

DELAY IN THE DIVISION OF INHERITANCE: A THEORETICAL REVIEW WITHIN LEGAL SYSTEM FRAMEWORK IN INDONESIA

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Abstrak: Penundaan pembagian waris banyak terjadi pada masyarakat Banjar, penundaan pembagian waris ini menimbulkan berbagai persoalan, mulai dari konflik antar ahli waris yang menyebabkan retaknya hubungan keluarga, harta warisan yang terlantar hingga gugat menggugat antar sesama keluarga di pengadilan. Tulisan ini bermaksud mengkritisi lebih dalam mengapa penundaan pembagian waris tersebut terjadi. Untuk menjawab hal tersebut penulis membahasnya dalam perspektif Teori Legal System Laurence M. Friedman, penelitian ini menggunakan metode penelitian kualitatif dalam bentuk penelitian hukum empiris. Data didapatkan melalui wawancara mendalam dan observasi, kemudian dianalisis dengan analisis deskriptif interpretatif. Dari penelitian ini ditemukan bahwa Struktur hukum penundaan pembagian waris, yaitu pengadilan agama, hakim, advokat dan ulama tidak memiliki kewenangan untuk “memaksa” masyarakat untuk sesegeranya membagikan waris. Substansi hukum yaitu Al-Qur’an, al-Hadis, kitab-kitab Fiqh dan Kompilasi Hukum Islam sebagai sumber hukum waris masyarakat Banjar tidak eksplisit menyatakan waktu pembagian waris, bahkan sumber hukum ini mereka “tinggalkan”, hukum waris adalah hukum yang hidup dan menjadi budaya hukum masyarakat terkait waktu pelaksanaan waris, di mana secara turun temurun mereka melakukan penundaan pembagian waris, membagikan waris dengan segera dinilai sebagai perbuatan tidak etis atau tidak beradat.

Kata Kunci: *Penundaan Pembagian Waris, Legal System, Hukum waris.*

Abstract: Delays in the distribution of inheritance are common in the Banjar community, and these delays in the distribution of inheritance cause various problems, ranging from conflicts between heirs that cause family relationships to break down, neglected inheritance, to litigation between families in court. This paper intends to scrutinize why this delay in inheritance distribution occurs. To answer this, the author discusses it in the perspective of Laurence M. Friedman's Legal System Theory, this research uses qualitative research methods in the form of empirical legal research. Data were obtained through in-depth interviews and observations, then analyzed with interpretative descriptive analysis. From this research, it was found that the legal structure of delaying the distribution of inheritance, namely religious courts, judges, advocates and scholars do not have the authority to "force" the community to immediately distribute inheritance. The substance of the law, namely the Qur'an, al-Hadis, Fiqh books and the Compilation of Islamic Law as the source of inheritance law of the Banjar community does not explicitly state the time of distribution of inheritance, even this source of law they "abandon", customary inheritance law is the law that lives and becomes the legal culture of the community regarding the time of inheritance implementation, where for generations they have delayed the distribution of inheritance, distributing inheritance immediately is considered an unethical or uncivilized act.

Key words: Postponement of Distribution of Inheritance, Legal System, Inheritance Law.



INTRODUCTION

Islamic inheritance law is one of the legal aspects in Islam that has been regulated so comprehensively, but in its application there are still problems that result in not achieving the benefit as the purpose of the presence of shari'ah. Among the problems in the application of inheritance law is the delay in the distribution of inheritance by the heirs. In *al-Fiqh al-Islamiy wa 'adillatuhu* it is stated that the distribution of inheritance is carried out after the rights relating to the *tirkah* (the legacy of the deceased) are carried out.¹ In this case it means that if the rights relating to other people have been fulfilled, then the care of the corpse and its memorialization, payment of debts and wills have been carried out then the next thing to do is the distribution of inheritance. If the distribution of the inheritance is not carried out by the heirs at that time, then this is what is meant by delaying.²

Delays in the distribution of inheritance are common among Muslim communities in various regions, causing psychological, sociological and economic problems, such as those of Muslim communities in Nigeria,³ Malaysia,⁴ as well as in various regions in Indonesia, such as in the city of Medan⁵, where delays are caused by a lack of knowledge and practice of religion, and these delays lead to less harmonious family relationships. This delay in the distribution of inheritance also occurs among the Banjar Muslim community, which is known as a religious, devout and fanatical Muslim community towards the teachings of Islam. The Banjar people also have a strong commitment to faith, one of the Banjar people's life philosophies is *baiman*, which means that each individual Banjar person is encouraged to learn the pillars of faith, if this is not done then their religion is considered imperfect.⁶ Amidst the *stereotype* of strong religiosity in Banjar society, there are cases of delays in the distribution of inheritance that result in problems such as the case of *munasakhakh*, where the first heir who should have received his rights eventually dies because the inheritance has not been distributed for too long.⁷ Likewise, delays in the distribution of inheritance cause disharmonious relationships among the heir's grandchildren,⁸ harta warisan berupa rumah

¹ Wahbah al-Zuhaily, *Al-Fiqh al-Islamiy wa 'Adillatuhu*, Cet.ke-2, vol. Juz 8 (Damsyiq: Dar al-Fikr, 1985).248-249.

² Reni Nur Aniroh, Khoiruddin Nasution, dan Ali Sodikin, "The Bilateral Inheritance System in Islamic Family Law: Fairness, Equality, and Mutual Exchange Perspectives," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (22 Mei 2024): 891, <https://doi.org/10.22373/sjhk.v8i2.17630>; Akhmad Wafi dkk., "Reaktualisasi Persyaratan Perempuan Menjadi Saksi Perkara Perdata Dalam Fikih Klasik Dan Korelasinya Pada Hukum Modern," *JOURNAL OF ISLAMIC AND LAW STUDIES* 7, no. 2 (27 November 2023): 186, <https://doi.org/10.18592/jils.v7i2.11550>.

³ Ismael Saka Ismael, "Consequences of Delaying Distribution of Estate in Islamic Law of Inheritance: The Nigerian Experience," *Jurnal Syariah* 24, no. 2 (2016). <http://ajba.um.edu.my/index.php/JS/article/view/4349>

⁴ Fazira Shafie, Wan Zahari Wan Yusoff, dan Syed Muhammad Dawilah El-Edrus, "Factors of failure and delay in Islamic inheritance distribution in Malaysia," 2016, 1–10. https://www.researchgate.net/profile/Fazira-Shafie/publication/319743194_Factors_of_Failure_and_Delay_in_Islamic_Inheritance_Distribution_in_Malaysia/links/59bb731e0f7e9b48a289f745/Factors-of-Failure-and-Delay-in-Islamic-Inheritance-Distribution-in-Malaysia.pdf

⁵ Fathul Djannah dan Muhammad Rizal, "The Delaying of Inherited Wealth Distribution and Its Impact: A Case Study of Family Fair in Medan City," *Randwick International of Social Science Journal* 1, no. 2 (2020): 382–93. <https://www.randwickresearch.com/index.php/rissj/article/view/64>

⁶ Sahriansyah Sahriansyah, *Sejarah kesultanan dan budaya Banjar* (IAIN Antasari Press, 2015).33

⁷ Wahidah Wahidah dan Fahmi Al Amruzi, "Fenomena Kewarisan Pada Masyarakat Banjar Kalimantan Selatan," *Khazanah: Jurnal Studi Islam dan Humaniora* 20, no. 1 (2022): 127–52. https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Wahidah+Wahidah+and+Fahmi+Al+Amruzi%2C+%E2%80%9CFenomena+Kewarisan+Pada+Masyarakat+Banjar+Kalimantan+Selatan%2C%E2%80%9D+Khazanah%3A+Jurnal+Studi+Islam+Dan+Humaniora+20%2C+no.+1+%282022%29%3A+127%E2%80%9352.&btnG=

⁸ Interview with Norhidayah, August 13, 2023 in Banjarmasin

terbengkalai,⁹ the inheritance in the form of a house is neglected,¹⁰ fellow heirs (children of the heir) quarrel, and the inheritance in the form of land is not cultivated optimally.¹¹

Various studies have been conducted in response to the delay in the distribution of inheritance which has caused many problems, such as Andi Herawati's research which analyzes with a normative approach and states that hastening the distribution of inheritance is a shari'a order that must be obeyed, because by hastening the distribution of inheritance, justice for the heirs is more guaranteed, and by hastening it can avoid a rift in the family.¹² Zainal Muttaqin's research also provides an explanation of the importance of hastening the distribution of inheritance, he focuses on the study of Sahih al-Bukhari Hadith No. 6732 with a normative juridical approach. 6732 with a normative juridical approach, then analyzes it based on the rules of *Ushul al-Fiqh*, and concludes that dividing the inheritance after the death of the heir is mandatory, while distributing it becomes mandatory immediately and it is forbidden to delay it if there is a potential for disputes between the heirs,¹³ Furthermore, there is research by Raja Sitonga and Amhar Maulana Harahap, according to them so that the distribution of inheritance is carried out in harmony and away from conflict, it requires a deep understanding of the values of justice, responsibility and tolerance in Islam.¹⁴

In contrast to the above studies, this research was conducted with the intention of analyzing more fundamentally why delays in inheritance distribution occur in Muslim communities, particularly in the Banjar community. Assuming that community behavior is related to the enactment of a law, this research uses Laurence M. Friedman's *Legal System* perspective. Friedman's theory is used because it talks specifically about the application of law in the social life of the community. This theory states that there are 3 (three) legal components that must exist in order to produce effective law, the three elements are legal *structure*, legal substance and legal *culture*. With this perspective, it will be known why the Muslim community delays the distribution of inheritance.¹⁵

METHODS

This research is *empirical legal research*, which focuses on the legal behavior of individuals or groups in relation to the enactment or application of the law.¹⁶ This empirical legal research is conducted using qualitative research methods, research that is carried out naturally, as it is in a normal situation by not manipulating the circumstances and conditions.¹⁷ Primary data was obtained by semi-structured interviews and observation.¹⁸ Semi-structured interviews were conducted with the Banjar Muslim community who had

⁹ "Observation" Martapura Banjar Regency, September 10, 2023

¹⁰ Interview with Ni'matus Sa'adah, June 10, 2024 in Pelaihari

¹¹ Interview with Siti Barsih, August 20, 2023 in Alalak, North Banjarmasin

¹² Andi Herawati, "Urgensi Penyelesaian Pelaksanaan Warisan," *Asb-Shababah: Jurnal Pendidikan dan Studi Islam* 6, no. 2 (2020): 183–91. <https://journal-uim-makassar.ac.id/index.php/ASH/article/view/294>

¹³ Zainal Muttaqin, "Hukum Penyelesaian Pelaksanaan Pembagian Harta Warisan (Analisis Ushul Fiqh terhadap Hadis Alhiqul Faraidh Bi Ahliha)," *Syaksia: Jurnal Hukum Perdata Islam* 22, no. 2 (2021): 183–96. <https://jurnal.uinbanten.ac.id/index.php/syaksia/article/view/5515>

¹⁴ Raja Ritonga dan Amhar Maulana Harahap, "Harmoni Dalam Kewarisan: Solusi Damai Untuk Mencegah Konflik Keluarga," *El-Faqih: Jurnal Pemikiran dan Hukum Islam* 10, no. 1 (2024): 117–33. <https://ejournal.iaifa.ac.id/index.php/faqih/article/view/1282>

¹⁵ Laurence M. Friedman, *The Legal System ; A Social Science Perspective* (New York: Russel Sage Foundation, 1975).5-16

¹⁶ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).83

¹⁷ Nursapia Harahap, "Penelitian Kualitatif," (Medan : Wal Ashri Publishing 2020).124

¹⁸ haris Herdiansyah, *Metodologi Penelitian Kualitatif Untuk Ilmu-Ulmu Sosial* (Jakarta: Salemba Humanika, 2010).124

postponed the division of inheritance, judges, lawyers and ulama or community leaders, while the observation method used was *participation charts*, namely observing, recording and noting the behavior that appears or does not appear from the subject.¹⁹ Furthermore, secondary data was obtained from various laws, fiqh books that discuss inheritance and other legal literature, especially those that discuss the traditions of the Banjar community.

The data obtained is then reviewed with Laurence M. Friedman's *Legal System Theory*. while the data analysis technique carried out in this research is an interactive data analysis model according to Miles and Huberman which includes 4 (four) stages, namely data collection, data reduction, data *display* and conclusion drawing.²⁰

RESULT AND DISCUSSION

The Enactment and Observance of Law in Laurence M. Friedman's Legal System Theory

In his book *THE LEGAL SYSTEM: A Social Science Perspective*, Laurence M. Friedman argues that "law" has three phenomena. The first phenomenon is the existence of social and legal forces that in a certain way force entry so that a law is formed. Second, the legal product itself and, Third, the impact of the law on people's behavior, and according to Friedman the first and third are essential in the context of social studies of law, while the second, which is also known as legal input, is widely ignored in the discussion of legal science.²¹

Furthermore, in order for the law that has been formed in the law to run effectively, Friedman ensures 3 (three) components that must exist and interact with each other, namely the legal structure, legal substance and legal culture which he calls the legal system.²² The legal structure is an institution created by the legal system with various functions to support the operation of the legal system, this legal structure is an institution authorized to make and implement laws, in this case the judiciary.²³ Legal substance is all products produced by the legal structure, either in the form of regulations or legal decisions.²⁴ Meanwhile, legal culture is a situation in which thinking and social forces determine how the law is implemented, avoided or misused.²⁵ Legal culture is the most important aspect in this legal system, because it includes human attitudes, behaviors and habits that form the social forces of society to obey the law or break the law.²⁶

An effective legal system for Friedman has ideal functions, namely distributing and maintaining the right values according to society, resolving disputes or conflicts, as social control, functions to create norms themselves and functions as an instrument of organized change or social engineering.²⁷

Legal Structure in the Delay of Inheritance Distribution in Banjar Society

1. Religious Court

¹⁹ Haris Herdiansyah.137

²⁰ Haris Herdiansyah.164

²¹ Friedman, *The Legal System ; A Social Science Perspective*.2

²² Friedman.5-16

²³ Friedman.5

²⁴ Friedman.6

²⁵ Friedman.

²⁶ Musda Asmara, Rahadian Kurniawan, dan Linda Agustian, "Teori Batas Kewarisan Muhammad Syahrur dan Relevansinya dengan Keadilan Sosial," *De Jure: Jurnal Hukum dan Syaria* 12, no. 1 (15 Juni 2020): 17, <https://doi.org/10.18860/j-fsh.v12i1.7580>.

²⁷ Friedman, *The Legal System ; A Social Science Perspective*.17-20

Religious courts are institutions that are part of the general judiciary, having the authority to handle family law issues among Muslim communities, within the scope of marriage, inheritance, wills, grants, waqf, and most recently the shari'ah economy. Religious courts are courts of first instance, located in districts/cities and at the appellate level there is the Religious High Court (PTA) located in the province, which decides on appeals from the decisions of the courts of first instance.²⁸

The legal basis for the existence of religious courts is the 1945 Constitution, Law No. 14 of 1970 on the Basic Provisions of Judicial Power, Law No.7 of 1989 on Religious Courts, and Law No. 4 of 2004 on judicial power, this law is an amendment to Law No. 35 of 1999. Law No. 3 of 2006 on the Amendment to Law No. 7 of 1989 on Religious Courts, and Law No. 50 of 2009 **on the** Second Amendment to Law No. 7 of 1989 on Religious Courts.²⁹

In terms of the application of inheritance law among the Banjar Muslim community, the Religious Court is the institution most authorized to handle inheritance cases. So how far is the authority of the Religious Courts in handling these inheritance cases? To see this, we can refer to 2 (two) religious court laws, namely Law No.7 of 1989 and Law No.3 of 2006 concerning Amendments to Law No.7 of 1989 concerning Religious Courts. The two laws are discussed because Article 106 A of Law No.3 of 2006 states that Law No.7 of 1989 on Religious Courts is still valid as long as it is not different from the latest law and as long as it does not conflict with Law No.3 of 2006.³⁰

Both laws discuss the authority of the Religious Courts as follows: First: Law of the Republic of Indonesia No.7 of 1989 concerning Religious Courts Chapter III Article 49 concerning the Powers of the Court, explains that the authority of religious courts is only passive, religious courts are only authorized to examine, decide and resolve inheritance cases which include determining who is an heir, determining the inheritance, determining the share of each heir and the implementation of the distribution. However, Article 52 paragraph 1 of this law states that the court can provide advice, consideration, and information about Islamic law to other institutions in the area where the court is located. This article provides discretion to the court to provide advice or socialization to the public in general about a rule related to the handling of cases in religious courts, as well as in this case is inheritance. This article also implies that the court is only passive because it only waits for requests from other institutions.³¹

The next law related to the authority of religious courts is Law No.3 of 2006 concerning Amendments to Law No.7 of 1989 concerning Religious Courts. Basically, this law does not differ in discussing the issue of the authority of religious courts in cases of marriage, inheritance, wills, grants, zakat, infaq, waqf and sadaqah, except that it provides a breadth of authority to religious courts by adding the authority to handle shari'ah economic cases. This means that in the context of inheritance cases the authority of

²⁸ Ruslan Abdul Gani, "Status Anak Luar Nikah Dalam Hukum Waris (Studi Komperatif Antara Kitab Undang-Undang Hukum Perdata Dengan Kompilasi Hukum Islam)," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 11, no. 01 (24 Juni 2011): 84, <https://doi.org/10.30631/alrisalah.v11i01.477>.

²⁹ Sri Lumatus Sa'adah, Saifuddin Zuhri Qudsy, dan Nur Quma Laila, "Sigar Semongko and Gilir Waris: The Controversy of Customary Law and Islamic Law in The Inheritance System," *AHKAM : Jurnal Ilmu Syariah* 23, no. 2 (30 Desember 2023), <https://journal.uinjkt.ac.id/index.php/ahkam/article/view/31266>.

³⁰ Anugrah Reskiani dkk., "Reform Methods of Islamic Inheritance Law in Indonesia in Jurisprudence," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (9 Juni 2022): 39, <https://doi.org/10.31958/juris.v21i1.5564>.

³¹ Surya Sukti, Munib Munib, dan Imam S. Arifin, "Pernikahan Adat Dayak Ngaju Perspektif Hukum Islam (Studi di Kabupaten Gunung Mas Kalimantan Tengah)," *El-Maslahah* 10, no. 2 (30 Desember 2020): 65, <https://doi.org/10.23971/maslahah.v10i2.2284>.

religious courts is the same as its authority in Law No.7 of 1989 concerning Religious Courts.³²

When referring to the two laws above, there is no authority for religious courts to take preventive steps in inheritance cases, which in this case is a case of delayed distribution. The religious court is only passively waiting for a request to settle an inheritance case, while the preventive aspect of the religious court has no authority.

2. Judge

The second legal structure that plays a role in the implementation of inheritance law among the Banjar Muslim community is the judge. Judges are one of the vital organs in the implementation of religious courts, in addition to the other elements of clerks and bailiffs. Judges are the ones who examine and give decisions on cases that come before the religious courts. Likewise, in inheritance cases, the judge is the person who examines and gives decisions that are directly confronted with the parties to the case, both the plaintiff and the defendant.³³

Article 11 of the Law on Religious Courts No.7 of 1989 states that judges are officials who exercise judicial power, which in Law No.3 of 2006 was slightly changed to court judges are officials who carry out the duties of judicial power. This statement is the reason that judges are the spearhead of the existence of a religious court. Judges have a major role in resolving court cases, in the case of inheritance judges are officials who have the authority to examine and decide on inheritance cases.³⁴ However, it seems that not much different from the authority of the court, the judge is only a passive party in dealing with cases. This means that the judge will work if there is a request to be resolved in court. In inheritance matters, the request is either in the form of a determination of heirs or inheritance lawsuits, including in this case a lawsuit for inheritance in the event of delayed / late distribution of inheritance, so that then problems arise from fellow heirs.³⁵ The judge has no intervention to the heirs so that the inheritance is divided as soon as possible. The judge can only provide advice and suggestions which are usually conveyed at the beginning of the lawsuit.³⁶ This means that the case has already been filed and the conflict over inheritance has already occurred, so it is not preventive.³⁷

Judges can inform the general public informally to divide the inheritance as soon as possible so that difficult problems do not arise in the future,³⁸ as one of the judges did

³² Elfia dkk., "Patterns for Settlement of Puhah Inheritance Disputes In the Community of Nagari Salareh Aia from the Perspective of Islamic Law," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 2 (31 Desember 2022): 480, <https://doi.org/10.19105/al-lhkam.v17i2.6246>.

³³ Kamarusdiana Kamarusdiana, Muhammad Ilham Fuadi, dan Muhammad Ishar Helmi, "Keadilan Waris Islam Dalam Kedudukan Anak Perempuan Sebagai Hajib Hirman Terhadap Saudara Dalam Putusan Mahkamah Agung," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (1 Desember 2021): 221, <https://doi.org/10.24090/mnh.v15i2.4960>.

³⁴ Abdulmajeed Hassan Bello, "Islamic Law of Inheritance among the Yoruba of Southwest Nigeria: A Case Study of Dar Ul-Qadha (Arbitration Panel)," *Journal of Islamic Law* 5, no. 1 (29 Februari 2024): 44, <https://doi.org/10.24260/jil.v5i1.2058>.

³⁵ Interview with LA, Judge/Head of Banjarbaru Religious Court, Banjarbaru on March 7, 2024

³⁶ Interviews with Mr, BF and AI, Mt, BF and AI, Judges of the Banjarbaru Religious Court, 21 August and 7 March August 2023.

³⁷ Ali Muhtarom dan Yuli Sutoto Nugroho, "Grants as a Model of Inheritance Prospective Distribution in the Coastal Santri Community," *Al-Ahkam* 32, no. 2 (30 Oktober 2022): 169, <https://doi.org/10.21580/ahkam.2022.32.2.12557>.

³⁸ Interview with Hk, Chief Judge at Martapura Religious Court, Martapura on August 7, 2023

when providing material in one of the government institutions.³⁹ So again, the judge can only advise and provide information on the importance of dividing the inheritance immediately before conflicts arise between families. The judge does not have the authority to force the heirs to share their inheritance immediately.⁴⁰

What has been done by these judges is certainly in line with what has been outlined by the law. Article 52 of Law No.7 of 1989 states that the court "-the judges-" can provide information, consideration and advice on Islamic law to government agencies in their jurisdiction if requested. This article was not amended in Law No.3 of 2006, so of course it can be said that here the position of the judge is no different from the position of the court, which is only passive. Judges do not have the authority to take preventive action against the many cases of delayed inheritance distribution.⁴¹

3. Advocate/Lawyer

Law of the Republic of Indonesia Number 18 Year 2003 on advocates regulates various aspects related to the profession of advocates or lawyers. In Chapter I General Conditions Article 1 points 1 and 2 of the law explains that an advocate is a person whose profession is to provide legal services, both inside and outside the court. These services are in the form of legal consultation, legal assistance, exercising power of attorney, representing, accompanying, defending and taking legal action for the legal interests of clients.⁴²

Although the definition states that there is authority for out-of-court legal aid, no explanation is found in subsequent articles. Even in Chapter IV on Advocate Rights And Liabilities, articles 14 to 20 do not mention out-of-court legal aid⁴³

Based on the above provisions, advocates or lawyers basically do not have the authority to provide guidance, direction or counseling to the public about the importance of accelerating the distribution of inheritance, or how harmful it is to delay inheritance. In line with this legal situation, what is experienced by lawyers in the field, especially when handling inheritance cases⁴⁴ is that all they can do as lawyers is to slip in advice to clients not to repeat the act of delaying the distribution of inheritance.⁴⁵

4. Scholars

Another party that has a major role in the application of inheritance law among the Banjar community is the ulama, because it is the ulama who have great power to spread religious knowledge at the *grassroots* level, but unfortunately this role has not touched on the issue of inheritance law. According to the chairman of the South Kalimantan MUI, K.H. Husin Nafarin, Lc, the Banjar community is not very interested in da'wah material about inheritance, so according to him, inheritance issues are rarely used as lecture material,

³⁹Interview with Ms, Lt, Judge of Martapura Religious Court, Martapura August 7, 2023

⁴⁰ Arifki Budia Warman dkk., "From Communal to Individual: Shifting Authorities of Family Dispute Resolution in Minangkabau Society," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 23, no. 2 (26 Desember 2023): 161, <https://doi.org/10.18326/ijtihad.v23i2.161-184>.

⁴¹ Maimanah Maimanah dkk., "Delay in the Division of Inheritance: A Theoretical Review within Legal System Framework in Indonesia," *Syariah: Jurnal Hukum Dan Pemikiran* 24, no. 1 (1 Juni 2024), <https://doi.org/10.18592/sjhp.v24i1.12916>.

⁴² "Undang Undang Republik Indonesia No 18 Tahun 2003 Tentang Advokat"

⁴³ undang Undang Republik Indonesia No 18 Tahun 2003 Tentang Advokat.

⁴⁴ Interview with Rt, lawyer based in Banjarmasin, Banjarmasin, August 14, 2024

⁴⁵ Interview with Rt, lawyer based in Banjarmasin, Banjarmasin, August 14, 2024

as well as rare preachers who master inheritance law well. Banjar people prefer to ask about inheritance when they are facing inheritance problems, or come to ask for the distribution of inheritance according to the rules in Islamic inheritance law.⁴⁶

This is no different from what was stated by the Chairman of the MUI of Banjar Regency, K.H. Zarkasy Hasby, Lc. In his statement that studies or lectures on inheritance law are rarely discussed, because according to him inheritance law requires calculation and memorization, so it needs special study.⁴⁷ This is also known by Ust. Ahmad - member of the Fatwa Council of MUI of Banjarmasin City and popular lecturer - that lecture material about inheritance is very rarely discussed in lectures in the community, this happens because according to him the issue of inheritance is not interesting to the community, so that when the material of inheritance is presented, the recitation participants are less enthusiastic, in addition also because the lecturer himself rarely mastered the issue of inheritance, so that the issue of inheritance is not popular in the community, so that the recommendation to settle the inheritance as soon as possible after the death of the heir is also not echoed because the issue of inheritance is far from the discussion or theme of the lecture.⁴⁸

From the statements of these scholars, it is clear that the law of inheritance is a subject that is rarely discussed in recitations in the community, this is because the material on inheritance does not attract the interest of the recitation participants, in addition, not only certain scholars who master the issue of inheritance.

Legal Substance in the Delay of Division in Banjar Society

1. Al-Qur'an and al-Hadis

Islamic inheritance law is one of the laws that has been regulated in detail by shari'a, the Qur'an itself explains who is entitled to inheritance and each heir's share (QS al-Nisa (4): 7, 11, 12 and 176), the causes of inheritance, both because of kin / blood relations (QS al-Nisa (4): 11, 176 and QS al-Anfal (8): 75), marriage (QS al-Nisa (4): 12) and *wala'*/oath of allegiance (QS al-Nisa (4): 33). Likewise, the Qur'an emphasizes and commands its implementation, promising that Allah will admit those who obey Allah and His Messenger (QS al-Nisa (4): 12) and *wala'*/oath of allegiance (QS al-Nisa (4): 33) into Paradise, where rivers flow underneath, and they will remain therein forever (QS al-Nisa (4): 13): 13). On the other hand, it threatens those who disobey Allah and His Messenger and violate His decrees, that Allah will cast them into Hellfire, and they will abide therein, and they will have a humiliating punishment. QS al-Nisa (4): 14).

Hadiths of the Prophet SAW are also not a few that discuss the issue of inheritance, when referring to the Book of *al-Nail al-Authar* (Collection of Legal Hadiths) there are 64 (sixty-four) traditions that discuss inheritance with various themes. These themes explain in more detail the issue of inheritance, as a reinforcement and explanation of what Allah SWT has revealed in the verses of inheritance.⁴⁹ Based on the above arguments, scholars

⁴⁶ Interview with K.H Husin Nafarin, Lc, Chairman of MUI South Kalimantan, Banjarmasin, November 18, 2023

⁴⁷ Interview with K.H. Zarkasy Hasby, Lc, Chairman of MUI Banjar Regency, Martapura on November 12, 2022.

⁴⁸ Interview with Ust. Ahmad, Member of the Fatwa Council of MUI Banjarmasin City, Banjarmasin, November 23, 2023.

⁴⁹ Muhammad bin 'Ali Asy-Syaukani, *Nayl Al-Authar*, Juz 11 (Dar Ibnu al-Jauzy, 1428 H).314-390

have no disagreement about the mandatory implementation of inheritance law.⁵⁰ As well as the opinion of the scholars of the Shafi'i Mazhab from among the *fuqaha* and the *mukallimun* that every command in the form of *fi'il amr* means mandatory law.⁵¹

The obligation to implement the law of inheritance is a *clear* law, however, neither the verses of the Qur'an nor the *Hadith* as stated above speak explicitly about the timing of the distribution of inheritance. Referring to the traditions related to the command of the implementation of inheritance that use the phrase "*fi'il amr*", as reported by Muslim tradition number 3028, 3029 and 3030. Of the three traditions starting with "*fi'il amr*" with the phrase *albiqnu* in hadith no. 3028 and 3029 and *aqsimu in hadith no.* 3030, then in the discussion of Ushul Fiqh if *fi'il 'amr* is associated with *qarinah* scholars differ in opinion about its implementation immediately or not. Some opinions state that the distribution must be immediate, as is the opinion of Abu Bakr Ash Shairafi and Al Qadli Abu Hamid, and according to the majority of Abu Hanifah's group.⁵²

2. Book of Fiqh

Al-Umm by Imam ash-Shafi'i

Is one of the monumental Fiqh books by Imam Syafi'i which is the master book among the Syafi'i Mazhab. In the book al-Umm the issue of inheritance is discussed in the 5th juz, namely in the Book of al-Faraidh which discussion includes: 1) Chapter on those whose inheritance is mentioned by Allah and those who are not mentioned 2) Chapter on differences of opinion about inheritance of different religions and inheritance of slaves and murderers 3) Chapter on scholars differing in opinion; a person does not inherit until he dies 4) Chapter on the return of inheritance, 5) Chapter on differences of opinion on the return of inheritance, 6) Chapter on inheritance, 7) Chapter on reversion in inheritance, 8) Chapter on inheritance of grandfather, 9) Chapter on inheritance of children of mula'anah, 10) Chapter on inheritance of Jews, 11) Chapter on the inheritance of apostates, 12) Chapter on the inheritance of musyarakah/partnership.⁵³ These discussions do not mention the timing of inheritance.⁵⁴

Likewise, in the Shafi'i Mazhab derivative, namely the book of Mukhtasar al-Muzani, the discussion of inheritance problems does not mention the rigid time when inheritance must be distributed. In detail, the discussion of inheritance in the book of al-Muzani includes the following chapters: 1) Chapter on people who do not have the right of inheritance, 2) Chapter on inheritance, 3) Chapter on the closest ashabah, 4) Chapter on grandfather's inheritance rights, 5) Chapter on the inheritance of apostates, 6) Chapter on the inheritance of musyarakah, 7) Chapter on inheritance of children of mula'anah, 8) Chapter on inheritance of Majusi, 9) Chapter on inheritance of khunsa, 10) Chapter on dhawil arham, 11) Chapter on Inheritance of grandfather's sister.⁵⁵

Nihayah al Mathlab by Imam al Haramain Al-Juwaini

⁵⁰ Musthofa al-Bugha dkk, *Al-Fiqhu al-Manhajiy 'Alaa Madzhab al-Imam asy-Syafi'iy*, Edisi ke-13, Jilid 1 (Damsyiq: Daarul Qalam, 2012). 267-269

⁵¹ Al-Imam al-'Allamah Ali ibn Muhammad al-'Amidy, *Al-Abkam Fi Ushul al-Abkam*, Juz 2 (Riyadh, Saudi al-Arabiyyah: Dar as-Sami'iy, 2013).188-189

⁵² Abu Ishaq Ibrahim bin Ali Al-Syairozy, *Al-Tabshirah Fi Ushul al-Fiqh* (Damaskus: Dar al-Fikr, 1980).53

⁵³ Al-Imam Muhammad bin Idris Asy-Syafi'i, *Al-Umm*, vol. 5 (Dar al-Wafaa, 1422 H).147-185

⁵⁴ Fakhrrurazi M. Yunus, Husni A. Jalil, dan Shafiratunnisa Shafiratunnisa, "Analisis Yuridis Terhadap Pembagian Harta Warisan Ahli Waris Pengganti Pada Putusan Mahkamah Syar'iyah No 245/Pdt.G/2017/MS.Bna.," *El-Ushrah: Jurnal Hukum Keluarga* 5, no. 1 (25 Juni 2022): 183, <https://doi.org/10.22373/ujhk.v5i1.7730>.

⁵⁵ Al-Imam Abi Ibrahim Ismail bin Yahya bin Ismail al-Misri Al-Muzany, *Mukhtasar Al-Muzani* (Beirut-Lebanon: Dar al-Kutub al-'Ilmiyyah, 1419 H).186-191

This book is a summary of four books, namely Al Umm, Al Imla', Mukhtashar Al-Muzani & Mukhtashar Al-Buwaithi. In it, the issue of inheritance is discussed in the 9th juz, in Kitab al Fara'idl which includes 30 chapters: 1) Who inherits and does not inherit. 2) Part of the inheritance. 3) Ashabah. 4) Inheritance for the grandfather of the deceased. 5) Inheritance for apostates. 6) The problem of musyarrakah. 7) Inheritance for the child of mula'anah. 8) Inheritance for the Magi. 9) Radd issues. 10) Granting inheritance for dzawil arham. 11) Granting inheritance to the child of the daughter of the mayyit. 12) The procedure for granting inheritance for the daughter of the mayyit's brother and the children of his brother and sister. 13) The procedure for granting inheritance for the uncle and aunt mayyit. 14) Inheritance for the children of the deceased's uncles and aunts. 15) The method of inheritance for relatives of the deceased's father and mother. 16) The procedure for giving inheritance to the grandparents of the deceased. 17) Procedures for granting inheritance for dzawil arham who have a relationship with two kinship. 18) The procedure for giving inheritance to dzawil arham with the husband / wife of the deceased. 19) Nasab ambiguity in dzwil arham. 20) Division of multiplication. 21) Removing fractions. 22) The problem of qismah. 23) Correcting the calculation of fara'idl issues. 24) Issuing the share of each person from the heirs. 25) Correcting the calculation of munasakhah issues. 26) Khuntsa and the method of inheritance for them. 27) Inheritance for children in the womb. 28) Distribution of inheritance 29) Strange opinions. 30) Problems that have nicknames. However, in the introduction to Kitab al Fara'idl and all its chapters there is no mention of when inheritance should be distributed.⁵⁶

3. Compilation of Islamic Law

The Compilation of Islamic Law is a collection of opinions of Fiqh scholars that are united in the rule of law and become a reference for religious courts in handling cases of Muslim communities.⁵⁷ Based on Presidential Instruction No. 1 of 1991 dated June 10, 1991, the implementation of the Compilation of Islamic Law in the Religious Courts has official legal legitimacy.⁵⁸

In the Compilation of Islamic Law, Islamic inheritance law is implemented in Book II of the Law of Inheritance, consisting of 6 (six) chapters covering 43 articles, namely articles 171 to 214. More details about the inheritance chapters are as follows: Chapter I on General Provisions, Chapter II on Heirs, Chapter III on Parts, Chapter IV on *Aul* and *Radd*, Chapter V on Wasiat and Chapter VI on Hibah.⁵⁹

Of the articles regulating inheritance, there is only one article related to the time of inheritance distribution, namely article 175, point No. 4 (four), which states that the obligations of the heirs to the testator are 1) taking care (bathing, praying, shrouding and burying the body) of the testator, 2) settling the testator's debts and credits if any, completing the testator's will and distributing the inheritance.⁶⁰

Based on article 175 above, it can be said that the compilation, which is the guide for judges in litigation, does not provide an explicit time for the distribution of inheritance. Indeed, this article is understood that when the 3 (three) obligations of the heirs to the heirs have been completed, and the testator still has property as inheritance, the next

⁵⁶ Imam al Haramain Abul Ma'ali Abdul Malik bin Abdullah Al-Juwaini, *Nibayah al-Mathlab fi Dirayah-Al Madzhab* (Jeddah: Dar al Minhaj, 1428H).5-367

⁵⁷ Mahkamah Agung RI, "Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya" (2011).5

⁵⁸ Mahkamah Agung RI.35

⁵⁹ Kementerian Agama RI, *Kompilasi Hukum Islam di Indonesia* (Jakarta: tanpa penerbit, 2018).

⁶⁰ Kementerian Agama RI.

obligation is to distribute the inheritance, so that all the rights of the heirs can be conveyed. But the fact is carried out differently because there is no rigid time about when the distribution of inheritance in KHI.

Legal Culture: Living Law in Banjar Society

1. Banjar Community Religious Model

As is known, Indonesian society is a predominantly Muslim society in the form of Nahdhatul Ulama, hereinafter abbreviated as NU. As the largest community organization (mass organization), NU greatly colors the religious style of Indonesian Muslims.

As an organization, NU has a religious identity that is very dominant in pro-tradition and local culture.⁶¹ This character even became one of the initial motivations for the establishment of Nahdhatul Ulama as an organization, in addition to another spirit of fighting the colonialists.⁶² This pro-tradition religious identity is the reason why traditionalist scholars who were members of NU at that time rose up, as an antithesis to the existence of the Muhammadiyah, al-Irsyad and Persis mass organizations that were formed earlier and spread the purification of "wahabism", and criticized local traditions and culture. The existence of these organizations, for NU leaders or ulama, poses a threat to the Islamic faith of the traditional laity.⁶³ In line with this opinion, Ahmad Baso argues that at that time the pesantren kiai were concerned because the harmonious religious life in the country had been disturbed by puritanical religious groups since the beginning of the 20th century, which they considered would undermine the harmony of religious life and weaken the life of the nation.⁶⁴

From the above discussion, it can be said that the rise of the ulama who are members of Nahdhatul Ulama is inseparable from the aim of maintaining traditions in the archipelago that have existed before, even before Islam came to the archipelago. Ahmad Baso also stated that NU was born driven by its concern to maintain Islam that is friendly to local cultural values, as well as respecting differences in religion, traditions and beliefs which are hereditary heritage in the Nusantara tradition.⁶⁵

2. The Banjar Community and Customary Inheritance Law

As a society that is inseparable from culture, the majority of Indonesian people are people who uphold customs that are carried out for generations, as well as in the issue of inheritance. The inheritance law that intersects with the customs that have been implemented for generations in Indonesian society can be said to be customary inheritance law.

As it is known that customary inheritance law has characteristics or characteristics that are different from other laws, one of its characteristics that is very relevant to the discussion here is the matter of the time of distribution of inheritance. That in customary inheritance law the inheritance may be distributed or not distributed, or distributed in part and not distributed in part or not distributed at all, or the inheritance is postponed for an

⁶¹ Tri Wahyudi Ramdhan, "Islam Nusantara: Pribumisasi Islam ala NU," *Al-Insyiroh: Jurnal Studi Keislaman* 2, no. 1 (2018): 73–91.

⁶²M. Mukhsin Jamil, Musahadi, Choirul Anwar, Abdul Kholiq, *Nalar Islam Nusantara; Studi Islam ala Muhammadiyah, al-Irsyad, Persis dan NU* (Jawa Barat: Fahmina Institut, 2008).277-290

⁶³M. Mukhsin Jamil, Musahadi, Choirul Anwar, Abdul Kholiq.

⁶⁴Ahmad Baso, *NU studies: pergolakan pemikiran antara fundamentalisme Islam & fundamentalisme neo-liberal* (Ciracas, Jakarta: Erlangga, 2006).388

⁶⁵Baso.388

unspecified time, are all valid things in customary inheritance law.⁶⁶ In fact, customary inheritance law also recognizes the existence of inherited property that is not allowed to be divided.⁶⁷

Based on this provision in customary inheritance law, it can be seen why the community delays the distribution of inheritance, that the majority of Indonesian Muslim communities are pro-tradition Muslim communities or traditionalist Muslim communities that uphold the value of traditions that have been carried out for generations. This means that in matters of inheritance the community applies customary inheritance law which gives them the opportunity not to distribute the inheritance or delay its distribution.

Because customary inheritance law is a law that lives in the community, it exists and fills the souls of the community, so when there are attitudes and behaviors of the community that are not in accordance or contrary to the customary inheritance law, they will be referred to as people who are not customary.⁶⁸ This value of not being customary is the basis for why the majority of heirs delay the distribution of their inheritance,⁶⁹ and this value also prevents other heirs who feel aggrieved from demanding the distribution of inheritance immediately. In the cases that the author found in the field, the control of one of the heirs over the inheritance and the reluctance of some of the heirs to demand the distribution of the inheritance which is their right is a real occurrence in the community, and this is due to the tradition that has been running continuously which has become the knowledge and practice of the community that the inheritance should not be distributed immediately, if it is done it is felt shameful because it violates custom.⁷⁰

CONCLUSIONS

In Laurence M. Friedman's *Legal System* review, this delay in inheritance in the Banjar community occurs because: 1) The legal structure related to the prohibition of delaying the distribution of inheritance is "weak", this is because religious courts and judges and advocates do not have the authority to force the Banjar Muslim community to distribute the inheritance as soon as possible. Likewise, the ulama do not talk intensively about inheritance, especially about the timing of inheritance, because the material on inheritance in lectures is not of interest to the Banjar community, and not all ulama have mastered the material on inheritance. 2) Legal Substance; there is no explicit legal statement on the timing of inheritance distribution. The main sources of inheritance law are the Qur'an and al-Hadith, Fiqh books talk a lot about the parts of inheritance and so on, as well as inheritance law at a more practical level, namely the Compilation of Islamic Law only states that the obligations of the heirs to the testator are 4 (four), namely taking care of and completing until the funeral of the body is completed; settling both debts in the form of treatment, care, including the obligations of the testator and debt collectors; completing the testator's will; dividing the inheritance among the entitled heirs. 3) The legal culture applied by the community for generations is not to distribute the inheritance, even when all obligations to the heirs have been completed, distributing the inheritance immediately

⁶⁶Ellyne Dwi Poespasari, *Pemahaman Seputar Hukum Waris Adat di Indonesia*, Cet. ke-1 (Jakarta: PrenadaMedia Group, 2018).9-10. Pembagian dengan penjelasan sebagaimana di dalam tabel ini dapat juga dilihat pada Rizkisyahbana Yulistiyaputri, *Hukum Waris Di Indonesia*, (Depok : PT RajaGrafindo Persada, 2021).131

⁶⁷ Sigit Sapto Nugroho, *HUKUM WARIS ADAT DI INDONESIA* (Solo: Pustaka Iltizam, 2016).35

⁶⁸ Interview with Ar, Heir, Banjarmasin, June 13, 2023

⁶⁹ Interview with BF, Heir, Banjarmasin, July 20, 2023

⁷⁰ Interview with SB, Heir, Alalak on August 15, 2023

is considered as uncivilized behavior. This happens because customary inheritance law has filled the void of the absence of regulations on the timing of inheritance distribution. Customary inheritance law gives discretion to the inheritance not to be distributed, or distributed partly and not distributed the other part or even not distributed at all, or the inheritance is postponed for an unspecified time.

There is a need for legal ijtihad that provides firmness on the immediacy of inheritance distribution in Banjar society, because the delay causes many problems, even if the delay in the agreement in the future still has the potential to conflict the heirs. Likewise, there is a need for circumstances that condition and force the community to distribute inheritance as soon as possible, whether in the form of population administration applications or other forms.

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