

Will Problems And Their Solutions Perspective Of Islamic Law And Positive Law

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ABSTRACT

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Wills as a part of family law have an important role, namely determining and reflecting the legal system and form in society. As a teaching of Islamic law (Islamic Fiqh), wills have the aim of realizing benefit, justice and conformity. As a note, wills are part of the property transfer system (Sarwah) which cannot be separated from human life, where the meaning of wills concerns material and non-material things, while what often causes division is wills which are closely related to material things. Regarding the data in this paper, the author obtained it using library research methods (Library Research). This method is carried out by examining library materials or secondary data, which consists of: Primary materials, namely materials that are binding and consist of books, journals, etc., which are related to the problem being discussed. And, secondary materials, namely materials that provide explanations of primary materials in the form of articles resulting from research, or opinions of other legal experts. regarding wills in the inheritance distribution system in Islamic law that wills in Islamic law are not merely about someone's last wishes, but rather one of the religious commands that must be carried out (for those who have large amounts of wealth), it is an effort to improve the welfare of the people/fellows in terms of distribution. and granting ownership rights to an inheritance and is a solution to the problem of dividing inheritance.

1. Introduction

A will is something important because wealth is one of the things that humans love, so there may be disputes between heirs regarding the distribution of inherited assets. The dispute could have been avoided with a final message. A will can also mean a person's message or promise to another person to do a good deed. (Andi Syamsu and M. Fauzan, 2008, p. 58) The act of determining someone's last message before they die in Islam is known as a will. With a will, the heir can determine who will be the heir. With a will, the inheritance can also be allocated to a particular person, either in the form of certain objects or a number of objects that can be replaced. A will takes effect after a person dies and is an obligation that must be fulfilled by the heirs.

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Wills as a part of family law have an important role, namely determining and reflecting the legal system and form in society. As a teaching of Islamic law (Islamic Fiqh), wills have the aim of realizing benefit, justice and conformity. As a note, wills are part of the property transfer system (Sarwah) which cannot be separated from human life, where the meaning of wills concerns material and non-material things, while what often causes divisions are wills which are closely related to material things through this author's background. will try to explain the problems and solutions of wills in Islamic and positive law.

2. Literature Review

Etymologically, the word will comes from Arabic, namely "wasiyat" (وصية) which is a type of word isim masdar which means tausiyat (توصية) or isho' (ايضاء). Both mean making a promise to something, ordering, making property rights after someone's death and placing trust in someone. As for the Al-Munawir Dictionary, wasiyat is the mufrod form of the word washoya (وصايا), which means to give a message. (Ahmad Warson, 1984, p. 1563) Meanwhile in Kifayah Al-Akhyar the word will comes from the word wassayyitu Al-syai (وصيت الشيء), meaning I connected something. It is called a will because the person who makes the will connects what he had while he was alive with what he has after his death. (Imam Taqiyyuddin, 1989, p. 31). In fiqh, there are several different definitions put forward by fiqh experts (Islamic law experts). The definition is as follows:

a. In the Imam Hanafi Madzhab

Imam Al-Hasan in Fiqh Al-Muqoron defines a will as:

اسم لما اوجبه الموصي في ماله بعد الموت

It means:

"The name for something that is required by the will to pay for his assets after death." (Ahmad Hasan Khatib, 1957, p. 57)

Imam Ibnu Abidin in Radd Al-Muhtar defines a will as:

تمليك مضاف الى ما بعد الموت بطريق التبرع سواء كان الموصي به عينا ام منفعة

It means:

"Ownership based on circumstances after a person's death, by voluntary means, whether bequeathed in the form of real (concrete) objects or in the form of benefits." (Imam Ibn Abidin, 1992, p. 57)

Meanwhile, the definition of a will according to the majority of Hanafiyah scholars is as stated by Abdurrahman Al-Jaziri in the Book of Al-Fiqh 'Ala Al-Madzahib Al-Arba'ah as follows:

الحنفية-قالوا-الوصية تمليك مضاف الى ما بعد الموت بطريق التبرع

It means:

"The Hanafi school of thought says: will is ownership that is based on the situation after someone dies through voluntary means." (Abdurrahman al-Jaziri, 1990, p. 277)

b. In the Imam Malik Madzhab

Muhammad Zakaria in Aujaz Al-Masalik Syarh Al-Muwatta' has said that the will is:

تبرع به بعد الموت

It means:

"Voluntary giving of assets after death." (Muhammad Zakaria, 1973, p. 316)

Meanwhile, the definition of a will according to the majority of Maliki scholars is as follows:

المالكية قالو الوصية في غرف الفقهاء عقد يوجب حقا في ثلث مال عاقده يلزم بموته او يوجب نيابة عنه بعده

It means:

"The Maliki ulama group says that a will according to fuqoha is a contract that requires rights to one-third of the assets of the person making the contract, with the continuity of these rights taking effect after the death of the testator or a contract that requires a successor to the testator after his death." (Abdurrahman al-Jaziri, 1990, p. 277)

c. In the Imam Shafi'i Madzhab

Ibn Ibrohim in the book Khasiyah Al-Shaykh ibn Qosim Al-Bajuri 'Ala Syarh Al-'Alamah ibn Qosim Al-Ghozali defines a will as:

تبرع بحق مضاف لما بعد الموت ولو تقدير

It means:

"Voluntary giving with something that is rightful, which is relied upon after death, even if it is only modest (as is)." (Ibni Ibrahim, 1994, p. 121)

The majority of Shafi'i scholars define a will as:

الى ما بعد الموت سواء اضافه لفظ اولاد

It means:

"Voluntary giving of a right that is relied upon after the death of a person who has a will, whether the reliance is based on words or without words." (Abdurrahman al-Jaziri, 1990, p. 278)

d. In the Imam Hambali Madzhab

In Syarh Al-Fath Al-Qodir Ibnu Qudamah defines a will with quite short sentences, namely:

هي الامر بالتصرف بعد الموت

It means:

"A will is an order to carry out tasharuf after death." (Ibnu Qudamah, p. 152)

Meanwhile, the majority of Hambali scholars define wills in detail, as stated by Abdurrohman Al-Jaziri in the Book of Al-Madzahib Al-Arba'ah as follows:

حنابلة قالوا الوصية هي الامر بالتصرف بعد الموت كان يوصى شخصا بان وم على اولاده الصغار او يزوج بناته او يفرق ثلث ماله ونحو ذلك

It means:

"The Hambali ulama group says that a will is an order to dispose of property after the death of the person who has the will, such as making a will for someone to look after their young children, marry off a daughter or separate a third of their property or something like that." (Abdurrahman al-Jaziri, 1990, p. 278)

According to the writer of a will, it is the voluntary giving of rights related to circumstances after death, whether expressed in words or not, in a will a person can order to give something to another person after he or she dies. Then, the testator has the power to make a will to anyone other than the heir. This is what the author stated in the Compilation of Islamic Law, article 171 letter f, which defines a will as follows: "Giving an object from the testator to another person or institution which will take effect after the testator dies."

3. Methodology

The research method used is descriptive qualitative, while the type of research is a library study, the activities of which are carried out by collecting data related to bibliographic titles. Qualitative descriptive studies are a combination of descriptive research and qualitative research. This research shows the data results as they are, without any process of manipulation or other treatment taken directly from primary data, namely materials that are binding and consist of books, journals, etc., which are related to the problem being discussed. And, secondary materials, namely materials that provide explanations of primary materials in the form of articles resulting from research, or opinions of other legal experts.

4. Results and Discussion

Talking about wills must of course have a clear legal basis and be accountable both religiously and socially. The author will try to outline the legal basis for wills in Islamic law and positive law as follows:

- Islamic law:

a. Al-Qur'an

The word of Allah SWT in QS al-Baqarah verse 180:

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَ Home عَزَوْفٍ حَقًّا عَلَى الْمُتَّقِينَ (١٨٠)

Translation:

"It is obligatory on you, if death comes to someone among you, if he leaves property, to make a will for both parents and close relatives in a good manner, (as) an obligation for those who are pious." (QS al-Baqarah verse 180)

It is also mentioned in the word of Allah SWT in QS al-Baqarah verse 240:

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا ۖ وَصِيَّةً لِّأَزْوَاجِهِمْ مِّمَّا عَرَّضُوا إِلَى الْحَوْلِ غَيْرِ إِخْرَاجٍ ۚ فَإِنْ خَرَجْنَ فَلَا جُنَاحَ عَلَيْكُمْ فِي مَا فَعَلْنَ فِي أَنْفُسِهِنَّ مِنْ مَّعْرُوفٍ وَاللَّهُ عَزِيزٌ حَكِيمٌ (٢٤٠)

Translation:

"And those who will die among you and leave wives, should make a will for their wives, (namely) maintenance for up to a year without taking them out (from the house). But if they go out (on their own), then there is no sin on you (regarding what) they do to themselves in good things. Allah is all-powerful, all-wise."(QS al-Baqarah verse 240)

The verses mentioned above clearly show the law of wills and the techniques for implementing them as well as what is the object of a will. However, scholars experience differences of opinion in understanding and interpreting these verses. This results in differences in determining the legal status of the will itself.

b. al-Hadith

There are several hadiths of the Prophet Muhammad that can be used as relevant sources of will law, including:

Hadith narrated by Ibn Umar ra.

حَدَّثَنَا عَبْدُ اللَّهِ بْنُ يُسُفَ، أَخْبَرَنَا مَالِكٌ، عَنْ نَافِعٍ، عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ رَضِيَ اللَّهُ عَنْهُمَا: أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «مَا حَقَّ أَمْرٌ مُسْلِمٌ لَهُ شَيْءٌ يَوْصِي فِيهِ، بَيْتَ لَيْلَتَيْنِ إِلَّا وَوَصِيَّتَهُ مَكْتُوبَةً عِنْدَهُ» (رواه البخاري)

It means:

"Abdullah bin Yusuf told us, he told us Malik from Nafi, from Abdullah bin Umar ra. that the Messenger of Allah SAW said: it is not appropriate for a Muslim to have property and want to leave it in a will for two nights unless the will has been written down. ." (Imam Bukhari, 1422, p. 2)

Hadith narrated by Sa'id bin Abi Waqqas ra.

حَدَّثَنَا أَبُو نَعِيمٍ، حَدَّثَنَا سَفِيَانٌ، عَنْ سَعْدِ بْنِ إِبْرَاهِيمَ، عَنْ عَامِرِ بْنِ سَعْدٍ، عَنْ سَعْدِ بْنِ أَبِي وَقَّاصٍ رَضِيَ اللَّهُ عَنْهُ، قَالَ: جَاءَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَعُودُنِي وَأَنَا بِمَكَّةَ، وَهُوَ يَكْرَهُ أَنْ يَمُوتَ بِالْأَرْضِ الَّتِي هَاجَرَ مِنْهَا، قَالَ: «يُرْحَمُ اللَّهُ ابْنُ عَفْرَاءَ»، قُلْتُ: يَا رَسُولَ اللَّهِ، أَوْصِي بِمَا لِي كُلَّهُ؟ قَالَ: «لَا»، قُلْتُ: فَالسَّطْرُ، قَالَ: «لَا»، قُلْتُ: التَّلْثُ، قَالَ: «فَالتَّلْثُ، وَالتَّلْثُ كَثِيرٌ، إِنَّكَ أَنْ تَدَعَ وَرَثَتَكَ أَغْنِيَاءَ خَيْرٌ مِنْ أَنْ تَدْعَهُمْ عَالَةً يَتَكَفَّفُونَ النَّاسَ فِي أَيْدِيهِمْ، وَإِنَّكَ مَهْمَا أَنْفَقْتَ مِنْ نَفَقَةٍ، فَإِنَّهَا صَدَقَةٌ، حَتَّى اللَّقْمَةَ الَّتِي تَرْفَعُهَا إِلَى فِي امْرَأَتِكَ، وَعَسَى اللَّهُ أَنْ يَرْفَعَكَ، فَيَنْتَفِعَ بِكَ نَاسٌ وَيَضْرَبَ بِكَ آخَرُونَ»، وَلَمْ يَكُنْ لَهُ يَوْمَئِذٍ إِلَّا ابْنَةٌ (رواه البخاري)

It means:

Has told us Abu Nu'aim has told us Sufyan from Sa'ad bin Ibrahim from 'Amir bin Sa'ad from Sa'ad bin Abi Waqosh radiallahu 'anhu said; The Prophet sallallahu 'alaihi wasallam came to visit me (when I was sick) when I was in Mecca". He did not like it if he died in the country he had emigrated from. He said; "May Allah have mercy on Ibn 'Afra". I said: " O Messenger of Allah, I want to make a will to hand over all my wealth." He said: "Don't". I said: "Half." He said: "Don't". I said again: "A third". He said: "Yes, a third and that third. already a lot. Indeed, if you leave your heirs rich, it is better than leaving them poor and begging people with their hands up. In fact, whatever you spend in the form of living is actually considered sadaqah, even if it is one mouthful that you put into your wife's mouth. And may Allah elevate you to a place where Allah benefits people through you or provides harm to other people." At that time he (Sa'ad) had no heirs except a daughter.(Imam Bukhari, 1422, p. 2)

The hadiths mentioned above are quite clear as the legal basis for executing wills and the techniques for implementing them. And it can also be understood that a will is important. Apart from being an act of worship to save for the afterlife, it also provides benefits for the interests of other people or society. Although in reality it is limited to a maximum of one third of the will's assets. This is intended so that the rights of the heirs are not reduced, resulting in their lives being neglected.

- Positive Law

a. Compilation of Islamic Law

The law of wills arises on the basis of the principle that every person has the right or freedom to do whatever they want with their property. Likewise, the person is free to bequeath his assets to anyone he wishes, although there are still limits permitted by law. Then in the Compilation of Islamic Law it is contained in Article 194 which states that:

- 1) People who are at least 21 years old, of sound mind and without any coercion can bequeath some of their assets to other people or institutions.
- 2) The assets bequeathed must be the rights of the testator.
- 3) Ownership of property as intended in paragraph (1) of this article can only be exercised after the testator dies.

b. Civil Code

Meanwhile, the legal basis for wills (Testament) in the Civil Code is contained in Article 874 which states that: "All the assets left behind by someone who dies belong to all the heirs according to the provisions of the law, only for that matter, with a will, no valid decision has been made." .

In Article 199 of Presidential Instruction no. 1 of 1991 concerning the Compilation of Islamic Law in Indonesia confirms that: (1) a testator can revoke his will as long as the prospective recipient of the will has not expressed his consent or expressed his consent but withdrew it, (2) revocation of a will can be done orally witnessed by two witnesses or in writing witnessed by two witnesses or based on a notarial deed, (3) if the will is executed in writing, then revocation can only be done in writing with two witnesses or with a notarial deed, (4) if the will is executed using a notarial deed, then revocation can only be done in writing with a notarial deed. Then in Article 203 paragraph (2) it is stated that if a will that has been executed is revoked, then the revoked will is handed back to the testator.

One of the factors that causes problems with wills is the revocation and cancellation of wills. Therefore, the person who gave the will may withdraw the will that has been stated, whether the will relates to property, benefits or matters relating to power or territory. Revocation of a will can be carried out verbally or by action as explained above, but not all revocations of a will can be justified, such as someone bequeathing a plot of land to another person, then the person who made the will sells the land to another party without notifying the person who has done it. accept the will. Imam Hanafi said that selling a will item unilaterally like this is not considered withdrawing the will that he has given, the recipient of the will has the right to receive the price of the will item that has been sold.

The solution that can resolve this is based on Article 49 of Law no. 7 of 1989 which has been amended by Law no. 3 of 2006 concerning Religious Courts stipulates that disputes regarding wills fall under the authority of the Religious Courts to resolve them. Therefore, a request for cancellation of this will is submitted to the Religious Court by the parties who feel disadvantaged by the existence of this will, stating the reasons justified by law as mentioned above. The Religious Court will examine the cancellation lawsuit and decide accordingly. In the practice of Religious Courts, many lawsuits related to wills are found by those seeking justice on the grounds that the will exceeds one-third of the testator's assets, or the testator has given all his assets to the adopted child so that the rightful heir does not get a share, or vice versa, the adopted child sues the expert. inheritance because the will given by his adoptive father is currently controlled by the heirs. Most of the implementation of wills was carried out before the enactment of Law no. 7 of 1989 concerning Religious Courts. With the enactment of Law no. 7 of 1989 which has been amended by Law no. 3 of 2006 concerning Justice.

5. Conclusion

From the explanation above, it can be concluded that in principle, refereeing has various meanings from various expert views, especially from the views of madhhab imams. If the explanation is to give voluntary rights related to circumstances after death, whether expressed in words or not, in a will a person can order to give something to another person after he dies. Then, the testator has the power to make a will to anyone other than the heir.

Regarding wills in the inheritance distribution system in Islamic law, it can be concluded that wills in Islamic law are not merely about someone's last wishes, but rather one of the religious commands that must be carried out (for those who have

large amounts of wealth), it is an effort to improve the welfare of the people/ each other in terms of dividing and granting ownership rights to an inheritance and is a solution to the problem of dividing inheritance

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