (civil law system) which is very rigid towards written law with the aim of clear and measurable legal certainty. However, legal certainty does not necessarily fulfill the values or morality that exist in society. Therefore, it is no less important that this research also focuses on how to reconstruct the legal paradigm so that on the one hand it fulfills legal certainty and on the other hand it fulfills the values and morality that live in society.

This article is normative/doctrinal research with a conceptual approach. A conceptual approach is carried out by exploring the influence of the legal positivism and legal realism paradigms on the practice of dividing Islamic inheritance 2:1 between men and women in Indonesia. Apart from that, the author obtained data using literature studies, namely studying books, journals and statutory regulations. The data analysis technique used in this article is evaluation, namely by assessing the Compilation of Islamic Law Chapter II on Inheritance as being too rigid regarding the validity of inheritance distribution in today's developments.

ANALYSIS AND DISCUSSION

A. Positivism and Empiricism

1. Positivism

The term positivism comes from the English language, namely positivism or positivus, which means to place. (Surawandi & Maulidi, 2022) The founder of positivism was Auguste Comte (1798-1857), as outlined in his work entitled "The Course of Positive Philosophy ". (Nugroho, 2016) The background to the emergence of this positivist philosophy began with the emergence of reactions due to the trauma of European society in the Middle Ages due to very strong intervention and shackles by religious teachings. At that time, European society accused religion of being the cause of their backwardness from the East. That's when August Comte reacted by giving importance to the truth aspect of knowledge. Therefore, he rejected philosophical or metaphysical studies and highly deified the scientific method. (Surawandi & Maulidi, 2022) He said that metaphysical problems applied in the Church were completely meaningless, and could not even be justified. (Dozn & Rohimi, 2019)

According to Comte, positivism contains two meanings, namely positivity as a method of scientific study and the level of development of human thought. According to Comte, the level of human development is divided into three levels. First, the theological stage , namely the idea that everything comes from God. (Mayadah, 2020) This stage is divided into three periods, namely animism, polytheism and monotheism. (Triono, 2020) At this level, humans are always under the strong dogmatic influence of religion. Second, the abstract level, namely the idea that everything comes from something abstract and thus creates something. At this stage, humans begin to see reality and use reason when interpreting things that happen in their environment. Third, the positive level, namely thinking that refers to empirical things. At this stage humans begin to study problems by looking at reality and then processing it using scientific methods which then gives birth to true science. (Mayadah, 2020)

Positivism states that natural science is the source of true knowledge and is based on positive events. Therefore, it is useful to think about what is positive and actual so that metaphysics is not accepted. Positive in this case means everything that is seen as an objective experience, not metaphysics which is non-physical and invisible. Therefore, positivism in viewing knowledge must be based on observation and reason. (Prabowo, 2017) Positivism places great emphasis on numbers (quantitative) in observations captured by the senses. According to Positivism, data must be repeatable and calculable. Therefore, according to this school, everything must be predictable with data and reality. Different from empiricism which is only based on descriptive sensory observations. (Chalibi, 2019)

The following is presented in table form about positivism.

Table 1. Characteristics of Positivism

Characteristics	Positivism
Source	Sensory observation
Method	Experimental and quantitative (measurable)
Verification	Correspondence (according to field realities) and predictability

2. Empiricism

The term empiricism comes from the Greek imperium which means experience or trial and error. As a doctrine, empiricism has its opposite, rationalism. (Anggraeni et al., 2023) Empiricism is a school pioneered by John Locke (1632-1704), a French philosopher. The birth of empiricism was a reaction to previous rationalist thinking initiated by Rene Descartes (1596-1650). According to Descartes, all human ideas and thoughts originate from innate, a priori ideas. John Locke refuted Descartes' paradigm by saying that all human ideas and thoughts originate from experiences obtained by the senses. John Locke added, humans are born white without any knowledge. Therefore, he believes that the mind is not passive towards external phenomena, but rather sensory experiences such as seeing, hearing, smelling and tasting that make thoughts and ideas for humans. (Kami et al., 2023)

The theory of empiricism developed by John Locke was developed based on the view of "tabula rasa" (blank or blank paper). He describes human nature as an empty soul, not filled with anything, including ideas. It will contain ideas or thoughts if you have gained experiences from the senses until the birth of science. Sudarsono believes that the view of empiricists is that reason cannot give birth to knowledge from itself. Reason in this school's view is like a piece of paper which is then filled with experience. This school does not differentiate between intellectual science and sensory science, so it argues that the only objects of knowledge are thoughts or ideas that arise from external experience and internal experience. (Kami et al., 2023)

There is no difference between Akali science and sensory science as believed by empiricism. It can be drawn that John Locke rejected Rene Descartes' opinion which placed reason as the source of knowledge. According to empiricism, the source of knowledge is facts captured by the human senses. The facts observed by the senses are the main source of empiricism. Therefore, by placing sensory experience as the main source, this school places great emphasis on experimental methods in realizing knowledge and then drawing general conclusions. Therefore, it can be concluded that the way to obtain data from this empiricist school is inductive. Thus, according to this school, the data source must be obtained from something observed by the senses, then to test it there must also be facts in the field that are accessible to the senses or what is usually called correspondence. (Vera & Hambali, 2021)

Both empiricism and positivism emphasize facts observed by human senses. Therefore, both schools assume that science is value-free or neutral. Science that talks about facts will not

question good and bad, useful or not, beautiful and ugly, etc. The thing that differentiates these two schools is that in the empiricism school, the results are in the form of descriptive statements, while the positivism school emphasizes quantitative statements in the form of numbers and must be clear and measurable. In contrast to rationalism which emphasizes reason as the main source of knowledge. With such a rationalist paradigm, it can be said that science is value-based because human judgment is not the same or subjective. (Erwin, 2011)

The following is presented in table form regarding empiricism.

Table 2. Characteristics of Empiricism.

Characteristics	Empiricism
Source	Sensory observation
Method	Test
Verification	Correspondence

B. The Influence of the Positivism Paradigm on Legal Positivism and the Empiricism Paradigm on Legal Realism

1. The Influence of the Positivism Paradigm on Legal Positivism

Legal positivism is a school of thought that views written law as the highest law in a country. This thinking is strongly influenced by the teachings of positivism in general. (Herlambang, 2019) One form of influence of positivism teachings on the flow of legal positivism is that everything must be carried out in strict, clear and measurable ways, and without paying attention to aspects of morality. Therefore, according to legal positivism, law must be based on what is written in the law and must not be analogous. (Malik, 2021) The advantage of legal positivism in Indonesia is that it provides legal certainty and makes it easier for judges to try cases. (Rohmat, Bagus, Partiah, Kholiqunnut, et al., 2022)

However, the negative impact of legal positivism is when a judge decides a case based only on the law, thus ignoring the moral values that live in society. This must be avoided because it creates injustice for the lower middle class. (Sitabuana & Adhari, 2020) The impact of the development of legal positivism in Indonesia is the emergence of legal rigidity which means that law in Indonesia is unable to create real justice. This indicates that the law is only a tool that is positioned as a horse pulling the burden for the wishes of the employer, namely the ruler who has the authority and the entrepreneur as the owner of capital. Laws that must be clear are only legitimized by capital owners or the upper class who always prioritize formal aspects that are truly measurable to protect their interests. (Rahmatullah, 2022)

The concept of justice according to legal positivism is formal and procedural. In the view of legal positivism, justice can only be achieved through the application of laws that apply the law, not the moral values of society. (Endratno, 2022) According to legal positivism, the concept of justice has many interpretations in society's view, making it difficult to realize the true concept of

justice. Therefore, for the sake of legal certainty and unity in the state, written laws were formed and justice was conceptualized as the substance of these written laws. Therefore, what is fair is what is written in the law. (Hermanto, 2016) The weakness of formal and procedural justice according to the teachings of legal positivism is that it actually defeats all citizens in the concept of justice in law, thereby ignoring the moral and ethical values that live in society in making legal decisions. This results in inequality and feelings of injustice in society in a particular area. Therefore, a more holistic approach is needed in making legal decisions that not only considers the availability of laws but also the moral and ethical values that exist in society. (Hermanto, 2016)

2. The Influence of Empiricism on Legal Realism

Empiricism is a school of thought which states that knowledge and truth can only be obtained through human sensory experience. Therefore, according to empiricism, everything that is not a fact observed by human senses or is metaphysical in nature is not worthy of being called a source of knowledge or truth. (Hayat, 2021)In the context of sociology, empiricism explains that the knowledge and knowledge that humans have is formed from their experiences in the social environment. Empiricism is very influential in legal science, one of which is the type of empirical legal research and the flow of legal philosophy called legal realism. (Barus, 2013)

From the perspective of naturalist legal philosophy, empiricism and phenomenology are two complementary approaches. Empiricism can help in collecting data and facts, while phenomenology can help in understanding the meaning of the data and facts. (Syafithri et al., 2023) Empiricism has an influence on legal science, namely assessing that in essence the law must be based on the moral values that apply in society. In other words, everything that exists in society must be upheld, not just legality for the sake of legal certainty. This is the paradigm of a school of legal philosophy called legal realism. (Samekto, 2012)

In the view of legal realism, justice can change according to individual experiences in a particular place. Justice in the view of legal realism is not only concerned with the availability of laws but also individual experiences in certain situations. In other words, justice is the values or morality that exist in society. Therefore, justice in the view of legal empiricism does not only take into account the availability of written law but also individual experience in certain situations. However, the weakness of the legal empiricism view is that justice which is based on the values that live in society in a region can give rise to legal uncertainty because justice can change according to the experiences of individuals in a particular region. If so, then within a country between one court and another court in a different region there will be a lack of uniformity in decision making. (Assiddiqie & Safa'at, 2012)

The following table shows the influence of positivism and empiricism on the flow of legal positivism and legal empiricism.

Figure 1. Concept the influence of positivism on legal positivism

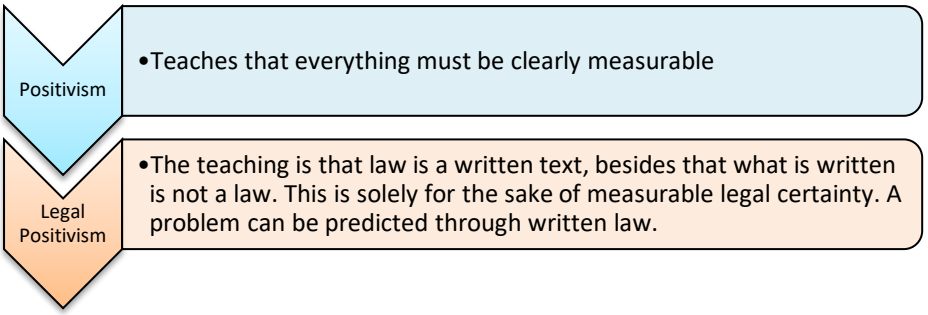
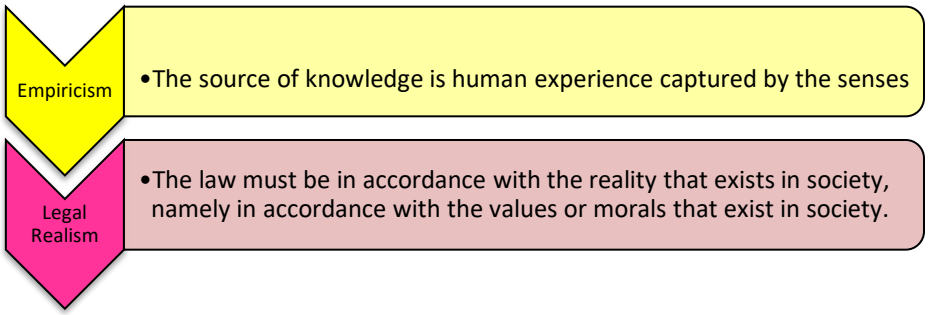


Figure 2. Concept the influence of empiricism on legal realism



C. The Influence of Legal Positivism and Legal Realism on the 2:1 Distribution of Heritage in Indonesia

Islamic inheritance law for Muslims in Indonesia is based on the Second Book of the Compilation of Islamic Law (KHI). This Compilation of Islamic Law (KHI) has a legal umbrella in the form of Presidential Instruction Number 1 of 1991 issued by President Soeharto (1921-2008). (Munif, 2015) Until now there has been no legal update regarding the Compilation of Islamic Law (KHI), so much of the material feels out of date. One of the things that is widely discussed is related to the 2:1 division of inheritance between men and women as stated in Article 176 of the Compilation of Islamic Law (KHI). (Azizah, 2021) Today's Islamic reformers who tend to interpret the verses of the Koran historically hermeneutically, such as Fazlur Rahman (1919-1988) with his theory of double movement, have even re-explored Surah An-Nisa' verses 7, 11, 12, and 176 . which talks about the division of inheritance 2:1 between men and women. According to Fazlur Rahman, in ancient times men had twice as much wealth as women because women did not have a part in being the backbone of the family, but only men. Meanwhile, currently after the massive reform of the gender movement, both men and women have the same rights to obtain work so that in a household the breadwinners consist of the husband and wife. Therefore, according to him, in overcoming problems with verses from the Qur'an, universal meaning and historical contextualization must be sought. (Sulkifli & Amir, 2023)

Regarding the implementation of 2:1 inheritance distribution in Indonesia in the courts, it is impossible to escape from the flow of positivism. This is because Indonesia is still influenced

by the Continental European legal system (civil law system) which teaches that the guideline for judges in court is written law. (Wau et al., 2020)This means that the Court in adjudicating a case cannot be separated from the judicial restraint approach, namely that judges as a judicial institution must respect the laws made by the legislative and executive institutions. (Hulwanullah, 2022)It is rare for judges in Indonesia to deviate from the written law made by the legislative and executive institutions in their legal considerations which favor the condition of the defendant and the values or morals that exist in society. In this way, judges only act as legal spokespersons who are blind to the values or morals that exist in society. (Mochtar & Hiariej, 2023) With the absolute application of judicial extraint in the Court, in the distribution of Islamic inheritance of course the judge will only act based on what is stated in the written law, namely Article 176 of the Compilation of Islamic Law (KHI) without looking at the condition of the heirs.

Apart from that, the flow of legal realism also developed in Indonesia through academics who were influenced by legal realism academics after studying in the United States. It should be noted that this legal realism school was born and developed rapidly in the United States. This can be seen from the judges at the United States Supreme Court who, in deciding a case, can ignore written law, but are based on the reality of what happened and the values that live in society. In other words, the United States Supreme Court uses a lot of judicial activism in deciding cases. (Rato, 2021)This legal realism is the antithesis of legal positivism in the legal science paradigm. If the teachings of legal realism are applied consistently in Indonesia, then the division of Islamic heritage will not only be based on a 2:1 division between men and women as in Article 176 of the Compilation of Islamic Law (KHI), but judges will make the law. deviating from written law based on the facts that occur or the values that live in society.

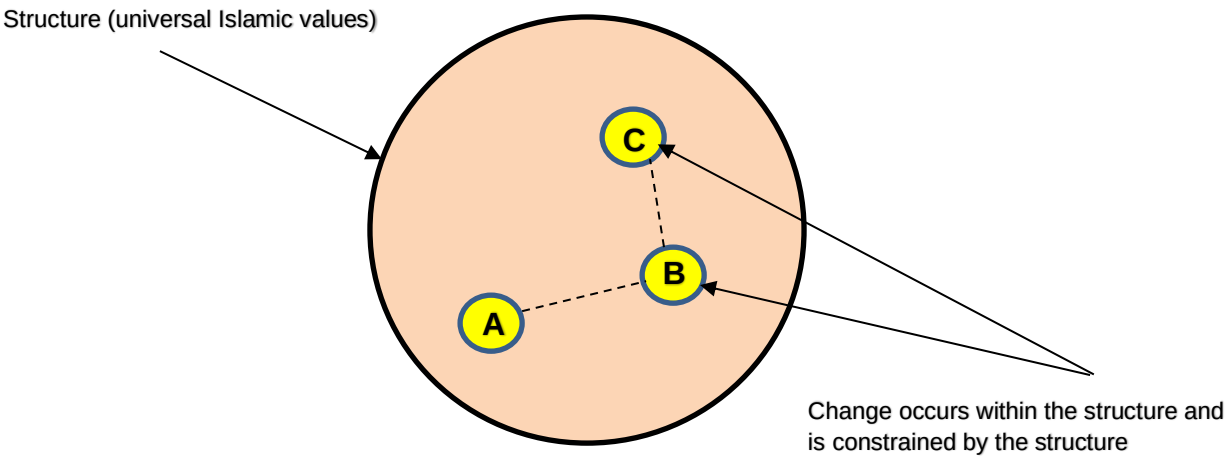
In addition, the antinomy between the paradigms of legal positivism and legal realism is also problematic in terms of inheritance. It is not uncommon for customary law, which is rich in moral values, to conflict with inheritance rights as guaranteed by written law. An example in this case is a case of inheritance at the Malang City Religious Court with heirs in the form of a mother and two sons. The inheritance left by the testator was in the form of a house that was then lived in by his mother. The problem began when the two sons wanted to immediately distribute the inheritance in the form of the house by selling and cashing out. However, the mother refused because she felt that the house was a legacy house with her husband and considered that in Javanese customary inheritance law, the inheritance left by the husband was transferred to the wife. Because there was no meeting point, the two children then sued the Malang City Religious Court. The judge in this case faced a dilemma between siding with the morality of devotion to the mother or upholding the rights of the children as guaranteed by written law. In the end, the judge handed over the case to a mediator for mediation between the two parties and it ended peacefully with the two sons giving up the house to their mother on the condition that it would not be sold

until she died. (Mahmudi, 2023) From the above example, it can be said that basically both the paradigms of legal positivism and legal realism can be used as weapons in obtaining interests.

This paradigm of legal positivism does not only come from the courts but also from some Muslims in Indonesia. Many Muslims still consider that the 2:1 division of Islamic inheritance as adopted in the Compilation of Islamic Law is still considered relevant to the values of justice without seeing the reality that occurs in society. Whereas in essence, the values of justice are abstract, determined by behavioral relationships between individuals or the legal culture of the community. (Zuhdi, 2021) With the increasing gender equality in this globalization era with jobs that are not only dominated by men, but it is also very unfair if boys get twice the share of women on the pretext of being the backbone of the family. However, this 2:1 division of inheritance is also still considered relevant if the condition of men in a particular area is the sole breadwinner. (Ahyani et al., 2022) Therefore, the division of inheritance 2:1 should not be seen as a necessity as the concept of rationalisation of legal formation by legal positivism because of the variety of circumstances that occur in Indonesia. In this case it is very appropriate the opinion of Charles Sampford (a figure in the school of legal realism) who said that this law should not be seen as something ideal but flows because the influence of the power and interests of each person is always different. (Sampford, 1989) This means that the 2:1 division of Islamic inheritance in the Compilation of Islamic Law is not necessarily for all Muslims, but for certain families or community cultures that place men as the sole breadwinner. As for other circumstances, the division of inheritance can be done according to the values of justice between the balance of rights and obligations of each family member.

In addition, in the theoretical field, Fazlur Rahman's paradigm reform in the division of inheritance by adhering to universal meanings such as the value of justice and not just sticking to the text alone is a breakthrough from the dogmatic legalistic way of thinking as taught by legal positivism. Fazlur Rahman understands that in the application of the division of Islamic inheritance 2:1 some areas experienced incompatibility due to different community cultures. According to him, it is not necessarily that certain regions have a patriarchal system like the culture of the Arabian Peninsula. In some developed countries, this concept has been abandoned and there is a balance in the professional world between men and women. Therefore, he understands that to overcome the acculturation of Islam with the diversity of places and times is not to use textualization of the law, but by contextualizing it with the universal values of Islam as stated in the shari'a, such as the value of justice according to the balance of rights and obligations. (Janah & Nugroho, 2022) These universal Islamic values become the structure that limits the interpretation from being done freely. In terms of legal discovery, Fazlur Rahman's concept is categorized as rule-breakthrough, namely legal discovery in order. (Susanto, 2019) The following is presents the concept of Fazlur Rahman's legal discovery regarding the division of inheritance.

Figure 3. Fazlur Rahman's concept of legal discovery



The concept of dividing Fazlur Rahman's inheritance with a double movement perspective has become an actual discourse for the development of Islamic inheritance law in Indonesia. However, the reading of Fazlur Rahman's theory has not been thoroughly understood by the Indonesian people and is still studied by some circles such as Sharia or legal scholars. Fiqh mawaris taught at the pesantren education level or educational institutions under higher education is only dogmatic or only limited to the application and calculation of inheritance assets as determined in shari'a or ijtihad companions (*aul* and *radd*). (Syahputra, 2023) In addition, there are still Muslim communities who are not even familiar with Islamic inheritance law and hold firmly to customary inheritance law. (Takdir et al., 2023) This is what later becomes a problem in the division of inheritance if the level of understanding of the heirs is different. In addition, Fazlur Rahman's concept of the division of inheritance has inspired a small number of Religious Court judges as evidenced by the existence of Religious Court decisions that skip Article 176 of the Compilation of Islamic Law. Some Religious Court decisions that make equal distribution according to the circumstances of the parties such as PA Makasar Decision No. 338/Pdt.G/1998/PA.Upg, PA Makasar Decision No. 230/Pdt.G/2000/PA/Mks, and PA Medan Decision No. 92/Pdt.G/2009/PA.Mdn. In addition to some of these decisions, Indonesia is still confined to the paradigm of legal positivism so it is only fixated on written laws.

D. Reconstructing the 2:1 Division of Heritage in Indonesia

The paradigms of positivism and empiricism that have developed since the Renaissance until now cannot be separated in influencing various areas of human life. Both are capable of bringing progress to humans towards a highly civilized nation. Positivism is a derivative of empiricism which believes that everything must be based on observations of the human senses

which are quantitative and measurable. It is hoped that clear and measurable observations will be able to predict various things that happen in this world. (Chalibi, 2019) With this emphasis on quantitative, positivism is closer and more suitable for use in the field of exact sciences or science. However, in its development, the positivism paradigm was also used in law, which is one of the categories of social sciences, giving rise to inconsistencies. (Nugroho, 2016)

Apart from that, empiricism, which is the parent of positivism, says that the source of knowledge is human sensory observation. Empiricism is not as rigid as positivism which emphasizes that human sensory observations must be clear and in the form of numbers. (Erwin, 2011) Empiricism is more descriptive of everything that appears through the human senses so it is very suitable for social sciences, including law. In social sciences, many things cannot essentially be measured with numbers so that applying the positivism paradigm to social sciences will cause many inconsistencies. Until now, in the field of law, there is still a war of opinion between whether or not the use of the positivism paradigm in law is suitable because it has given birth to a school of legal philosophy which is influenced by positivism and empiricism. The two schools of legal philosophy are legal positivism and legal realism. (Rahardjo, 2002)

The influence of the positivism paradigm on legal science is that in law enforcement, a law enforcer must be based on written law. This is solely for the sake of realizing clear legal certainty. The clarity of written law is intended so that problems that occur can be predicted accurately, thereby leading to uniformity between regions within a country. (Rohmat, Bagus, Partiah, Kholiqunnut, et al., 2022)The influence of positivism which emphasizes clear and definite things in legal science was influenced by the Industrial Revolution movement where investors needed formalities that supported the existence of their businesses. Therefore, contracts are made in written form as a formality. This then developed into a situation where determining and maintaining its existence also required the formality of written texts. The existence of this written text can make law enforcers confident in enforcing the law because its existence has been recognized in written law. However, legal certainty is not always beneficial for people's lives, rigid application of written law without paying attention to social developments in society will only create an antinomy between justice and legal certainty in society. (Manullang, 2019)

The influence of empiricism on law is that in law enforcement, law enforcers must pay attention to the realities that occur in society. The values or morals that exist in society must be upheld by law enforcers in carrying out their duties. Law enforcers must not be rigid about written laws in enforcing the law and blind to the surrounding environment. Real societal justice lies in the values or morals that apply in society, not in written laws. Law enforcers can deviate from the law at any time if the legal material does not match the reality in society. According to legal realism, this is because written legal products created by parliament and the executive which are applied to society are full of political interests. Therefore, sticking to written laws will only result in oppression of the people. (Erwin, 2011)

Indonesia adheres to a civil law legal system where law making lies in the legislative and executive institutions, unlike the common law legal system where law making lies in the judicial branch with jurisprudence as a source of guidance for judges in adjudicating. (Amin, 2019)Therefore, the Religious Courts in Indonesia adhere to an interpretation model with a Judicial Restraint approach. The Judicial Restraint approach is an approach that places judges to respect the legal products of legislative and executive institutions and not interfere with their policies. (Nahdliyah et al., 2011)Meanwhile, the judicial activism approach is an approach where judges act as enforcers of justice and position themselves as authorities in making decisions, while the validity of decisions can only be measured from fundamental considerations. decision ratio). (Latipulhayat, 2018)This judicial activism approach often occurs in countries that adhere to a common law legal system and is used as a court response to social changes occurring in society. (Satriawan & Lailam, 2019)This approach is also not much different from the originalist interpretation of the Constitution by interpreting current problems in relation to the Constitution which has not been updated for a long time. (Ghoffar, 2022)

In fact, Article 5 of Law Number 48 of 2009 concerning Judicial Power explains that in making decisions, judges must study, follow and understand the values that exist in society. However, Indonesia still adheres to the judicial restraint approach, especially if legal rules are strictly regulated. Because, Indonesia is a civil law country, and laws made by the DPR and the President cannot be ignored on the pretext of following the social values that live in society. Therefore, written law remains the main reference for judges in deciding a case. (Rahmanto, 2023)If studied more deeply, the judicial restraint approach is very close to legal positivism, namely that justice cannot be realized through the view of human subjectivity based on experience in the form of values or morals that live in society because these values are values. relatively. Therefore, the measure of justice that must always be applied and is considered ideal is through the application of formal and procedural legal norms in order to realize legal certainty. Thus, justice can be interpreted as legality, fair if a formal rule is applied to all cases where the contents of the rule should be applied. In the concept of legality according to legal positivism, whether a person's action is fair or not is the same as whether it is legal or not, namely whether or not it conforms to legal norms in assessing it as part of a positive system. (Wicaksono, 2021)

With the courts in Indonesia using a Judicial Restraint approach, all judge considerations must be based on written law. The distribution of inheritance also experiences complicated problems due to the use of a restraining judicial approach. Article 176 of the Compilation of Islamic Law (KHI) explains that men and women inherit 2:1. This provision is based on QS An-Nisa' verse 11 which also explains that the division of inheritance between men and women is 2:1. However, in the 21st century, this provision has begun to be challenged because social developments have led to demands for gender equality. Men and women now have equal positions, and women even work like men. Therefore, many gender activists have begun to study new interpretations of the

Koran in the face of current social changes. (Zahro & K.M., 2023)Apart from that, it will be a new problem if in a household, when both parents are sick, the daughter takes care of them until they die, while the son does not take care of his parents at all and then dies. divided 2:1 as in Article 76 of the Compilation of Islamic Law (KHI). (Amalia & Az-Zafi, 2020)

In this regard, it is important to explain Fazlur Rahman's double movement theory, namely the application of interpretation to the Al-Qur'an by understanding the verse according to the historical context in which the Al-Qur'an was revealed, then exploring the general values implied. in it, the second movement is to connect the general values in the verse with the current situation. Fazlur Rahman's interpretation method is classified as a contextual interpretation method because it understands the verses of the Koran in one cohesive unit according to *the asbabun nuzul* in understanding its meaning. (Umair & Said, 2023)Fazlur Rahman's interpretation with a double movement approach to QS An-Nisa' verse 11 by traditionalist interpretive scholars is considered contradictory because the verse is *qat'i* (fixed) and *ijbari* (coercion), thus giving rise to the door to ijtihad regarding Islamic heritage is closed. However, Fazlur Rahman answered that applying a rigid attitude in viewing the text (Al-Qur'an and Hadith) through a literalist, ahistorical and autonomous approach would only reduce the historical dynamics and true meaning of the Qur'an. (Muttaqin, 2013)

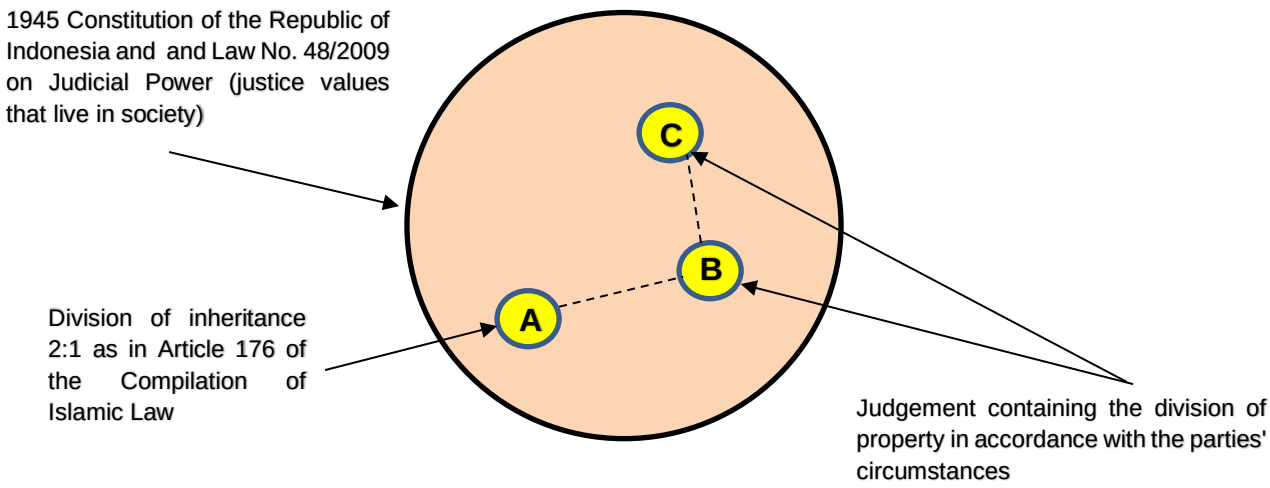
Regarding the interpretation of QS An-Nisa' Verse 11, Fazlur Rahman said that if studied historically, the division of inheritance between men and women was 2:1 due to the social conditions of Arab society at that time where women did not have inheritance rights. had as much independence as they do now. At that time, women were not obliged to earn a living because their position was not considered to be the head of the family as also regulated in QS Al-Baqarah verse 233 and QS At-Thalaq verse 6, and even received it from their husband who played the role of breadwinner. On the other hand, women currently have great independence so they can pursue a career in the world of work. Therefore, Fazlur Rahman concluded that the condition of Arab society with women not having as much independence as now and men having the responsibility to provide for the family which then has an impact on the distribution of inheritance in the Koran, does not necessarily mean that Muslims now have to refer to the verse especially if current conditions are very different from past conditions. Then, as a conclusion to his interpretation, Fazlur Rahman draws on the law that the division of inheritance will be distributed 1:1 to sons and daughters if in reality both are breadwinners. (Muyasarah, 2021)

From Fazlur Rahman's statement, it can be concluded that the division of inheritance between men and women is 1:1 based on the requirements of being a breadwinner, so this is based on justice according to legal empiricism. Justice according to legal realism does not only pay attention to the availability of laws but also pays attention to individual experiences in certain situations. Therefore, in implementing the division of inheritance between sons and daughters, judges should not only be limited to the text of the Compilation of Islamic Law (KHI) but determine

it according to the conditions of the heirs. However, it is very difficult to implement equal distribution of inheritance between men and women because Indonesia still adheres to a rigid civil law legal system, namely using a restrictive judicial interpretation approach. All judge considerations in deciding cases must be based on written law.

However, from a glimmer of Fazlur Rahman's double movement theory that seeks the universal meaning of the reason for the establishment of norms with the current situation, it is time for judges today to use their senses to see and feel moral justice according to the reality in society, not just looking for formal justice. As Fazlur Rahman's approach while still not leaving universal values in contextualisation efforts, judges in Indonesia should be able to explore universal values regarding their ontological position as judges. It is time for judges to take a stand on the 1945 Constitution of the Republic of Indonesia (Pancasila, the second principle and Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia) and Law No. 48/2009 on Judicial Power, which states that their main task is to uphold the values of justice that live in society. These two laws can be said to be universal principles that support the existence of judges in exercising their independence when adjudicating a case. Therefore, not being guided by the division of inheritance 2:1 as in Article 176 of the Compilation of Islamic Law is no longer seen as going out of the existing structure, but is still guided by the existing structure based on universal values. Such a paradigm is a middle ground so that judicial restraint and judicial activism approaches can be used according to limits so that the law can create justice that is rich in morals. This cannot be separated from what Satjipto Rahardjo said that the nature of the law was formed for humans, not the other way round. The following is a demonstration of the reconstruction of the paradigm of legal contextualisation in the distribution of inheritance in Indonesia.(Rahardjo, 2010).

Figure 4. Concept map of reconstruction of the paradigm of legal contextualisation in the distribution of inheritance in Indonesia.



CONCLUSION

The development of the positivism and empiricism paradigms became the basic guidelines for schools of legal philosophy such as legal positivism and legal realism. Basically, the two paradigms of legal philosophy can be useful if applied in a balanced manner. However, Indonesia is currently still thick with the dominance of the legal positivism paradigm that relies on written law as the only source of law so that it does not want to see the reality of the parties who are ultimately trapped in the blurring of the values of justice that are rich in morals. Therefore, in inheritance law, there is a problem when the division of inheritance law 2:1 as in Article 176 of the Compilation of Islamic Law is felt to be incompatible with most Indonesian people because of gender equality. The findings in this study reveal that the factor causing the excessive application of judicial restraint (the approach of judges being obliged to submit to written law) is a result of the legal culture left behind by the civil law legal system even though the current Law on Judicial Power has given freedom to explore the values that live in society. What needs to be changed in this regard is the reconstruction of the judge's paradigm so that it does not only revolve around written law. By borrowing Fazlur Rahman's double movement theory of historical contextualization of norms by drawing on universal values, it is possible to reform the paradigm of judges to always uphold the values of justice that live in society as stipulated in the Constitution and the Law on Judicial Power as a structure that limits them so that they can get out of norms that are not by the context of the times. In this way, judges can integrate the two approaches of judicial restraint (influenced by legal positivism) and judicial activism (influenced by legal realism) within limits so that they are useful in the discovery of morally rich justice. Therefore, it is time for the distribution of inheritance in Indonesia to always prioritize the conditional aspects of the parties so that it can fulfill moral justice.

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