Distribution of Inheritance Property Before The Testator Dies: A KHI and Civil Law Perspective in Indonesia

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Abstract

This research examines the practice of distributing inheritance before the testator dies from the perspective of the Compilation of Islamic Laws (KHI) and the civil law that applies in Indonesia. The problem studied in this research is the practice of distributing inheritance before the testator dies and whether such distribution is permitted according to KHI and civil law in Indonesia. This research applied literature review methodology that used a normative approach. The result shows that the practice of distributing inheritance before the testator dies according to KHI and civil law in Indonesia is not permitted, because the death of the testator is an absolute requirement for the distribution of inheritance. However, KHI provides an alternative for heirs to appoint someone as the person who will divide the inheritance after the testator dies. Concerning on civil law in Indonesia, it is stated that the distribution of inheritance while the testator is still alive cannot be carried out as it has no legal force and its status is null and void.

Keywords: Inheritance; Heir; Islamic Law; Civil Law

A. Introduction

Basically, this research examines inheritance practices before the decedent dies that occur in society. The practice of inheritance before the decedent dies is exceptional, which is only executed by certain communities and in particular areas. In addition, this practice has even become a tradition for the local community.

The requirements regarding the distribution of inherited assets have been strictly regulated in the Al-Qur'an and the existing positive law. However, in real life, there is still a traditional practice of distributing inheritance which has developed in the society itself. The share and rights of each heir are determined and finalized by the decedent according to what he or she wished. In fact, the practice of transferring inheritance is individual for each family so that there is an opportunity to divide inheritance according to the wishes of the testator.

In Article 171 paragraph (2) of the Compilation of Islamic Law, it is stated that a testator is a person who, when he dies, based on religious courts' decision, leaves heirs and inheritance. Inheritance assets can be divided if the testator dies. If the testator has not died, the status of the assets cannot be said to be inherited and families who are related are not yet considered as the heirs.

Moreover, according to Article 830 of the Indonesian Civil Code, it is declared that inheritance can only occur due to death. This clearly means that the principal condition for the inheritance distribution process to be performed is the death of the testator. To obtain an inheritance, two conditions must be met, which include:

1. Someone must die.
2. In achieving inheritance, a person must be alive when the testator dies.

Basically, there has been numerous previous research that have investigated the practice of distributing inheritance in certain areas when the testator is still alive. Majorly, the studies are derived from the field practice and the perspective of Islamic inheritance law.

Research conducted by Nita Sugiarta,[1] Jainuddin,[2] and Wildan Qurfa Aini [3] revealed that the distribution of inheritance when the testator is still alive happens as a result of certain reasons in a society that force the inheritance to be divided while the testator is still alive, besides the finding that such practice is not recognized in Islamic inheritance law. The condition is merely considered a gift.

From the literature review, it is understood that the distribution of inheritance when the testator is still alive has something to do with sociological reasons for a particular society and developing customs. Furthermore, the studies perceive this practice from Islamic inheritance law point of view.

The study of inheritance when the testator is still alive in detail has not been scrutinized normatively based on the provisions of the laws applied in Indonesia. For this reason, the author is interested in conducting an in-depth study of *the Practice of Distributing Inheritance Before the Heir Dies: A Compilation Perspective of Islamic Law and Civil Law in Indonesia*.

Specifically, this is library research which utilizes library sources to obtain the main data. accordingly, library research is limited to library collection materials without conducting field research.[4] Additionally, the research literature makes use of literatures, which in this case the primary data source is the Compilation of Islamic Law and civil law in Indonesia.

B. Research Methods

This study is library research, this research utilizes library sources to obtain the main data. Library research is limited to library collection materials only without conducting field research. Library research is sourced from literature, in this case the primary data sources are the Compilation of Islamic Law and Civil Law in Indonesia.

The approach in this research uses a normative legal approach. The normative legal approach is research that refers to the concept of law as a rule with a doctrinal-nomological method whose starting point is the rule of teaching.

Data collection is carried out in the form of written data either books, magazines or other print media related to the theme of study in this study. If the data has been collected completely. The data analysis technique is focused into several stages, namely data reduction, data display, and data verification. The data reduction process is the process of selecting, focusing and abstracting data. The next process is data dispalai, which is the process of organizing data by connecting it between one data and other data. Then the data that has been selected is associated with data sourced from books, the internet or laws. Furthermore, the last stage is to verify the data. At this stage, it starts with interpreting the data, so that it can be used as a basis for the analysis.

C. Discussion

I. Concept of Testator, Heirs, and Inheritance

a. Testator

A testator (or can be said as decedent) is a person who has died and left an inheritance whose ownership consequently passes to his or her living family or also known as heirs. The transfer of assets from the testator to the heirs comes into force only if the testator dies. In other word, a testator can be defined as a person who dies, whether male or female, who leaves behind a quantity of assets and rights

[1] Nita Sugiarti, "Pembagian Harta Sebelum Muwaris Meninggal Dunia (Studi Kasus Masyarakat Desa Nunggal Rejo Kecamatan Punggur Kabupaten Lampung Tengah", 2019.

[2] Jainuddin, "Pembagian Harta Warisan; Telaah Pembagian Warisan Oleh Pewaris Kepada Ahli Waris Sebelum Pewaris Meninggal Pada Masyarakat Bima" *Jurnal Pemikiran Hukum*, IAIN Bima, 2020.

[3] Wildan Qurfa Aini, "Pembagian Harta Kepada Ahli Waris Saat Pewaris Masih Hidup Pada Keluarga Idom di Kelurahan Pasir Jati Kecamatan Ujung Berung Kota Bandung", *Thesis* Fakultas Syariah UIN Sunan Gunung Jati, 2017.

[4] Mustika Zed, Metode Penelitian Kepustakaan (Jakarta: Yayasan Pustaka Obor Indonesia, 2014) hlm. 2.

acquired during his or her lifetime, whether with a will or without a will.

Likewise, according to Zainudin Ali, someone who is still alive and transfers his rights to his family cannot be called a testator, even if the transfer is carried out nearly before the time of his death.[5]

b. Inheritance

Inherited assets or inheritance are the congenital and joint assets that are issued for inheritance during illness and after death, for instances are the costs for paying debts, arranging corpses and funerals. Inherited assets from the testator refer to the assets left behind by the testator in the form of objects that belong to him or become his rights. Inheritance assets as stated in Article 171 letter e of the Compilation of Islamic Law are defined as congenital assets plus part of the joint assets after being used for inheritance purposes during illness until death, costs of arranging the body, paying debts, and giving to relatives.[6]

In line with Islamic inheritance law, inheritance is all assets left by the testator due to death, and these assets have been freed from religious and worldly obligations which can then be divided among the heirs as determined based on the Al-Quran and hadith as well as the agreement of the Muslim scholars.[7] Therefore, inheritance in Islam can be described as follows:[8]

a) Inherited assets are assets that truly belong to the testator – the deceased heir – in the form of tangible or intangible objects that are free from religious and worldly obligations that can be divided among the heirs.

b) To ensure that the inherited assets are clean and can be divided, the assets have been reduced by:
- All costs for medical purposes when the testator was sick until his death.
- All costs for taking care of the testator's dead body.
- All religious obligations that have not been fulfilled by the testator, such as zakat and waqf or endowments that he had previously declared.
- All worldly obligations that have not been fulfilled such as debts, ransoms, and so on.
- Assets that have been bequeathed by the testator when he was alive with the amount of which does not exceed 1/3 of the inheritance left.

Finally, along with the Compilation of Islamic Law, Article 171 Letter e inheritance is understood as inherited assets plus part of the joint assets after being used for care purposes during illness, until death, costs for handling the corpse, payment of debts, and gifts to relatives.

c. Heir

An heir is a person – or several people – who have the right in receiving a share of the inheritance. Broadly speaking, the heirs in Islam can be divided into three groups, namely:[9]

a. The heirs who have been determined in the Qur'an are also called *dźawil furūd*, is the direct heirs who always receive a fixed and unchanging share.

b. The heir based on the mother's line is *dźul arhām*. The meaning of the word *dźul arhām* is a person who has blood relation to the heir only through the female line.[10] Hazairin in addition

[5] Zainudin Ali, Pelaksanaan Hukum Waris di Indonesia (Jakarta: Sinar Drafika, 2008) hlm.46.

[6] Satriyo Wicaksono, Hukum Waris (Jakarta Selatan: Transmedia Pustaka, 2011) hlm. 8.

[7] Hilman Hadikusumo, Hukum Waris IndonesiaMenurut Perundangan Hukum Adat, Hukum Agama Hindu, dan Islam (Bandung: Citra Aditya Bakti, 1991) hlm. 51.

[8] *Ibid*, Hukum Waris IndonesiaMenurut Perundangan Hukum Adat, Hukum Agama Hindu, dan Islam, hlm. 51.

[9] Eman Suparman, Hukum Waris Di Indonesia dalam perspektif, Islam, Adat, dan BW, Cet.V (Bandung: Pt Refika Aditama, 2018) hlm. 17.

[10] *Ibid*, Hukum Waris Di Indonesia dalam perspektif, Islam, Adat, dan BW, hlm. 19.

gave an interpretation of *dźul arhām*, which is defined as all people who are not *dźawil furūd* and not *ashabah*, generally consisting of people who are members of the son-in-law's patrilineal family or members of the son-in-law's side or members of the father's and mother's families.[11]

c. Among the heirs, there are those who are not entitled to receive a share of inheritance from their heirs due to several reasons, namely: [12]
   a. An heir who killed the testator
   b. An apostate person
   c. Unbelievers who have no right

What is more, people who fall within the criteria for heirs as mentioned above, if it turns out they have pretended and controlled some or all of the testator's inheritance, then he is obliged to return all the assets under his control.

II. Distribution of Inheritance Assets Before the Testator Dies According to Islamic Law

In essence, the principle of inheritance is characterized by a transfer from the testator to his heirs in the form of ownership of an object, rights and responsibilities. In Islamic inheritance law, inherited assets received are based on the principle of *ijbari*, that is the inherited assets which is automatically received according to the forethought and regulations from Allah SWT notwithstanding on the wishes of the testator or the heirs themselves.[13] The transfer of ownership of an object or right occurs if the terms and conditions for inheritance are met and there are no obstacles to inherit. However, there are several conditions that must be met in dividing inheritance assets. In this case, three inheritance conditions have been agreed upon by the Muslim scholars, namely:[14]

a) The death of a person (testator) either legally (for example, considered dead) or *taqriri*.
b) The existence of the essentially living heirs when the testator dies.
c) The precisely recognized respective shares of all heirs. In addition, the pillars of inheritance must be fulfilled when inherited assets are divided.

In his book, Fachtur Rahman wrote three types of pillars of inheritance in Islamic inheritance law, namely:[15]

1) *Muwaris,* that is a person whose assets are inherited, or a person who inherits his property. The condition is that the *muwaris* has been ensured that he undoubtedly has died. According to Muslim scholars, the death of the *muwaris* can be divided into 3 forms, namely:
   a. *Hakiki* death (genuine death) is the death of the *muwaris* which is believed and ensured without the need for a judge's decision, as the death is witnessed by many people with the five senses and can be proven with clear and concrete evidence.
   b. *Hukmi* death (death according to a judge or juridical) is a death that is declared based on a judge's decision due to several considerations. As consequences, with the judge's decision, the *muwaris* is legally declared dead even though there is a possibility that the *muwaris* is still alive. According to Malikiyyah and Hambaliyah, if someone leaves the place for four years, that one will be declared dead. On the other hand, in the opinion of other Muslim scholars, it depends on

[11] *Ibid*, hlm. 20.
[12] *Ibid*, hlm. 23.
[13] Muhammad Daud Ali, Asas Hukum Islam (Jakarta: Rajawali Press, 1990) hlm. 129.
[14] Abdul Ghofur Anshori, Hukum Kewarisan Islam di Indonesia (Yogyakarta: Ekonisia, 2005) hlm. 24-25.
[15] Muhammad Ali As-Sahbuni, Hukum Waris Dalam Syariat Islam (Bandung: CV Diponegoro, 1995) hlm. 4.

the judge's *ijtihad* to consider various aspects of the possibilities.

c. *Takdri* death (death according to suspicion) is a death (of *muwaris*) which is based on strong suspicion, for example the assumption that a pregnant woman is hit in the stomach or forced to drink poison. When the baby is born dead, it is strongly suspected that the death is caused by beating experienced by the mother.

2) Heirs, who refer to the people who are declared to have a kinship relationship, whether blood relationship (*nasab*), relationship by marriage, or by freeing the servants. The condition to meet is that at the time of the *muwaris*' death, the heir is accurately alive. In this case, including babies who are still in the womb (*al-haml*), there are also other conditions that must be met, i.e., no obstacles between the *muwaris* and heirs to mutual inheritance.

3) *Maurūs* or *al-Mirās*, is an inheritance of the testator after deducting the costs of caring for the corpse, paying off debts and executing the will.

The death of the testator is an absolute condition for the transfer of rights and property belonging to him in the form of inheritance. This is based on QS al-Nisa (4): 7 as follows;

لِلرِّجَالِ نَصِيْبٌ مِّمَّا تَرَكَ الْوَالِدٰنِ وَالْاَقْرَبُوْنَۖ وَلِلنِّسَاۤءِ نَصِيْبٌ مِّمَّا تَرَكَ الْوَالِدٰنِ وَالْاَقْرَبُوْنَ مِمَّا قَلَّ مِنْهُ اَوْ كَثُرَ ۗ نَصِيْبًا مَّفْرُوْضًا

Translation: For men there is the right to share in the assets inherited from their parents and relatives, and for women there is the right to share (also) in the assets inherited from their parents and relatives, whether in small or large amount, according to the portion that has been determined.

Surah al-Nisa (4) verse 7 is the basis that the death of a person in the real sense is said to be a testator, including the verses *qat'i subut* and *qat'i dilalah*. Specifically, *qat'i subut* is a verse that has a strong source, namely from the *al-Qur'an* and *mutawatir hadith*. Meanwhile, *qat'i dialalah* is a verse that clearly shows that it does not require other interpretations to understand it.

According to Jalaludin as-Suyuti and Jalaludin al-Mahalliy[16], the meaning contained in QS. al-Nisa verse 7 in the sentence *"mimma tarakal waalida wal-aqarabun"* is treasures from deceased relatives.[14] Jalaludin as-Suyuti and Jalaludin al-Mahalliy's interpretation of sentences *"tarakal walidani walaqrabun"* is the same with QS. al-Nisa verse 7 which is equal with the interpretation made by Wahbah al-Zuhaily, which elaborates part of the inheritance of a relative who died. Thus, from the explanation above, it is understood that the death of a person is an absolute condition for the transfer or inheritance of rights and assets from the testtaor to his heirs.

The distribution of assets from the testator to the heirs while the testator is still alive is included in the practice of giving and cannot be said to be a distribution of inheritance. This is considered that way as inheritance law requires that the death of a person is an absolute condition for inheriting rights and assets after the heirs have incurred all forms of maintenance costs for the testator.

III. Distribution of Inheritance Assets Before the Testator Dies According to the Compilation of Islamic Law and Civil Law in Indonesia

The Compilation of Islamic Law (KHI) does not explain the legal consequences when the distribution of inheritance is carried out while the testator is still alive. However, in KHI in Article 171 letter b, it is explained that what is meant by testator is a person who at the time of his death or who dies is declared dead based on the decision of a Muslim court, leaves behind

[16] Al-Mahalliy, Imam Jalaluddin dan Imam Jalaluddin As-Suyuthi, Terjemah Tafsir Jalalain Berikut Asbaabun Nuzul, Jilid 1, Cet. I (Bandung: Sinar Baru, 1990).

heirs and inheritance. In Article 171 letter g KHI, it is stated that the voluntary gift of an object without any compensation from someone to another living person to own it is called a gift, and the practice is carried out by a person or person giving the gift while they are still alive.

Additionally, Article 187 paragraphs (1) and (2) of KHI provides an alternative to make it easier to determine the rights of each property that will be divided if one day the testator dies. In Article 187 paragraph (1), it is specified that whenever the testator leaves an inheritance, then the heir during his lifetime or the heirs can appoint several people as executors of the distribution of the inheritance with the following duties:

a. recording in a list of inherited assets, both in the form of mobile and immobile objects which are then authorized by the heirs concerned, if necessary, the worth is valued by money;
b. calculating the amount of expenses for the needs of the testator in accordance with Article 175 paragraph (1) sub a, b, and c. In article (2) it is mentioned that the rest of the expenditure referred to above is inherited property which must be distributed to the rightful heirs.

Naskur believes that Article 187 paragraph (1) of the KHI introduces another method of inheritance process that has never been found in inheritance law. According to him, the ability to complete inheritance without being based on a death is not absolute or its implementation is still tentative (uncertain). This can be understood from the word "can" which contains two meanings. First, it contains the meaning of being allowed to carry out inheritance without being based on the death of the testator. Secondly, it brings up the meaning of not being able to carry out inheritance without being based on the death of the testator. As elaborated in the explanation of article 187 paragraph (1) above, the ability to carry out inheritance without being based on death is not absolute or is still tentative (uncertain) in its implementation, so before implementing it, there are several things that need to be considered:

a. Setting aside a portion of the testator's assets for living expenses, illness needs and *tajhiz* expenses, unless the heirs agree to cover it all.
b. No new heirs will appear or be born to the testator.
c. None of the heirs died before the testator.
d. There is no worry that some of the heirs will apostatize.
e. If the inheritance is not distributed during the testator's lifetime, disputes will occur and cause harm among the heirs.[17]

Naskur in addition provided an explanation of the five things that needed to be agreed upon. First, if the heirs agree to cover all living expenses, illness costs and *tajhiz* costs for the testator, then the testator's inheritance can be divided while he is still alive. Second, if another new heir appears or is born to the testator, then the heirs who have divided the inheritance are willing to return the portion of the newly appearing or born heir. Third, if any of the heirs dies before the testator, then the heirs are willing to redistribute the share of the heir who died earlier than the testator according to the ratio of their respective shares (the male's share is twice the female's share). Purposely, his position cannot be replaced by his son. However, if his position is replaceable by his son, then the share of the heir who dies earlier than the testator is handed over to his son provided that the son gets twice the share of the daughter. Fourth, if it happens that one

[17] Naskur, Pembagian Harta Warisan Disaat Pewaris Masih Hidup Telaah Pasal 187Ayat *(1)* Kompilasi Hukum Islam (KHI), Jurnal Ilmiah al-Syir'ah Vol. 15 No. 1 (Sulawesi Utara: Institut Agama Islam Negeri Manado, 2017) hlm. 47-48

of the heirs apostates, then the portion of the apostate heir must be converted into a mandatory testament as much as 1/3 of the testator's inheritance. Fifth, if there is a dispute which ultimately results in loss between the heirs when the inheritance is not distributed while the heir is still alive, then the inheritance can be distributed during the testator's lifetime, even though article 171 letter b requires that there be a death of the testator.[18]

Consistent with the discussion above, the argument developed by Naskur tries to get out of the habit of people's understanding of the law. It is moreover coupled with clear interpretation of the articles in the KHI which should be done by legal practitioners, namely judges. Besides, the provisions stated by Naskur are very difficult to implement, as events that occur in the future, such as the death of an heir, the presence of a new heir, and the occurrence of apostasy, are all beyond human control. Disputes that occur in the future can be resolved through legal channels so they cannot be used as an excuse. Apart from that, Naskur's argument for allowing inheritance to be distributed while the testator is still alive is to eliminate harm.

Nevertheless, Naskur's opinion as stated in the scientific article is not in accordance with the provisions of Article 171 paragraph (6) which states that giving an object while the testator is still alive is called a gift instead of inheritance. Article 187 paragraph (1) KHI on the other hand only contains the ability to appoint someone as the executor of inheritance as an effort to facilitate the distribution of inheritance when the testator has died.

In civil law, the provisions regarding inheritance include Article 830 of the Civil Code, which states that inheritance only occurs due to death. This means that the death of a person (the testator) is the central condition for the inheritance process to take place. Therefore, based on Article 830 of the Civil Code, inheritance taking place without the death of the testator equals to the distribution of inheritance assets to the heir before the testator dies cannot be carried out. To obtain an inheritance, two conditions must be met:

a. Someone has to die, and...
b. In achieving it, a person must be alive when the testator dies.[19]

Inheritance law provides regulations on what will be accomplished with a person's wealth when he dies. In general, inheritance begins to open and practicable by each heir when the testator has died. However, in practice, the inheritance process is still carried out while the testator is still alive. The process of passing on inherited assets begins when the testator is still alive, especially for inherited assets that can be divided individually (individual inheritance system).[20]

It needs to be underlined that the distribution of inheritance assets while the testator is still alive is contrary to national law, namely Article 830 of the Civil Code, which states that inheritance can only be executed when the testator has died. However, considering the existing customary law, the distribution of inheritance can only be carried out by Indonesian people who still adhere to customary law. The consequences resulting from granting an inheritance while the testator is still alive are null and void by law. The status of null and void is contained in Article 1335 of the Civil Code, namely that an agreement without cause, or made based on a false or prohibited cause, has no force. The meaning of the phrase “has no power” is also called null and void. Thus, the

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[18] Ibid, hlm. 48

[19] A. Pitlo, Hukum Waris Menurut Kitab Undang-Undang Hukum Perdata Belanda (Jakarta: Intermasa, 1979) hlm.1.

[20] Wayan P. Windia Dan Ketut Sudantra, Pengantar Hukum Adat Bali (Denpasar: Lembaga Dokumentasi Dan Publikasi Fakultas Hukum Universitas Udayana, 2006) hlm.115.

process of bestowing an inheritance while the testator is still alive is considered to have never existed because it is done based on illegal reasons which violate or conflict with Article 830 of the Civil Code.

D. Conclusion

Distribution of inheritance before the testator dies according to inheritance law is not permitted, as the inheritance law states that the death of the testator is an absolute condition for the distribution of inherited assets to occur. Specifically, the assets made by the testator while he is still alive are considered gifts. According to KHI, inheritance may not be given while the testator is still alive, but the heir may appoint someone to distribute the inheritance to the heirs after the testator dies. On the other hand, according to civil law in Indonesia, the distribution of inheritance executed when the testator has not died is considered having no power and is null and void by law. All in all, inheritance distribution practices should be in line with applicable statutory provisions so that they have legal force.

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