

# Analysis of Religious Court Judges' Considerations in Equal Distribution of Inheritance Property

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DOI: 10.23917/laj.v9i1.5077

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## Submission Track:

Received:  
14 May 2024

Final Revision:  
22 July 2024

Available Online:  
28 July 2024

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## ABSTRACT

Kewenangan Pengadilan Agama dalam menyelesaikan perkara perdata Islam diatur dalam Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman. Dalam penelitian ini, penulis menggunakan metode yuridis normatif dengan analisis kualitatif. Hasil penelitian ini menunjukkan bahwa hakim tidak menggunakan ketentuan dalam Pasal 176 KHI dan QS An-Nisa 11 sebagai dasar hukum dalam putusan No. 92/Pdt.G/2009/PA.Mdn, melainkan menggunakan ketentuan yang terdapat dalam QS An-Nahl 16 dan pandangan ahli. Oleh karena itu, hakim dalam kasus ini menerapkan prinsip hukum progresif dengan tidak terfokus pada sumber hukum normatif saja, melainkan mempertimbangkan keputusan berdasarkan illat hukum, yaitu keadilan. Majelis hakim berani memutuskan pembagian warisan 1:1 antara anak laki-laki dan perempuan dengan menggunakan sumber hukum berdasarkan prinsip keadilan. Pembagian jumlah warisan menurut majelis hakim juga tidak hanya terfokus pada ketentuan Pasal 176 KHI dan QS An-Nisa 11 saja, tetapi dapat berdasarkan kesepakatan para ahli waris. Kemudian dapat disimpulkan bahwa majelis hakim telah memutuskan perkara warisan No. 92/Pdt.G/2009/PA.Mdn dengan bagian warisan anak laki-laki dan perempuan 1:1 menggunakan sumber hukum di luar ketentuan KHI dan QS An-Nisa 11. Putusan tersebut dapat diterima oleh para pihak yang berperkara, yaitu penggugat dan tergugat atau para ahli waris, yang dibuktikan dengan tidak adanya upaya hukum yang diajukan pada tingkat banding setelah putusan memperoleh kekuatan hukum tetap.

**Kata kunci:** Pertimbangan hakim, Pengadilan Agama, Warisan

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The authority of the Religious Court in resolving Islamic civil cases is regulated in Law No. 48 of 2009 concerning Judicial Power. In this

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research, the author uses a normative juridical method with qualitative analysis. The results of this study indicate that the judge did not use the provisions in Article 176 KHI and QS An-Nisa 11 as the legal basis in decision No. 92/Pdt.G/2009/PA.Mdn but instead used the provisions contained in QS An-Nahl 16 and expert views. Therefore, the judge in this case applied the principle of progressive law by not being fixated on normative legal sources alone but considering the decision based on the legal illat, namely justice. The panel of judges dared to decide the division of inheritance 1:1 between sons and daughters by using legal sources based on the principle of justice. The division of the amount of inheritance, according to the panel of judges, is also not only fixated on the provisions of Article 176 KHI and QS An-Nisa 11 alone but can be based on the agreement of the heirs. Then it can be concluded that the panel of judges has decided the inheritance case No. 92/Pdt.G/2009/PA.Mdn with the share of inheritance of boys and girls being 1:1 using legal sources outside the provisions of KHI and QS An-Nisa 11. The decision can be accepted by the litigants, namely the plaintiff and the defendant or the heirs, as evidenced by the absence of legal remedies filed at the appeal level after the decision has obtained permanent legal force.

**Keywords:** Judge's considerations, Religious Courts, Inheritance

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## INTRODUCTION

Based on the Royal Islamic Strategic Studies Center (RISSC) report entitled *The Muslim 500: The World's 500 Most Influential Muslims 2024*, Indonesia has the largest Muslim population in the world. RISSC noted that the Muslim population in Indonesia will reach 240.62 million people in 2023. This number is equivalent to 86.7% of the national population, which totals 277.53 million people (Annur, 2023). So in the practice of life, especially in civil matters, the majority of the Muslim population uses Islamic civil law. And in Indonesia itself Islamic law has been recognized and codified, which is now known as the legal product KHI (Compilation of Islamic Law). The Compilation of Islamic Law (hereinafter written KHI) is an Islamic law product dedicated to uniting various products of legal understanding (fiqh) scattered in classical jurisprudence literature into one unification (Ajidin, 2022). Regarding the enforcement of Islamic law in Indonesia, the Religious Court is an agency that is competent in Islamic civil cases. The Religious Court is an agency that has the authority to try Islamic civil cases based on the KHI and the sources of Islamic law, the Al-Qur'an and hadith. In accordance with the provisions of Law Number 7 of 1989 concerning

Religious Courts. The Religious Courts are one of the implementers of judicial power for people seeking justice who are Muslims regarding certain civil cases (Susylawati, 2018).

Islamic law regulates various aspects of the legal field, including inheritance, endowments, gifts and wills. Sensitive problems in social life often cause disputes, chaos between families caused by struggles over ownership rights to property, heirloom property which can also be called inheritance property. This can happen to anyone regardless of upper class or lower class (Khaeri, 2022). In Islamic inheritance, the distribution of inheritance according to Islamic law is different between sons and daughters, where the distribution of inheritance for sons is greater than the distribution of inheritance for daughters. This is divided based on the responsibilities carried by both of them, where the man is the one who must be responsible for providing for his family. Then it is also based on Surah An-Nisa verse 11, which says "Allah has ordained about the share of your children, namely that a son gets the same as two shares of a daughter." The universal message is justice in dividing inheritance (Anwar & Bahri, 2017). So the law enforcement in dividing inheritance according to the rules above is that sons will get 2 times the inheritance obtained by daughters. And in Islamic law the division of inheritance between sons and daughters is clearly absolute, meaning that it cannot be negotiated anymore.

In practice, it is found that considerations regarding differences in the size of inheritance distribution in several cases are not the same as what is regulated in the KHI and Islamic law itself. In which, the judge decides to divide the inheritance equally between male heirs and female heirs in the same or comparable amounts. This happened in the decision issued by the Medan Religious Court No.92/Pdt.G/2009/PA.Mdn, which in the decision as Plaintiffs were three sons and two daughters of the heir as well as three granddaughters and one grandson, against the Defendant, namely two daughters and one son of the heir. The content of the decision states that boys and girls get equal shares. This is based on a request from the daughter as Defendant, because as long as her parents are sick, she is the one who cares for and fulfills her parents' needs, while the Plaintiff does not care about the fate of her parents. (Anwar & Bahri, 2017). Based on this case, it can be seen the reasons and considerations of the Medan Religious Court Judge Number. 92/Pdt.G/2009/PA-Mdn regarding the principle of justice for women in obtaining an equal distribution of inheritance to sons. Analyzing more deeply, based on the results of the decision, the judge used progressive legal principles which emphasize that law is not just text. Progressive law places behavior as a much more important factor in law than regulations that are nothing more than text (Rahmad & Hafis, 2021). Then the judge considered the decision, seeing from the facts of the trial that the Defendant

had carried out his obligations towards his parents by taking care of and paying for his parents' lives, in contrast to what the Plaintiff had done.

With this decision, there was a discrepancy between the rules and practice. And this is very contrary to the positivism school of thought. The reason is that the positivist school of thought emphasizes the aim of law on legal certainty, not justice, which is not based on rules made by a sovereign authority (Riqiey, 2023) . The rules according to the Qur'an Surah An-Nisa verse 11 and Article 176 of the KHI (Compilation of Islamic Law) state that the share of boys is two to one with girls, but in this case what happened was equal distribution. In Previous research, has analyzed how the judges of the Medan Religious Court No. 92/Pdt.G/2009/PA-Mdn. Then, in this research, the author wants to update the previous research, namely by conducting broader research, on how the legal and philosophical considerations for making decisions are used by Medan Religious Court judges and how Religious Court Judges view analyzing these decisions. Also in this study the researcher wanted to examine the relationship between the imposition of decision No. 92/Pdt.G/2009/PA.Mdn with progressive legal principles.

## **RESEARCH METHOD**

In this research, the author will use normative juridical research methods. A normative juridical approach is "an approach that refers to applicable laws and regulations" (Benuf & Azhar, 2020). By using qualitative analysis of source material in the form of laws and regulations, articles and scientific works and other literature (books). The qualitative approach examines the depth of the researcher's subjective meaning and experience (Tan, 2021). Then the author will also conduct research by collecting various views from parties involved in the practice that is the research topic, using the interview method.

## **RESULTS & DISCUSSION**

### **1. Considerations of Religious Court Judges Regarding the Decision of the Medan Religious Court Number 92/Pdt.G/2009/PA-Mdn**

#### **A. Analysis of the Medan Religious Court Decision Number 92/Pdt.G/2009/PA-Mdn**

Based on the chronology of the examination in Decision No. 92/Pdt.G/2009/PA-Mdn, in this case the Plaintiff wants the division of inheritance to be divided using faraid

law, which is stated in Article 176 KHI and the Al-Qur'an Surah An-Nisa verse 11 that in inheritance, sons get 2 shares and daughters get 1 share of the assets inherited from their parents. In contrast to the Defendants who wanted an equal distribution of inheritance, on the grounds that during the heir's life the Defendant was the one who cared for, fulfilled all the needs and interests of the heir, while Plaintiff 1 never did this, and did not even care about the heir himself. The Defendant's argument was strengthened by the testimony of witness II presented by the plaintiff that it was true what was argued by the defendant, that the only people who looked after the heir when he was sick and cared about him were defendants 1, 2 and plaintiff 5. Then the testimony of the witness presented by the defendant also stated that the only people who cared and paid for the treatment costs when the heir was sick were defendants 1, 2, 3. This is one of the measuring points for the judge's decision in this case.

Therefore, considering the arguments and facts of the trial that emerged, there has been a discrepancy between the facts of the trial and the normative values that emerged. The panel of judges is of the opinion that if it is linked to normative values, namely referring to QS An-Nisa 11 and Article 176 KHI, male heirs will get 2 shares of the share of female heirs. If this legal basis is used in this case, it will be very unfair to defendant or woman. Justice must pay attention to the rights of individuals or groups by giving those rights to those who are entitled to them, while the opposite of justice is injustice, namely a situation where rights are not given their due importance (Rohmah & Faizah, 2022). So it is deemed unfair if the panel of judges continues to decide on the distribution of inheritance in accordance with the provisions of the applicable law, whereas in the facts of the trial only the Defendant is the one who cares for and takes care of the heir's needs, even though taking care of and caring for parents is an obligation for all children of heir. Among the obligations of children which are the rights of both parents is that children must provide support for them if their parents need it and the child is rich and capable, that is the most *afdhal* thanks and the most fair treatment for them. The scholars have agreed that the maintenance of poor parents who cannot run a business and have no assets must be taken from their children's assets. Because previously, a child's maintenance was mandatory and borne by his parents (Anwar & Bahri, 2017). This should be commonplace and definitely known to all heir children, because caring for parents is a devotion that must be carried out and is a form of

reciprocation for the love that parents have previously always showered on each child, but in this case, The plaintiff actually did not carry out his filial obligations towards his parents. So when the Plaintiff does not carry out his duties towards his parents, but wants a greater distribution of assets to him, it will be very unfair and seen as unethical. So it is no longer relevant if these verses and rules are used in this incident.

According to the panel of judges in their *ijtihad*, the division of inheritance as regulated in the verses of the Qur'an and KHI is not a patent rule that must be defended to the death without looking at the actual conditions, which in fact in the future the decision will not bring a sense of justice to the parties involved. The logical thought is that it is impossible for a verse from the Qur'an to have been revealed by Allah SWT, and the existence of this verse would actually lead to discrimination between two different genders, because in the understanding of religion, every human being is the same, the only difference is the level of their faith. And if we look at it from a historical perspective, the revelation of these verses by Allah SWT certainly aims to deal with problems or events that occurred at that time or era, and it can be seen that times are increasingly developing and previous events cannot be equated with what is happening in this era. So if there is a discrepancy between this verse and events that are currently occurring, of course Islam does not necessarily forbid resolution without using the provisions of this verse, because in Islam itself it is taught to humans to always make efforts to achieve justice. So if you use legal sources or other provisions in resolving a case, which are no longer relevant to the normative legal sources that regulate it, it is permissible, as long as it aims for justice and still pays attention to the principles of justice

In its consideration, the panel of judges also quoted the opinion of Shaykh Ali Ahmad al-Jurjawi in the Book of *Hikma al-Tasyari' wa Falsafatuhu*, namely "Another reason why men are bigger than women is because men are burdened with life problems that cannot be carried out by woman" (Faudzan, 2014). So the panel of judges apply this opinion to the events that occurred in this case, women can also get the same share as men, if a woman experiences difficult life problems. And in this case it is the female heir who bears the costs of care, looking after and taking care of all the heir's needs. This cannot be considered a burden, because taking care of parents is obligatory by law. However, looking at how it is determined why men get a bigger share than women

because the responsibilities and duties they have to carry out are greater, then in this case female heirs are considered to also carry out greater responsibilities and duties, in contrast to male heirs

In line with this opinion QS. Al-Nahl 16 also explains that "whoever does righteous deeds, whether male or female, in a state of faith, we will indeed give him a good life." Therefore, the panel of judges is of the opinion that section 2:1 between boys and girls can change if seen from the facts of the existing trial, because it refers to a sense of justice as a legal illat. So, by considering the legal sources used as the basis for the decision and relating it to the facts of the existing trial, the panel of judges decided that the distribution of the amount of inheritance in this case was equal between boys and girls, each child getting  $1/9$  (one ninth) of the heir's inheritance.

So, based on the considerations of the panel of judges, it has been determined that: Based on the Medan Religious Court Decision Number 92/Pdt.G/2009/Pa-Mdn, the panel of judges has determined the heirs of the heir who died on April 29 2005 due to illness. The heirs proposed by the plaintiff are: 1st son (as plaintiff 1), 2nd child, boy (died on June 15 2005), 3rd child, girl (as plaintiff 2), 4th child, boy (as plaintiff 3), 3rd child 5 girls (as defendant 1), 6th child, boy (as defendant 2), 7th child, girl (as defendant 3), 8th child, boy (died in 1980 and was not married), Children 9th boy 10th child girl. Then the heirs who are descendants of the 2nd heir are: the 1st child is a girl, the 2nd child is a girl, the 3rd child is a boy, and the 4th child is a girl from the deceased's 2nd child. After the judge's determination, the heirs remain the same but the inheritance rights of the 2nd Child and 8th Child are removed because they have died. The inheritance left by the heir is a plot of land measuring 255 square meters along with a semi-permanent house building standing on it measuring approximately 8.5 meters x 20 meters with a tin roof, cement floor, locally known as being located on Jalan Sei Deli No. 119 A, Silalas Village, West Medan District, Medan City. Regarding the decision handed down by the Panel of Judges at the Medan Religious Court, as stated in decision no. 92/Pdt.G/2009/PA.Mdn :

1. Determine the heirs who are entitled to the heir's inheritance, namely the heir's eight children apart from the deceased's second and eighth children and their distribution, each of whom will receive  $1/9$  (one ninth) share of the heir's inheritance.

2. States that the children from the marriage of the deceased second child of the heir and his wife are substitute heirs by obtaining 1/9 of the share, namely the share of the deceased second child of the heir.
3. States that the object of the dispute is : a plot of land measuring 255 square meters along with a semi-permanent house building standing on it measuring approximately 8.5 meters x 20 meters with a tin roof, cement floor, locally known to be located on Jalan Sei Deli No. 119 A, Silalas Village, West Medan District, Medan City is the inheritance of the deceased heir which must be divided among his heirs in the distribution as mentioned.
4. Punish the Plaintiff and the Defendants to divide the deceased heir's inheritance in real terms and if this cannot be done in real terms then it is done by auction sale and the proceeds are distributed to the heirs according to the share/portion of each heir.

## B. Principles Used by Medan Religious Court Judges in Decision No.92/Pdt.G/2009/PA.Mdn

### 1. Contra Legem Principle

The principle of contra legem is that judges override statutory regulations in order to uphold justice (Widowati & Wijayanta, 2023). Judging from how the judge considered Decision No.92/Pdt.G/2009/PA-Mdn by not referring to the rules contained in Article 176 KHI and QS An-Nisa 11, because it was deemed that it did not provide a sense of justice for female heirs, if in The judge decided this case using legal considerations. This is aimed at upholding justice by deviating from the provisions of existing laws and regulations, because the regulations in them do not reflect justice, the rationale for applying the principle of contra legem by judges, is only done when the laws and regulations do not provide equitable arrangements that are not provide proportional protection of public interests, as mandated by the Judicial Power Law which is given to judges to exercise judicial power to uphold law and justice (Widowati & Wijayanta, 2023).

### 2. Principle of Equality of Men & Women

The principle of equality in terms of inheritance means that each heir has the same position in having the right to receive inheritance/inherited assets (Amalia & Zafi, 2020). Understanding that men and women have the same rights in the eyes of



the law, as well as in religion because the only difference is their deeds of worship and achievements. In this case, it is the heir's devotion to the heir that is the difference between the two male and female heirs. Where the service of female heirs is an achievement that is not possessed by male heirs who actually ignore their obligations towards the heir.

### 3. Principle of Balanced Justice

The principle of balanced justice is that there is a balance between the rights obtained with a goal, the need and usefulness of carrying out an obligation (Zuhdi & Hidayah, 2024). Like men, women also have the same strong rights to inherit. Men and women for example, have rights that are commensurate with the obligations they each bear in family and community life (Anwar & Bahri, 2017). In this case, the panel of judges considered that if a daughter fulfills her obligation to care for and take care of all the interests of the heir, the female heir may also receive rights that are commensurate with the obligations she has carried out. In fact, caring for parents is not a burden, but in reality the difficulties or obstacles in carrying out a task are not entirely easy, because it requires sincerity and patience. In this case, the male heir, who was considered capable and had a difficult task, actually did not care about his parents in fulfilling his obligations. So a decision may be made that the female heir gets the same share as the male heir for his achievements in caring for and taking care of all the heir's needs during his lifetime.

### 4. Principle of Justice

Being a judge is a big duty and responsibility, a judge must be able to position himself as a fair and wise mediator in presiding over a trial. Judges must be able to realize the objectives of the law itself, as stated in article 1 paragraph 3 of the 1945 Constitution, where there are 3 objectives of the law, namely legal certainty, legal justice and legal benefits, of these three goals, legal justice is the one that really wants to be realized. However, this does not exclude the other two objectives, all three are equally important in law enforcement. One thing that judges really need to pay attention to is that every decision apart from being fair according to legal justice, which is no less important is the implementation of social justice, in the sense that the decision must bring many benefits to society (Anwar & Bahri, 2017). If seen from the

implementation of the law in Decision No. 92/Pdt.G/2009/PA.Mdn, the decision does not fulfill the element of legal certainty, in that the decision is taken and considered not based on the rules contained in Article 176 KHI and the Qur'an Surah An-Nisa Verse 11 concerning the distribution of the amount of inheritance between boys and girls. However, it is considered by looking at the facts of the trial which are considered unfair if the normative legal sources are still used as material for consideration. And this decision is still considered to embody the principles of justice. In the opinion of Imam Raghīb al-Ashfihani, justice is equality in giving back, namely giving good for good and bad for bad (Urrosyidin et al., 2022).

Based on the events that occurred in this case, viewed from the perspective of justice, every human being has the right to receive equal and fair treatment. In this case, the panel of judges considered that what was meant by fairness was if the female heir received an appropriate share for the actions she had done, namely a form of appreciation for her devotion to caring for her parents, which the male heir did not do.

#### 5. Principle of Benefit

Law is everything that is useful for the people as part of the legal ideal (*idee de recht*), justice and legal certainty require a complement, namely usefulness (Anwar & Bahri, 2017). A law is considered successful in becoming a pillar of the court if the law can provide benefits and justice to society. Law is also seen as a tool to create a sense of protection, benefit and profit for society.

In this case, benefits are to be achieved through legal complaints addressed to the Religious Courts. The law is considered to be able to resolve cases and provide justice in this case. So it can be concluded that in this case the aim of the plaintiff who submitted this lawsuit or problem to the Religious Court was to obtain benefits. And the Religious Court, which is the agency that has the authority to try this case, can use *maslahah* in determining decisions, with the aim of justice and benefit for each party involved in the case.

Jumhur ulama are of the opinion that *maslahah* is a *hujjah* of the Sharia which can be used as a method of establishing law regarding events whose laws are not contained in the *nas*, *ijma'*, *qiyas*, or *istihsan*. Surveys prove that in sharia laws there is always an element of benefit for humans. This kind of assumption will give rise to strong suspicions about the legality of *maslahah* as one of the determining variables of

Islamic law. Meanwhile, following strong assumptions is a necessity as times develop more rapidly (Anwar & Bahri, 2017). So it is not wrong if in Decision No. 92/Pdt.G/2009/PA.Mdn the judge used *maslahah* as a method of *ijtihad* when Article 176 KHI and the Qur'an Surah An-Nisa Verse 11 cannot be used as a reference and source of law in this case. And the textual texts of the Shari'a do not specifically regulate all issues in detail. So it is necessary to reform the law by using the *maslahah* method in order to maintain and achieve the benefit of many people in the future.

#### 6. Principle of Justice as Fairness

The theory of justice as fairness (a theory of justice that relies on fairness) developed by John Rawls, namely that it fulfills substantial justice, even though in Islamic law this is not considered fair, it has been judged to be reasonable because changes in place and time have occurred which can cause changes in the law (Hakim et al., 2023). In Decision No. 92/Pdt.G/2009/PA.Mdn the panel of judges has handed down a decision that does not bring legal certainty, by not using the normative considerations of Article 176 KHI and the Qur'an Surah An-Nisa Verse 11 because it is deemed not to fulfill the elements of justice if applied as a basis consideration of the decision. However, referring to the principle of justice as fairness, this is still legal because judging from the time, event, place, incident and current developments, the case cannot be tried using the legal sources above. So that the panel of judges considers the decision with the aim of looking for other legal sources and legal views that are relevant to this case. This is what is called legal fairness which is caused by changes in time, events, places, incident and developments over time.

## 2. Implementation of Progressive Legal Principles by Religious Court Judges

Progressive law is a law that provides freedom, especially in terms of applying and thinking about the law, so that you can let the law flow in order to fulfill its duty of service to humans. In a real sense, law has the aim of building prosperity and justice for the population (-AD et al., 2022). The idea of progressive law emerged as an antithesis to modern law. Progressive law rejects the flow of *rechtsdogmatiek* (legal dogmatics) and analytical jurisprudence. This school emphasizes law as a building of rules. The laws in these two schools are far from the actual reality in an ever-changing society (Rahmad & Hafis, 2021). The legal texts contained in positive law are considered not always relevant to society's life which is always developing over time.

Progressive law provides an understanding that law exists not only for the law itself, but for a larger and broader purpose, namely human dignity, happiness, prosperity, human glory and humanity (Rahmad & Hafis, 2021). Therefore, the application of progressive law in law enforcement practices needs to be developed. Judging from the nature of law which is always lagging behind, where a legal text sometimes cannot always answer legal problems that arise and is not relevant to current developments and new events that arise. So that with the application of progressive law, we gain an understanding that humans live to find justice and make laws according to the substance of the case, rather than glorifying legal texts as patent references in dealing with new events that are not relevant to the legal text itself. Because basically law is a product of the thoughts and studies of legal experts who have the power and intellect to make rules that can resolve a legal problem. So it is not right if humans submit themselves to the law itself, which humans should live to implement, enforce, make laws in order to create dignified justice in people's lives.

In civil trial practice, There are principles of active judges and passive judges, of which there is a lot of understanding of these two principles. Generally, in civil trials, judges are passive regarding the cases they handle. The explanation of the principle of passive judges can be viewed from two things, namely from the source of the case and from the extent of the dispute in a case. First, the initiative to file a lawsuit is always carried out by the interested parties and not by the judge. Second, the extent of the dispute submitted depends on the parties. In deciding a civil case, the judge can only rely on the events presented by the interested parties (Afriana et al., 2022). In civil trials, the principle of passive judging requires the judge to decide the case in accordance with the evidence presented in the trial, then related to the oath that the judge may not carry out an examination of the decisor oath (supplementary oath) after the oath has been taken and must assume that the oath is valid as evidence and decision considerations. In handing down decisions, the judge's principle of passiveness only relies on evidence, the facts of the trial and the standard rules underlying the case. Based on the explanation regarding the principle of the passive judge, it can be concluded that the application of the principle of the passive judge is limited only to the subject matter of the case being disputed by the parties and must not be active in the subject matter of the case, such as expanding the dispute between the parties or making a decision that exceeds the petitum requested by the plaintiff (Junaidi & Merta, 2020). Meanwhile, the active judge principle is a principle that must be upheld by judges in examining and deciding civil cases because the judge is the head of the trial who must try to resolve disputes as effectively and fairly as

possible and overcome all obstacles and hurdles for justice seekers in carrying out fair justice (Afriana et al., 2022). This means that in using the active judge principle in civil trials, the only limitation is that the judge is not allowed to determine the extent of the case, submit or dismiss the case, because these rights are only owned by the parties, for the rest the judge must be able to be active in presiding over the trial and in deciding the case using various references, trial facts, views and principles of the judge himself, in order to create justice for the parties. This is strengthened by the provisions of Article 4 paragraph (2) of Law No. 48 of 2009 concerning Judicial Power is the juridical legitimacy of judges' activities. This provision emphasizes that the court helps justice seekers and tries to overcome all obstacles and hurdles to achieve justice that is simple, fast and low cost (Afriana et al., 2022).

Progressive law is related to the principle of active and passive judges. Namely, in order to seek justice that upholds the dignity of the parties in a case, judges need to carry out legal reforms by not just sticking to the text of the law which is no longer relevant to the case being handled. Therefore, in practice, judges need to apply the principle of an active judge in handling cases, especially in cases submitted to the Religious Courts, judges must be more active in determining and considering their decisions, not just looking at the evidence, and focusing on the KHI, the Al-Qur'an and Hadith. However, he develops his views on the law that underlies the case and connects it to the concept of justice. So that in the future, when an incident of irrelevance occurs between the case and the underlying law, the judge can consider the case using previous judge's decisions or jurisprudence which can become a legal reform to create justice in society. As well as opening up understanding that judges who handle cases in the Religious Courts can also apply progressive legal principles and the principle of active judges in leading a trial.

### **3. The Relationship Between Principles Of Progressive Law and Judges Considerations In The Medan Religious Court Decision Number 92/Pdt.G/PA-Mdn**

The history of law in Indonesia has experienced various changes and reforms in line with ongoing law enforcement practices. One of them is law enforcement practices that take place in court. Each court has its own legal sources, provisions and law enforcement procedures according to the type of judicial institution. The role of the courts cannot be sanctioned any longer, because with the Court Institution, everything involving neglected rights and responsibilities can be resolved, this institution provides a place and even helps

those who feel their rights have been taken away and forces the parties to take responsibility for their actions done to the detriment of another party (Cahyani, 2019). In carrying out law enforcement, each court uses legal sources in accordance with the substance of the law under its authority. There are legal sources that form the basis of law enforcement, namely : the Criminal Code, Civil Code, Islamic Law and other legal sources. However, in its development, sometimes the law lags behind, meaning that the old rules that are the source of the law are no longer relevant to the current situation. So basically law enforcers such as judges must start to innovate by developing an understanding of legal reform in accordance with Friedman's Tool of Social Engineering theory, so that judges are not only guided by existing legal texts, which may no longer be relevant to the current situation.

This is known as the principle of progressive law, the view of progressive law emphasizes that law is not just text. Progressive law places behavior as a much more important factor in law than regulations that are nothing more than text (Rahmad & Hafis, 2021). Progressive law is more concerned with the concept of justice as seen from the events that occur, or the problems that occur rather than the written laws that govern. However, we do not necessarily consider written law to be an unimportant source of law, understanding progressive law still uses written legal sources but in practice places more emphasis on assessing law based on whether the normative legal source is still relevant to the events that occurred.

Progressive legal principles are starting to be widely used by judges in handling cases, especially in considering the imposition of decisions. Religious Court judges are no exception. Sources of law that apply within the scope of the Religious Courts include the Al-Qur'an, Hadith, the Compilation of Islamic Law, the Compilation of Sharia Economic Law and the Fatwa of the Sharia Council of the Indonesian Ulema Council. Religious Court judges use these legal sources as guidelines in their proceedings. However, judges according to progressive legal principles must also be able to apply the principle of active judging because basically when settling civil cases in court, the parties have practically entrusted their cases to the judge to be tried and given the fairest possible decision. This is the reason why judges must be active. Judges are not just mouthpieces for the law (*la bouche de la loi*) who only apply legal regulations, but rather state officials who have high knowledge, dignity and authority and are a place of complaint for those seeking justice (*justitiabelen*) (Saputra & Hakim Fasif Principles, 2019)

So, in essence, progressive legal practice has 1 absolute thing. Judges who handle

Islamic civil matters in the Religious Courts must also apply the principle of an active judge. Based on Decision No. 92/Pdt.G/2009/PA.Mdn, the panel of judges in considering the decision did not refer to the source of inheritance law as contained in Article 176 of the KHI and the Qur'an Surah An-Nisa Verse 11 concerning the distribution of the amount of inheritance. However, the panel of judges actually quoted expert views and provisions in QS An-Nahl 16 regarding equal rights between men and women for actions carried out by each party. So the judge in considering the legal source of the decision is not in line with the provisions of the text of the law that regulates it, but without forgetting the existing legal rules the judge tries to find legal updates by looking for legal sources that are relevant to the facts of the existing trial. The reason is that it would be very unfair for the female heirs if in this case the judge handed down a decision using legal considerations originating from Article 176 KHI and QS An-Nisa 11, because that would create injustice for the female heirs who have been caring for and taking care of heirs during life, while male heirs do not do so.

Based on the actions of the panel of judges in resolving Islamic inheritance cases, and according to the views of several Religious Court judges, it can be said that the judge used the principle of an active judge in deciding the case, looking at how the judge really took into account the facts of the trial that emerged during the examination. Then the judge's actions in considering his decision were not focused on the main source of law which regulates the distribution of Islamic inheritance between sons and daughters. So the judge used progressive legal principles where the judge did not make a decision in accordance with Article 176 KHI and the provisions of QS An-Nisa 11, on the basis that these rules were irrelevant and would actually cause injustice to the parties concerned. The panel of judges as the leader in the trial certainly wants to realize justice, expediency and benefit for the decision they hand down. Therefore, the panel of judges tries to find considerations that provide the most justice for both parties, by using other legal provisions in considering their decision.

The panel of judges also has other views in dividing inheritance assets. You don't have to stick to KHI legal rules or the Qur'an. This means that in determining the amount of inheritance, the main thing that must be the guideline is the agreement between each party who is the heir, this is regulated in Article 183 KHI which confirmed that the heirs can agree to make peace in dividing the inheritance, after each is aware of their share. So that there will be an understanding that the distribution of inheritance assets does not

always have to be 2:1 between sons and daughters, in accordance with the rules in Article 176 KHI and QS An-Nisa 11. The panel of judges stated that the distribution of inheritance assets may be divided according to the wishes of the experts. Inheritance as long as the word "agree" occurs in the distribution process. In fact, with this agreement, it will be felt to provide a greater sense of justice and sincerity to each heir, because there will be no disputes or feelings of envy towards fellow heirs, because the distribution is based on a sense of brotherhood and sincerity of the heirs themselves. However, this division concept is not a concept that can be used as a basis for determining the systematic distribution of the amount of inherited assets. This concept of division by agreement can be implemented in the case of the division of inheritance between an older brother and a younger sister where, if referring to the provisions of Article 176 KHI and An-Nisa 11 the division is 2: 1, but between them there has been an agreement that in the future, the inheritance will be divided equally, on the basis of an older brother's love for his younger sister, and on the basis that during the life of the heir it was his daughter who looked after the testate as in Decision No.92/Pdt.G/2009/PA-Mdn, so that the older brother will give his share of the inheritance to his younger sister. Or in other cases, for example, equal distribution due to a will from the testator, and all heirs agree to it on the grounds that there is no damage to the harmony of sibling relationships. So in this way the goal of achieving a sense of justice and benefit has been fulfilled. However, the legal basis that applies and is recognized in dividing the amount of inherited assets still refers to the provisions of the KHI and the Al-Qur'an. This concept is only an alternative in resolving the division of inheritance.

Returning to the concept of progressive law, the panel of judges in handing down decision No.92/Pdt.G/2009/PA.Mdn has gone through a mature process and is not playing around, because what the panel of judges wants to realize is justice, the judge is trying to make it happen with his wisdom. Judges are of the view that law is not an absolute and final institution, because law is always in process and becoming (law as a process, law is making). In an effort to explain the theory of progressive law, it is explained that it is human interests (based on experience) that must be the central point of legal attention, rather than the opposite, humans must submit themselves to the law as explained in legal-positivism. This method makes progressive law place certainty, justice and expediency in one line. But what is no less important is the character of progressive law which adheres to conscience and rejects material slavery (Rahmad & Hafis, 2021).



## CONCLUSION

Imposition of decision No. 92/Pdt.G/2009/PA.Mdn by the panel of judges has gone through such a process to create a sense of justice for the legal heirs. The contradiction between the results of the decision and the applicable legal rules in Article 176 KHI and QS An-Nisa 11 concerning the distribution of the amount of inheritance is not a deviation or abuse of judicial power, but is a legal reform that provides an understanding that the law is sometimes not always relevant to cases current inheritance matters. Bearing in mind that matters regarding inheritance are always developing and becoming more complex. So the judge tries to harmonize legal considerations with the facts that occurred in order to realize justice, expediency and benefit. And also in considering the handing down of this decision the judge used the principle of progressive law which requires the judge to apply the principle of an active judge in civil trials. In which the judge is allowed to act actively by trying to link the suitability of the law with the facts of the trial that arise, by using legal grounds, provisions or other views that are more relevant than using the legal rules contained in Article 176 KHI and QS An-Nisa 11. Which in this case the judge preferred to use the provisions in QS. Al-Nahl 16 which explains that every human being has the right to receive appropriate rewards for his actions regardless of gender, in this case female heirs may receive the same share as male heirs for their service to the heir during their lifetime. As well as the panel of judges who used the views of Shaikh Ali Ahmad al-Jurjawi in the Book of Hikma al-Tasyari' wa Falsafatuhu who held the view that the difference in the amount of inheritance between male and female heirs was based on the differences in burdens carried, and from the ijthad of the panel of judges from the views it can be concluded that if a woman has a large burden or responsibility, then she is also entitled to a share of inheritance that is as large as a son's share of inheritance. In inheritance law, this provision is also excluded in certain cases (casuistry), such as the agreement of all heirs by equalizing the number of shares of rights, so it is possible to share equally, as discussed in this case study article (Anwar & Bahri, 2017). And this decision is a pioneering decision in placing female heirs on an equal footing with male heirs, but so far this decision has been accepted by the parties and there has been no legal action at all. The strong reaction of the Muslim community to these three decisions has also never been heard (Anwar & Bahri, 2017). So it can be concluded that a sense of justice in the handing down of the decision has been achieved.

With the development of the application of progressive legal principles in determining considerations in decision No. 92/Pdt.G/2009/PA.Mdn, it is hoped that in the future judges under

the auspices of the Religious Courts will be able to use this decision as a jurisprudential reference in handing down decisions on inheritance cases that may not be relevant to the standard rules. It is also hoped that this will be able to open the judge's view of the urgency of implementing progressive legal principles in handing down court decisions.

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