

Protection of Mafqud Rights in Inheritance Without Court Determination According to Islamic Law

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ABSTRACT

The community in one of the villages in Muna Regency faces a complex inheritance dilemma, and this is not an exception. People with little legal understanding about inheritance often ignore pre-existing legal rules or conventions, such as mafqud inheritance or someone whose news is stopped, making life and death questionable. In accordance with Islamic law, a court order is required before an heir's inheritance can be distributed. The issue that exists in the community of Lakologou village is the lack of knowledge of legal requirements surrounding the role of mafqud heirs in the distribution of inheritance. According to information gathered from a number of sources, the judge's judgment will have a significant impact on the mafqud's situation in that it will subsequently offer legal certainty over whether he is still alive or otherwise. These indicators support legal actions that can be done to protect the mafqud rights, including voluntarily submitting an application to the Religious Courts as a means of protecting mafqud rights in succession.

Keywords: Distribution of Inheritance; Mafqud; Without Court Decision

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INTRODUCTION

Islamic law has long been applied in place of the common law that governs society, which is present in the majority of Indonesian regions. Mainly in areas that historically have an Islamic royal system or areas whose territories have become places for the spread of Islam and have slowly recognized and adopted the provisions of Islamic law as part of the customary law system they adhere to today.

The basic rules used in Islamic law (that act as legal guideline) are dominated by sharia fiqh, which is the foundation for human actions according to the arguments detailed on the results of the ijihad analysis of the scholars. As explained by TM. Hasbi Ash Shiddieqy quoted by Ismail Muhammad Syah that Islamic law is formulated as a collection of efforts by jurists to apply shari'a for the needs of society (Syah 1992). It can be interpreted that all the rules in Islamic law are provisions regarding commands and prohibitions which simultaneously regulate order in the life of a society, such as the rules

regarding inheritance. Inheritance law is also considered part of family law which plays a very vital role, even in determining and reflecting the family system that applies in society (Hazairin 1981).

Islamic inheritance law regulates everything related to the transfer of rights and obligations over a person's assets after he dies to his heirs. Thus, in inheritance law there are three main elements that are interrelated, namely the heir, inheritance, and heirs. Inheritance is basically an inseparable part of law, while law is part of the main aspects of Islamic teachings (Parman 1995). In Indonesia there are several legal provisions that regulate inheritance nationally, there are three kinds of them, which are Islamic inheritance law, western/civil wars law, and customary inheritance law.

Inheritance law based on Islamic law applies to those who embrace Islam, civil inheritance law applies to groups of citizens who come from China and Europe, while customary inheritance law is a law that has always been in force among the people, most of which are still unwritten but live in the daily actions of society, and this customary inheritance law applies to groups of indigenous Indonesian people (Subekti 1995).

Settlement of inheritance problems in Indonesia, both from the perspective of civil inheritance, customary inheritance or Islamic inheritance, sometimes does not always bear fruit or ends according to the expectations of every heir. Inheritance often creates disputes between the heirs or with parties other than the heirs. From the few or many problems that arise due to inheritance, it is influenced by complex problem situations after the death of the heir or during the inheritance. This rather complex issue has implications for the clash of attitudes and real actions of heirs with the existence of legal norms that apply especially in the midst of village communities. The cognitive pattern of the community in the village from the perspective of legal awareness is relatively low, and that the level of their understanding is also low in terms of inheritance law events. This is supported by the lack of information related to inheritance law so that they have come to a conclusion that the problems that arise in their midst do not yet have legal provisions. In the end, the people in the village often experience difficulties in answering legal disputes, such as in the context of inheritance when one of the heirs is considered missing or absent.

According to Islamic law, people who disappear or absent are known as *mafqud*, namely people whose news has been interrupted so that life and death are not known. This person had lived before and it is not known for sure whether his family is still alive or not (Syarifudin 2005). In cases like this, basically the problem of inheritance regarding the existence of *mafqud* must wait for the judge's decision first, whether the person is still alive or has died. If the decision stipulates that the person concerned is still alive, then his inheritance rights must be kept. Conversely, if the decision stipulates that he has died, then his inheritance rights must be distributed to the existing heirs. Regarding the length of time a person has disappeared, several opinions in the schools of thought put forward by the Hanafiyah Ulama and Syafi'iyah Ulama, some say 70 years, and some others say 80 to 120 years. According to an opinion among the Hanafiyah Ulama, this matter is left to the opinion and *ijtihad* of the judge. If it is presumed that he has died, then it is decided that he has died and his assets are distributed to his heirs who presents at the decision time.

Settlement of *mafqud* cases is one of the authorities of the Religious Courts (Arto 2003), in which according to Law Number 7 of 1989 as amended by Law Number 3 of 2006 concerning Religious Courts and the Second Amendment to Law Number 50 of

2009 concerning Religious Courts, that the authority of the Religious Courts is limited specifically to people who are Muslim, in other words, cases of missing persons who are heirs or heirs are a part of inheritance disputes that must be resolved through this court. This is regulated in Article 49 of Law Number 3 of 2006, namely "The Religious Court has the duty and authority to examine, decide, and settle cases at the first level between people who are Muslim in the fields of Marriage, Inheritance, Wills, Grants, Waqf , Zakat, Infaq, Sadaqah and Syari'ah Economy" In addition, Article 96 paragraph (2) of the Compilation of Islamic Law states that "The distribution of joint assets to a husband or wife whose wife or husband is missing must be suspended until there is certainty of an essential death or legal death on the basis of the decision of the Religious Court."

Based on the provisions above, the problems that occur in the midst of the Lakologou Village community, Muna Regency are marked by the disappearance of one of the heirs in a family where the inheritance event takes place. In this position, the whereabouts of the heir whose whereabouts are unknown are not immediately submitted to the Religious Court. However, the family, who is also the other heir, continues to distribute the inheritance and does not set aside certain portions for safekeeping. By norm, the family of the missing heir is considered to have not obeyed or not fulfilled the orders of the Islamic law and/or related laws governing this matter.

From the statement above, the rules in Islamic law should apply massively to the concerned family. Because of their religious status and also the majority of the indigenous people in Lakologou village are Muslims. If you look at it from the point of view of the cultural system and customs used by the people in Lakologou village and the Muna people in general, everything is based on existing Islamic values. This can also be reflected in the legal system of marriage and the legal system of inheritance.

Based on the problem of the inheritance of the missing heirs, the author considers that it is necessary to implement more in-depth research related to the object under study, namely how the form and legal protection of mafqud rights when the distribution of inheritance takes place without a court decision according to Islamic law.

METHOD

This research methodology uses an empirical juridical approach, where the problems under study is related to the Form of Mafqud Rights Protection in the Distribution of Inheritance, Without a Court Determination According to Islamic Law. *The juridical* approach is used to analyze various laws and regulations as well as other sources of Islamic law related to mafqud rights in inheritance distribution. Meanwhile, *the empirical* approach is used to analyze law which is seen as patterned social behavior in people's lives that always interact and relate to social aspects (Sunggono 2003).

The research sample inclusion criteria is based on the selection of the Easy Sampling technique (*Convenience Sampling*), which is based on chance alone, where the population that the researcher meets are willing or voluntarily become respondents. The population in this study are parties related to efforts to protect mafqud rights in inheritance distribution without a court order. Parties who are respondents in this study included mafqud relatives; Head of the Raha Religious Court, legal practitioners and academics, as well as clerics or community leaders.

The data collected from two sources, (1) Primary data, in the form of data obtained directly from writing in the field, in which data obtained from in-depth interviews (*deft interviews*). The interviews used in this paper are free and guided interviews (Soemitro 1990). This interview contains the main points of alternative solutions. (2) Secondary data, in the form of data needed to complete primary data such as the Qur'an and Hadith, Law Number 7 of 1989 as amended by Law Number 3 of 2006 and Second Amendment to Law Number 50 of 2009 on Religious Courts, and Compilation of Islamic Law.

Data analysis used in this paper is qualitative analysis, that is a data that has been obtained from field studies and literature studies are then collected and grouped according to the facts and characteristics of the object under study (Fajar and Yulianto 2010). The data that has been obtained is compiled systematically and then analyzed qualitatively with the aim of obtaining a conclusion from the research problem to find out legal certainty regarding the form and efforts to protect mafqud rights in the distribution of inheritance without a court decision.

RESULT AND DISCUSSION

Legal Status of Mafqud Without Court Determination.

Status according to language terms is a *Noun* of a state or position (person, body, etc.) in relation to the society around it (Poerwardaminta 1984), so legal status can be said to be the state or position of a person or a body in law. In general, the legal status of a person is his position in the law. The legal status can be obtained by a person through a determination from the judiciary in accordance with his application on the basis of certain reasons. Likewise, the legal status of mafqud is attached to it.

The legal status of mafqud obtained from the determination of the judge serves as a guideline in determining the division of inheritance. Through the stipulation, the judge determines how many certain parts should be kept or set aside in order to maintain the existence of the mafqud's heirs. Thus, there is a right of privilege that is owned by mafqud even though its existence is not yet clearly known.

This privilege will be different if the mafqud does not have legal status based on a court decision. This problem can trigger inheritance disputes that may occur in the future among the heirs, because the determination of inheritance distribution is carried out unilaterally.

In response to that, the judge of the Raha Religious Court said that when there is an inheritance event and in the event there is one of the missing heirs or mafqud, then according to Islamic provisions the property of the missing person cannot be inherited, and the rights of the missing person cannot be inherited. spent or transferred, his ownership cannot be tampered with until it is truly known whether he is dead or alive. Or has passed for a certain amount of time and is presumably thought to be dead, and the judge has determined that he is considered to be dead. Sometimes it can also be designated as a person who is still alive based on their origin, until it really appears that the opposite is true (that is, they are really dead) (Drs. Mustafa, MH., interview March 30, 2015).

In the Qur'an surah Al Baqarah verse 188, Allah SWT confirms, which means: "And do not eat the wealth of other people among you in a vanity way, and (do not) bring

(business) the property to the judge (as money) bribes) so that you can eat some of other people's property by sinning, even though you know." From the quotation of the verse, it explains the basis for humans not to eat or control fellow property which has been limited by Allah's provisions including inheritance which has been determined according to Islamic law. Human obligations to assets that are known to belong to other people should be maintained and protected for the sake of good, not to be controlled or used for personal gain.

As a result of the absence of a judge's determination of the legal status of the mafqud, it can lead to a weakness in the legal status of the mafqud and losses for the mafqud. The loss is in the form of possession by other heirs (mafqud brothers) as private property. The reasons for this weakness could be due to a lack of legal understanding and awareness among other heirs. Although due to a lack of legal understanding and awareness, weaknesses can also be due to deliberate factors (Drs. Mustafa, MH., interview March 30, 2015).

One of the religious leaders in the interview outlined some specific points about the legal status or Mafqud's position is related to the absence of a court order, which are:

- a. If Mafqud is an heir. The property of the bequeathes remains his own and is not divided among his heirs until his death is officially acknowledged or a judge rules that he has passed away. He takes his stuff if it turns out that he is still alive. The person who becomes his heir at the time of his death or when the judge decides his death will inherit him if he is deceased or the judge determines his death.
- b. If the heir's mafqud. In the case that he is an heir, some of the bequeathes's estate is withheld. The inherited property is also returned to the other heirs of the bequeathed after his demise has been confirmed..
- c. It cannot be divided until the judge arrives at a decision. The provisions of Ushul Fiqh state that a mafqud person's property, which still belongs to him even if it has not yet been determined that he has passed away, cannot be inherited since, according to *istishhaabul hal*, the person is still deemed to be alive. It is different if the person was certified legally dead by a judge based on substantial evidence; in that case, the property might be given to the decedent's legitimate heirs. The heirs who are still alive at the time of the mafqud's passing are the legitimate heirs.

If it is confirmed to be alive upon the judge's ruling. The property granted to the mafqud person is the residual property that has been received by his heirs if the judge declares him to be dead but it turns out that he is still alive and returns to claim his property. It is not necessary to replace property that has been consumed by the heirs who are entitled to get it first. It is not permissible to demand that the heirs who received the inheritance and used or sold it replace the items that were used or sold. They just had to return the materials that were left over after the decision was made (because it was put into effect by the judge). Regardless of the reason for using or selling the inherited things, this is not an absolute statement. As soon as the heirs who received the inheritance sell their inherited goods, they may be required to return the inheritance they have received if the sale is intended to prevent the return of the goods in the event that the person who was presumed dead comes back, such as after learning that the mafqud is still alive. (H. Sanuking, S.Ag., interview April 02, 2015).

Forms of Legal Protection for Mafqud Rights.

Legal protection is a method or action carried out by law enforcement officials in accordance with their duties and responsibilities according to the law. According to Fitzgerald, protection is carried out against certain interests by limiting various interests on the other hand. The interests in question are regarding legal interests, namely dealing with human rights and interests, so that the law has the highest authority to determine human interests that need to be regulated and protected (Raharjo 2014). Furthermore, according to Satijipto Raharjo, said the concept of legal protection is a way to provide protection for human rights (HAM) that are harmed by other people and that protection is given to the community so that they can enjoy all the rights granted by law (Raharjo 2014).

It can be understood about the concept of protection as described above, that law is an important tool as the highest authority in terms of protecting every human interest, including in terms of the interests of inheritance rights in mafqud. Therefore, referring to the opinion of the clergy or the fatwa and the agreement in the form of *ijtima'*, it is said that there is a need for a coercive legal ruling from the judiciary in the form of a court order that determines the status or position of the mafqud before the inheritance issue is carried out.

In another explanation, in relation to the legal protection of mafqud through the determination of the Court, according to one of the Legal Practitioners in an interview, he said that a judge's determination can cause legal consequences which cause a change in the existing legal situation because of the judge's determination or the determination in written form is a legal action, then as a legal action it is always intended to cause legal consequences for a person or a civil legal entity. If it cannot cause legal consequences, it is not a legal action and therefore also not a written stipulation. As a legal action, the written stipulation must be able to cause a change in existing legal relationships, such as a strengthening a legal relationship or existing legal situation (*declaratoir*) and creates a new legal relationship or legal situation (*constitutief*). (La Ode Kudus, SH., interview April 01, 2015). And that opinion, it is very clear the position of mafqud when legally with the determination of the Court he can obtain the necessary rights.

Based on the principle of Islamic personality, determining mafqud status is the authority of the Religious Courts. And the interviews obtained explained that the authority within the Religious court environment is one of them resolving inheritance disputes as regulated in Article 49 paragraph 3 of Law Number 7 of 1989 which basically consists of and:

- a. Determination of legal heirs, to determine who is referred to as legal heirs is of course inseparable from the understanding of the heirs themselves according to the provisions of Islamic law. (Article 171 letter c Compilation of Islamic Law).
- b. Determination of inheritance, based on the principle of Islamic Personality, to determine an inheritance including inheritance that must be distributed to legal heirs, it is necessary to first understand the meaning of inheritance (*tirkah*) according to Islamic law. (Article 171 letter e Compilation of Islamic Law).
- c. Determination of the share of each heir from the inheritance, the division of the inheritance becomes the authority of the Religious Courts if the distribution is based on the provisions of Islamic law.

- d. Implementation of the distribution of inheritance, this is the duty and authority of the Religious Courts to execute the decisions handed down by them (Drs. Mustafa, MH., interview March 30, 2015).

The opinion of the religious figure in the interview said that the judge in determining the status of mafqud based on the rule of 'istishab' or legal basis is in accordance with the opinion of the jumhur ulama. Istishab is establishing the law that applies from the beginning, until there is evidence that shows another law. In the matter of determining the death of mafqud, the judge is also based on clear evidence and with that evidence it is strongly suspected that the mafqud has died. The way is to pay attention to friends of the same age or generation with the relevant mafqud. If the friends of the same age/generation of the mafqud are no longer alive, then the judge can determine that the mafqud in question has died (H. Sanuking, S.Ag, interview April 02, 2015).

Furthermore, the judge of the Raha Religious Court mentioned that there are two legal considerations that can be used to find clarity about the legal status of this missing person, one of which is based on authentic evidence that can be accepted according to Isiam shari'a, for example the decision is based on testimony and a fair and trustworthy person. If that is the case, then the mafqud has lost its mafqud status, it is set as a person who has actually died since it was decided. Based on the length of the trip. If the matter of the missing person is asked for certainty, and the judge has determined his death, then that is called 'mafqud' (Drs. Mustafa, MH., interview March 30, 2015).

Protection Efforts Against Mafqud Rights.

Efforts to formally protect a person's rights as stated by Drs Mustafa, MH, are carried out through the Religious Courts with two possibilities, namely through petitions (*voluntair jurisdictie*) or through lawsuits (*contentiuse jurisdictie*). Voluntary cases or requests, the parties involved are only one, namely only the applicant party itself, no other party is drawn as an opponent. Because there is only one party in this case and what is requested in the petitem is not based on a dispute, but only to fulfill the applicant's unilateral wish that he is determined to have a certain position in certain matters as well. So the dictum in the decision is declaratory in nature, only a declaration regarding a condition or position, and cannot be more than this.

It was further explained that a voluntary application or lawsuit is a civil matter filed in the form of an application signed by the applicant or his attorney addressed to the head of the court in this case, namely the head of the Religious Court. The distinctive feature of a voluntair petition/lawsuit is that the problem submitted is of a unilateral interest, meaning that it is really purely to resolve the interests of the applicant which requires legal certainty and does not come into contact with the rights and interests of other people. Issues filed without disputes with other parties or no third parties are drawn as opponents. The strength value inherent in the determination of the application is only limited to the applicant and is the same as the nature of the ex-parte itself. In the sense that the value of the strength of proof is only binding on the applicant, it does not have binding power to other people or to third parties (Drs. Mustafa, MH., interview, March 30, 2015).

An application for a person to be declared to be in a state of mafqud according to the provisions of the voluntary jurisdiction of the Religious Court as an effort to protect the rights of the mafqud, can be done by means of, among others (Harahap 2005):

- a. The application is submitted with a letter of application signed by the applicant or his legal authority and submitted to the Head of the Religious Court in the area where the applicant resides.
- b. Applicants who cannot write can submit their application orally in front of the Head of the Religious Court who will order the application to be recorded.
- c. The legal basis and events that form the basis of the application, sufficiently contain and explain the legal relationship (*rechtsver houding*) between the applicant and the legal issue in question. In this regard, the *fundamentalum petendi* or *posita* of the petition is principally based on the provisions of the Article of Law which are the reasons for the application by linking said provisions to the events faced by the applicant.
- d. The application petition must not violate or exceed the rights of others. It must be completely pure a request for the settlement of the applicant's interest, with a template:
 - 1) the contents of the *petitum* are declarative requests;
 - 2) the petition cannot involve other parties who are not participating as applicants;
 - 3) can't contain a *petitum* that is *condemnatoir* (contains law);
 - 4) the *petitum* must be detailed one by one about the matters the applicant wants the religious court to assign to him;
 - 5) *petitum* cannot be composed or *ex aequo et bono*.
- e. The principle and system of proof that must be upheld and applied are:
 - 1) proof must be based on the evidence specified by the Law, namely writing, witness testimony, conjecture, confession, and oath;
 - 2) the teaching on the burden of proof based on Article 163 HIR/203 RBg/1865 of the Civil Code, which in this case is fully borne by the applicant;
 - 3) the strength value of valid proof must reach the minimum proof limit;
 - 4) what is legal as evidence is only limited to evidence that meets the formal and material requirements.

Drs. Mustafa, MH., as the judge of the Raha Religious Court in his last interview added that there are several reasons that can be used in submitting voluntary requests to determine someone's *mafqud*, including:

1. The reason is because there is no news about it and the family doesn't know where it is, it has been done search efforts but his whereabouts are still unknown.
2. According to what is regulated in Islamic law, the availability of news of a *mafqud* person must be waited for between 4-5 years.
3. If it is later than that time, then an application can be submitted to the Religious Court to determine the *mafqud* status of the person who died according to the law.
4. The family has tried to find information on its whereabouts through electronic media, print media, and to the authorities (Drs Mustafa, MH., interview March 30, 2015).

Based on the results of the explanation above, it can be understood that the form of legal protection for mafqud, whether acting as an heir or heir, is by appointing a judge according to the absolute authority regulated according to the provisions of the Judicial Law. Because the mafqud heirs are known to be Muslims, the determination is submitted to the Religious Court. The court's decision is intended to protect the interests of mafqud rights related to the distribution and acquisition of inherited assets. In addition, the determination of the judge is also considered important because it is able to provide legal certainty for the status and legal position of the mafqud so that it does not cause doubts and beneficially can avoid polemics over inheritance disputes if one day it is deemed that it will cause disputes between heirs. This is also the case with the mafqud inheritance problem that is currently occurring in the Lakologou village community.

The result that can be used as a further reference is that efforts to protect mafqud rights cannot be pursued in any other way other than by filing a civil voluntary request or lawsuit. The request was taken because from a legal perspective it can be said that a judge's decision is a proportional and binding decision for a case filed. Another reason is that the judge's decision was taken using an in-depth interpretation based on principles that uphold moral values and aspects that contain the values of legal certainty, namely those that are beneficial and just.

CONCLUISON

The results of this research concludes that the position of mafqud is very dependent on the Court's determination, so that it is not seen as weak due to its absence when the inheritance event takes place. One of the ways that the right to inherit mafqud is still recognized is through the determination of the judge. The form of legal protection against mafqud is established by the decision of the Designation of Religious Court Judges as a legal force that binds all parties, especially those who related to mafqud by family.

This form of protection is implemented by means of civil voluntary requests and or lawsuits. The hope is to protect and maintain the mafqud's rights as a whole before there is certainty about whether he is still alive or dead. Furthermore, based on these indicators, judges decide cases based on in-depth interpretation using principles that uphold moral values and aspects that contain legal certainty values, namely those that are useful and just.

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