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| RESEARCH ARTICLE

The Position of the Fidei Commis in the Division of Inheritance of Indonesian Companies' Shares

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| ABSTRACT
The issues in this research stem from the prohibition of the fidei commissum practice in the Western Civil Code, although there are various exceptions in certain cases. The concrete normative legal regulation prohibits fidei commissum, but it is still widely used in practice. This research is particularly interesting to be examined from a normative-philosophical perspective. The practical condition of fidei commissum does not reflect the values of justice and legal certainty, thus rendering the testament under fidei commissum in this Deed of Gift legally invalid. Fidei commissum is a closed, systematic, and individualistic legal system which deviates from the principles of justice. Similarly, with regards to the inheritance of company shares, it is regulated according to the Western Civil Code, but its transfer is specifically governed by Law No. 40 of 2007 concerning Limited Liability Companies.

| KEYWORDS
Inheritance Law, Fidei Commis, Civil Law System

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1. Introduction

The issue of inheritance[1] is a challenging matter to resolve, as the inheritance law in Indonesia remains highly pluralistic.[2] The resolution of rights and obligations arising from the death of a testator is governed by inheritance law. According to legal experts in Indonesia and the available legal literature,[3] the inheritance system in Indonesia lacks uniformity, resulting in various inheritance systems. The purpose of regulating inheritance law is to ensure a fair and equitable transfer of wealth or inheritance to the rightful heirs. The division of inheritance often becomes a trigger for conflicts, and the establishment of inheritance laws can provide a means of resolving inheritance disputes within families. The focus of inheritance law is on the family, typically requiring a blood relationship between the testator and the heirs, except for the spouse of the testator, who is still bound by marriage.[4]

[1] Inheritance represents the wealth of a deceased individual, who is referred to as the testator, whether that wealth has been divided or remains undivided. See in: Hilman Hadikusuma, Hukum Waris Adat, PT. Citra Aditya Bakti, Bandung, 1993, hlm; 47.

[2] Due to its pluralistic nature, inheritance law is particularly interesting to study within the field of Legal Science, as dividing an inheritance is not as straightforward as one might imagine. There are several provisions that must be followed by an individual when they wish to pass on their inheritance to their heirs. Indonesia does not have a concept of Unified Inheritance Law (unified inheritance law for all citizens). This is due to: (1) Indonesia's diverse culture, (2) Each religion's inheritance issues being subject to their respective beliefs, (3) The cultural practice of distributing inheritance based on familial ties without adhering to legal regulations, particularly among indigenous communities. Therefore, achieving Unified Inheritance Law in Indonesia would be extremely challenging. See in: Indah Sari, Pembagian hak Waris Kepada ahli Waris Ab Intestato & Testamentair Menurut Hukum Perdata Barat (BW), Jurnal Ilmu Hukum Dirganatara, Universitas Suryadarma, Vol 5 nomor: 1 , 2014.

[3] Eman Suparman, *Hukum Waris Indonesia*, Refika Aditama: Bandung, 2007, hlm; 27.

[4] Kusumawati L. *Pengantar Hukum Waris Perdata Barat*, Laros : Surabaya, 2011, hlm; 45.

The subject of inheritance constantly evolves because inheritance issues are inseparable from the evolving society, as evidenced by the types of wealth that become the objects of inheritance, such as shares[5] A share represents an intangible asset of a company, and there are specific provisions regarding its transfer. [6]The transfer of share ownership resulting from an inheritance event must obtain approval from the corporate organs mentioned in Article 1 number (2) of Law No. 40 of 2007 concerning Limited Liability Companies, namely the General Meeting of Shareholders (GMS), Board of Directors, and Board of Commissioners, as well as relevant institutions such as the Capital Market Supervisory Agency, for publicly traded company shares.

The transfer of deceased person's assets will be transferred to their heirs by the provisions of the applicable inheritance regulations. However, in addition to the heirs, it is often found that a will (testament) is made by the deceased, which contains the wishes of the deceased during their lifetime. The will may include the appointment of heirs or the distribution of inheritance to the heirs, or the allocation of specific assets. In the event of the entire or partial transfer of wealth, the execution of the will can only take place after the testator has passed away.[7] The initiative to make a will is usually unilateral, meaning the intention to give away assets, release debts, or provide benefits from a particular property comes from the testator's side. Consistent with the legal perspective, a will is a unilateral legal act (a unilateral declaration), which means that a will can be made without the presence of the will's recipient and can even be done in written form.[8]

The will of a deceased person holds complex significance in terms of material possessions (referring to the deceased person's intentions towards their assets) and is subsequently formalized through a legal document (recorded in a document created according to formal requirements) known as a will (testament).[9] A will is a statement declared in a deed made with the involvement of an official officer recorded in a notarial deed. Because a will is a statement that originates from a single party, it can be revoked by the party who made it at any time. The commonly used form of will (testament) in practice is a general will, as regulated in Articles 938 and 939 of the Civil Code.

The process of dividing the inheritance, whether it is in the form of general assets or shares, is typically known as fidei commissum regarding shares. These methods allow waiting for parties to claim their right to demand that the party granted the right to hold shares register them with the company for the benefit of the parties involved by the function of publication for the knowledge of interested parties. If the party holding the right fails to announce that the shares are encumbered with fidei commissum, a third party may purchase those fidei commissum shares assuming that they represent the full rights of the recipient of the share donation. Therefore, a well-intentioned third party is not legally protected in terms of acquiring inheritance assets through a fidei commissum.

This writing aims to highlight the issues surrounding the validity of the bequest of shares in a company through the mechanism of fidei commissum (conditional bequest) in Indonesia. Additionally, it seeks to explore the implementation of the bequest of shares in a company through fidei commissum in the distribution of inheritance.

2. Literature Review

The theory that will be used in writing this article is the theory of legal systems, which is a combination of primary and secondary rules. The essence of a legal system lies in the unity between what is called primary rules, which are rules that create duties and obligations, such as rules in criminal law or laws regarding breach of contract, and secondary rules, which are rules that provide authority or power, such as laws that facilitate the creation of contracts, wills, marriages, and so on, or in other words, principles that ensure the conditions for the applicability of primary rules. [10]

Generally, the theory of legal systems consists of the elements of legal structure, legal substance, and legal culture. Furthermore, a legal system is a unity between primary rules, which consist of customary norms, and secondary rules, which consist of norms that determine whether those customary norms are valid and applicable or not. [11]

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5 The term "shares" is frequently encountered in Law No. 40 of 2007 concerning Limited Liability Companies; however, there is no article that provides a clear definition of shares.

6 Leonardus Gultom, *Prosedur Formil Pengalihan Saham Karena Pewarisan*, URL : http: //www.gultomlawconsultants.com / prosedur formil pengalihan saham karena pewarisan.

7 Umar H Sanjaya, *Kedudukan Surat Wasiat Terhadap Harta Warisan Yang Belum Dibagikan Kepada Ahli Waris*, Jurnal Yuridis, vol. 5 - Juni, 2018, hlm; 67-68.

8 Suhrawardi K. Lubis & Komis Simanjuntak, *Hukum Waris Islam*, Sinar Grafika, Jakarta, 2009, hlm; 44.

9 Badriyah Harun, *Panduan Praktis Pembagian Waris,* Pustaka Yustisia: Yogyakarta, 2009, hlm; 15.

10 Herbert Lionel Adolphus Hart, *Konsep Hukum – The Concept Of Law,* Nusa Media : Bandung, 2009, hlm: 183.

11 Lawrence M. Friedman, *The Legal System: A Social Science Perspective,* New York: Russel Sage Foundation, 1975, hlm: 4 – 6.

The Theory of Tort is a part of the theory that will be used in this article, specifically Article 1365 of the Civil Code, which requires the presence of "fault" ('should) in a tortious act. This fault encompasses intentional conduct or negligence ('negligence, culpa'), and there should be no justifiable reason or excuse ('rechtvaardigingsgrond'), such as force majeure, self-defense, insanity, and others. In the realm of civil law, the term used for tortious acts is "Onrechtmatige daad," which inherently implies an active nature. This can be seen when someone intentionally performs an act that causes harm to another person, indicating the active nature of the term *against*.

Furthermore, the author also employs the theory of Gustav Radbruch (1878-1949), which is also known as the fundamental values of law.[12] In legal practice, the theory often encounters "spannungsverhältnis" or tension between each other. The fundamental values of law, as envisioned by Gustav Radbruch, embody the aspirations of law. It is undeniable that the ideas of this legal expert, legal philosopher, bureaucrat, and politician from the school of Relativism in Germany, have had a significant impact on the world of law. Gustav Radbruch argues that law as a cultural concept cannot be purely formal but must be directed towards the ideal of justice. To fulfill this ideal, we must consider its utility as the second element of the law's aspirations. The understanding of utility can only be addressed by examining different conceptions of the state and law.[13]

The main principles of the three fundamental values by Gustav Radbruch are oriented towards creating a harmonization of law enforcement. Providing active and passive protection to individuals is an implementation of the purpose of the law. Actively, it aims to create a social condition where humans can engage in a fair and orderly process. Passively, it seeks to prevent arbitrary actions and unfair abuse of rights. The efforts to achieve this protection include establishing order and organization, promoting genuine peace, ensuring justice for all members of society, and realizing the well-being of the entire population.

3. Methodology

This article utilizes normative legal research methodology.[14] The nature of this research is prescriptive-analytical in the sense that the chosen methodology serves as a technical aid in this study. The selected method is based on the prescriptive nature of legal science as something substantial. Prescriptive legal science is the field of study that examines the purposes of law and the values of justice.[15] The validity of legal rules, legal concepts, and legal norms are also part of the specifications of this research, supported by a descriptive-qualitative research design,[16] also known as descriptive-analytical, which is a study that, besides providing a description, writes and reports on an object or an event, will also draw general conclusions from the discussed issue.

4. Results and Discussion

1. Validity of Testamentary Grant (Legacy) Arrangement for Corporate Shares through Fidei Commissum in Indonesia.

The civil inheritance legal system operates within a systematic framework, offering advantages in maintaining legal certainty and providing protection for heirs affected by someone's death. However, this system also has limitations in accommodating social and cultural changes occurring within society. The civil law system, including the systematic system, encompasses rules and legal principles applied in a specific country or region. A systematic legal system is characterized by a clear and well-organized structure, as well as detailed and systematic legal regulations.

The Western civil law system recognizes zakelijke rechten, which are rights over a property that are binding on everyone, and persoonlijke rechten, which are rights of an individual over a specific object. Zakelijke rechten applies universally to all individuals and pertains to the property itself, while persoonlijke rechten is specific to certain objects and applies only to the individuals involved.[17] The Western civil law of inheritance (erfrecht), as regulated in Articles 830-1130 of the Civil Code, pertains to the legal position of an individual's wealth after their death, particularly the transfer of that wealth to others. It governs the rules and procedures for distributing assets, determining heirs, and addressing the transfer of wealth from the deceased person to other individuals.[18]

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[12] Satjipto Rahardjo, *Ilmu Hukum,* PT. Citra Aditya Bakti: Bandung, 2000, hlm: 19. Sumber aslinya adalah Gutav Radbruch, *Einfuhrung in die Rechtswissenschaft,* Stuttgart: K. F Koehler, 1961.

[13] W. Friedman, *Legal Theory,* diterjemahkan oleh Muhammad Arifin dengan judul *Teori & Filsafat Hukum - Idealisme Filosofis dan Problema Keadilan (Susunan II*), Raja Grafindo Persada: Jakarta, Cetakan Kedua, 1994, hlm: 42-45.

[14] Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media : Jakarta, 2005, hlm: 22

[15] *The forms of justice may vary, but the essence of justice always exists in human life and community living. This is because justice cannot be separated from the law.*

[16] Sanapiah Faisal, *Format - Format Penelitian Sosial,* Rajawali Press: Jakarta, 1992, hlm: 18. *Descriptive research is a type of research that involves the exposition or presentation of information, aiming to obtain a comprehensive description of the legal situation or legal events in a specific location, or regarding existing juridical phenomena or a particular legal event that occurs within society.*

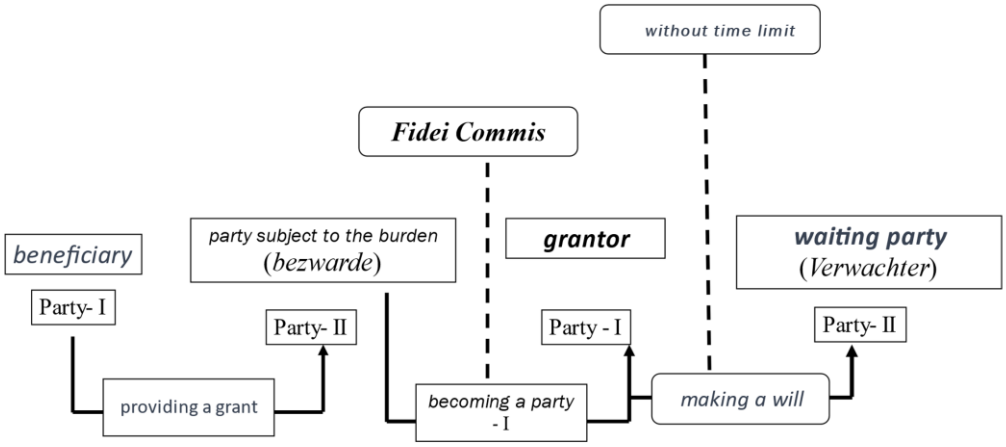
[17] Soerojo Wignjodipoero, *Pengantar & Asas - Asas Hukum adat,* PT.Gunung Agung: Jakarta, 1984, hlm: 70.

[18] Titik Triwulan, *Hukum Perdata dalam Sistem Hukum Nasional,* Jakarta: Kencana, 2008, hlm: 247.

According to Article 879, paragraph (2) of the Civil Code, it can be inferred that fidei commissum refers to a provision in a testamentary document wherein it is stipulated that the person receiving the inheritance, or a portion thereof, including subsequent rights holders, is obliged to preserve what they receive. After a certain period or upon the death of the recipient, they are required to deliver or transfer the inheritance to a third party. In essence, fidei commissum entails a provision in a testament that requires the recipient of the inheritance to preserve it until a specified time or until their death and then pass it on to a third party. In this manner of inheritance, the recipient is unable to utilize the inherited assets; their responsibility is solely to safeguard and deliver them to the designated third party on the agreed-upon date or upon their demise.

The normative regulations regarding the inheritance of fidei commissum are stated in Articles 879 (1) and (2) of the Civil Code, which provides that: (1) The appointment of an heir or the granting of a testamentary gift through fidei commissum or by leaping hand is prohibited. (2) Therefore, any provision requiring the appointed heir or the recipient of the gift to retain the inherited or gifted assets and subsequently transfer them, either in whole or in part, to a third party shall be deemed void and of no effect. The provisions outlined in Article 879 of the Civil Code explicitly prohibit the appointment of an heir through leaping hand (erfstelling over de hand or fidei commissaire multiturn). The sanction for such testamentary gifts is null and void in law for both the appointed heir and the recipient of the gift. The heir appointed under fidei commissum is legally obligated to retain the inherited assets or gifts and subsequently transfer them, either in their entirety or partially, to another person.

Inheritance through this method results in the recipient of the deceased's property being unable to utilize the assets. The burden-bearer in this inheritance matter is only obligated to retain the assets and subsequently transfer them to a third party or the beneficiary of the inheritance at a later date



The above diagram signifies that the beneficiary (*Verwachter*) is inherited by the settlor or the testator, not by the burden-bearer (*Bezwaarde*). The burden-bearer is the person who must hold the inheritance, although, in the fidei commis inheritance, there is an anomaly that the Verwachter indeed does not inherit or receive an inheritance from the burden-bearer, but inherits from the testator through the burden-bearer. Even if the Verwachter happens to be both the heir and the burden-bearer, they still have the right to the fidei commis property, even if they reject the inheritance from the burden-bearer.[19]

In essence, the provisions stated in Article 879, paragraphs (1) and (2) of the Civil Code stipulate that fidei commissum is prohibited and legally void. Consequently, its implementation will result in an Act Contrary to Law (ACL). In fidei commissum, the legislator prohibits the heir from making a disposition that has successive legal consequences on one or several individuals in succession, thereby rendering the transfer of the said assets impossible for an extended period. [20]

Article 879, paragraphs (1) and (2) of the Civil Code, when examined in depth, lack legal certainty. This pertains to the matter of goods or inherited assets that must be kept by the burdened heir (beware) and delivered or surrendered to the inheritor (Wachter). No provision in the Civil Code specifies when the goods or inherited assets should be handed over to the rightful heir. Normatively,

[19] J Satrio, *Hukum Waris,* Alumni : Bandung, 1992, hlm: 270.
[20] J satrio, *Hukum Waris,* Ibid: 213.

no regulation in the law determines the duration for which the burdened heir (beware) retains the goods or inherited assets. In practice, the goods or inherited assets are typically kept by the burdened heir (beware) until their death. Article 879, paragraph (2) of the Civil Code merely stipulates that the burdened heir (beware) is obliged to keep the goods or wealth and later transfer them to the inheritor (*verwachter*) (Article 973, 974 of the Civil Code). The timeframe is not clear and extends as long as the burdened heir is alive.

On the other hand, there is a possibility that a fidei commissum may violate the inheritance laws in a particular country. For instance, in some countries, inheritance laws may restrict a person's right to limit the rights of an heir regarding the acceptance of inheritance. Therefore, in such situations, inheritance laws typically establish clear rules to address the uncertainty of fidei commissum within the realm of inheritance law. It is important to note that the uncertainty surrounding fidei commissum may vary in each country, depending on the applicable inheritance laws in each respective country.

In the system of fidei commissum, the verwachter (legatee) is the person designated to receive an inheritance after the initial heir (*bezwaarde*) passes away or is no longer able to inherit the said inheritance. The Wachter is typically appointed in a fidei commissum or testamentary agreement, where the first heir (*fideicommissary*) is granted the right to use or manage the inherited assets but does not have the right to own or transfer ownership of the assets. In this case, a legal inconsistency arises if the fideicommissary or initial heir (bezwaarde) dies or is no longer able to inherit the assets, as the ownership of the assets will automatically transfer to the verwachter according to the fidei commissum agreement. However, if the verwachter passes away significantly earlier or simultaneously, the situation becomes uncertain and would require further legal consideration.

The author discusses a comparative study of laws, specifically in Malaysia, where if the verwachter (legatee) passes away before the fideicommissary or initial heir or burden-bearer (*bezwaarde*), the inherited property or gift will be passed on to the descendants of the Wachter, based on blood relationships. However, there is a lack of legal certainty for a verwachter in this scenario. The clause in the agreement only applies to the initial heir or burden-bearer (*bezwaarde*) until their death. Nevertheless, several factors need to be considered depending on the regulations and legislation in that country. For instance, in some cases, the fidei commissum agreement may include provisions addressing such matters, such as whether the property will revert to the estate or be transferred to another designated party.

On the other hand, there is a possibility that fidei commissum violates the applicable inheritance laws in a country. For example, in some countries, inheritance laws may restrict a person's right to limit the rights of an heir in terms of inheriting. Therefore, in such situations, inheritance laws usually establish clear rules to address the uncertainty of fidei commissum inheritance laws. It is important to note that the uncertainty of fidei commissum inheritance laws may vary in each country, depending on the applicable inheritance laws in each respective country. However, in the Law of Estate Ownership, fidei commissum is allowed for charitable purposes, wherein a person bequeaths their inheritance with the condition that it must be used for specific charitable purposes, such as education, health, or religion. In this case, the first recipient is given the right to use the inheritance during their lifetime but must transfer the remaining assets to the designated charitable purpose after their death.

The assessment of the validity of fidei commissum from the perspective of justice theories such as those of Aristotle, John Rawls, Gustav Radbruch, and other experts is indeed challenging to implement. The author believes that the values of justice are highly abstract, as justice pertains to the ethical values embraced by individuals.[21] What is considered fair depends on rechtmatigheid (compliance with the law) or the personal views of an evaluator. This means that it is not appropriate to say that the law is fair but rather that the law is considered fair by some people. Perceiving fairness is a matter of personal value judgment.[22]

Ethical theory can provide insights into legal justice, stating that the law should be based on ethical principles that protect individual rights and promote social justice. One important ethical perspective in legal justice is the contractualism theory. According to this theory, the law should be based on a social contract among individuals in society. This social contract establishes rules and obligations that must be adhered to by all members of society to ensure justice and equality. Another ethical theory is utilitarianism, which emphasizes the common good or social welfare. According to utilitarianism, the law should be based on principles that promote overall social well-being, even if it may harm certain individuals. However, these principles must be balanced with the protection of individual rights.

From a perspective of justice, fidei commissum can be seen as a way to balance the interests of the current and future generations. It allows the current generation to enjoy the benefits of their wealth while also ensuring that future generations have access to

[21] Achmad Ali, *Menguak Tabir Hukum,* PT. Ghalia Indonesia : Jakarta, 2008, hlm: 60.

[22] *The views summarized above suggest that the law strives solely to achieve justice. Law is not synonymous with justice. In fact, this is a critique of ethical theory. See in:* Sudikno Metokusumo, *Mengenal Hukum suatu Pengantar,* Liberty : Yogyakarta, 2002, hlm: 60.

resources and opportunities they might not otherwise have. However, it should be noted that the use of fidei commissum can also be controversial, as it has the potential to perpetuate existing inequalities and create dynastic wealth. Theorists argue that it can create situations where a small group of families controls the majority of wealth and power while others are left with little or no inheritance. Ultimately, whether fidei commissum is a fair way to distribute inheritance depends on the perspective and values of each individual. While it can be seen as a means to promote intergenerational justice, it can also be seen as a way to reinforce existing inequalities and preserve dynastic wealth.

Stocks, as movable assets, can confer proprietary rights to their owners to perform legal actions, such as[23] Attending and voting at General Meetings of Shareholders (GMS), Receiving dividend payments and a share of the remaining assets upon liquidation, Exercising other rights as provided by law.[24] Article 499 of the Civil Code defines movable property as any object or right that can be subject to ownership. This regulation indicates that movable property encompasses everything that can be owned by legal subjects, including tangible and intangible objects or rights, all of which can be granted ownership rights. Furthermore, Article 511 (4) of the Civil Code confirms that shares or interests in financial partnerships, trading partnerships, or companies, regardless of whether the partnership's assets or the company's assets are immovable property, are considered movable property, but only concerning concerto concerningticipants while the partnership is ongoing.

If shares are categorized as movable property, then shareholders who own shares have proprietary rights over those shares. In this case, as legal subjects, shareholders have rights and obligations that arise from the shares and can enforce their rights against any person. The rights and obligations of shareholders, both towards the company and other shareholders, are governed by contractual relationships, as regulated in the laws and articles of association of the company.[25] Stocks are classified as movable property under civil law, regulated in Book II of the Civil Code. The term 'property' refers to a legal object that can be physically touched (tangible property).[26] Since the majority of Book II of the Civil Code discusses rights over properties, while in reality, these rights can only be conceptualized, property rights are related to the provisions in Article 52(1) of Law No. 40 of 2007 concerning Limited Liability Companies (PT). The essence is that company shares are part of movable property rights and grant property rights to their owners. Property rights in share ownership can be asserted against anyone (droit de suite), which is why these property rights are inherent wherever the shareholder is located, not limited to territorial jurisdiction.

The issue in this article is whether shares can be inherited based on the principle of property law. If shares are considered movable property, then they can be inherited. Inheritance law is part of property law, as stated in Article 584 of the Civil Code, which equates inheritance rights with property rights. It states that ownership of a property can only be obtained through acquisition for possession, attachment, expiration, or inheritance, according to the law or a will, and through designation or delivery based on a civil event for the transfer of ownership performed by the rightful person. Article 584 of the Civil Code regulates inheritance rights as a means of acquiring property rights and is placed in Book II, Chapters XII to XVIII, from Article 830 to Article 1130 of the Civil Code. The placement of inheritance in this Book II has sparked debates among inheritance law experts because they argue that inheritance law should not only be seen as property law but also as a matter of individual and familial rights.

Company shares can be inherited, as they possess inherent property rights that make them inheritable objects transferable by shareholders or inheritors to their heirs. This aligns with the provision stated in Article 833, paragraph (1) of the Civil Code, which essentially grants heirs automatic ownership rights over all assets, rights, and debts of a deceased person. The transfer of rights and obligations from the deceased to their heirs is referred to as saisine, wherein the heirs acquire all rights and obligations from the deceased without requiring any specific actions, even if they are unaware of the existence of the inheritance.[27]

How about the transfer of ownership rights of shares through the process of donation or testamentary disposition? In this case, the donor is classified under what is known as a gratuitous agreement[28] . This means that it is only applicable to the existence of achievements on one side, while the other party is not required to provide a counter-performance in return. The term, during the

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[23] Pasal 60 ayat (1) Undang – Undang No. 40 Tahun 2007 *Tentang Perseroan Terbatas* (PT).

[24] Pasal 52 ayat (1) Undang – Undang No. 40 Tahun 2007 *Tentang Perseroan Terbatas* (PT). The provision referred to in paragraph (1) applies after the shares are recorded in the register.

[25] Zainal Asikin & L. Wira Pria Suhartana*, Pengantar Hukum Perusahaan*, Prenada Media Group: Jakarta, 2016, hlm: 65.

[26] *An object is a tangible item that can be physically touched, devoid of life and personal will, and can only be utilized by humans in the pursuit of pleasure.* See Wirjono Prodjodikoro, *Hukum Perdata Tentang Hak-Hak Atas Benda,* PT Pembimbing Masa : Jakarta, 1959, hlm: 11.

[27] Eman Suparman, *Hukum Waris Indonesia Dalam Perspektif Islam, Adat dan BW*, Refika Aditama : Bandung, 2005, hlm: 28.

[28] *The term "Contract" is a translation of the Dutch word "overeenkomst" and "verbintenis," which are often translated into several non-uniform terms. Some translate "verbintenis" as commitment, obligation, or even agreement, while there are also scholars who translate "overeenkomst" as consent. is an agreement in which Party I provides a benefit to another party (Party II, III, etc.) without receiving any benefit in return. For example, grant, borrowing or usage, interest-free loans, and custody of goods without any charge.*

lifetime of the Grantor, is used to distinguish this grant from other gifts made in a will, which only gain force and take effect after the donor's death and can be altered or revoked by the donor.[29]

The grantor, in a testament, according to the Civil Code regulated under inheritance law (Book II), while this grant is an agreement, therefore, it cannot be unilaterally revoked by the grantor. This means that there are two types of grants according to the Civil Code, namely: grant and testamentary grant, where the provisions of testamentary grants often apply to grant provisions as well. Grants are regulated by Article 1666 of the Civil Code and are an act of consent from the grantor during their lifetime, given freely and irrevocably to transfer a certain object for the benefit of the grantee. A grant deed, according to Article 1682, must be made in the presence of a Notary. This means that the validity of a testamentary grant deed is the same as the validity of an agreement made between both parties.

If, in the deed of share donation fidei commissum, the parties involved have mutually agreed upon it, then the deed can be considered valid and legally binding, and neither party can deny it. In this case, both the Testator or the Insteller and the Beneficiary I (*bezwaarde*) or the bearer of the trust from the Insteller are obligated to preserve only a portion of the inheritance or the legacy object[30] . Both Heirs II (verwachter) or heirs who are waiting/guardians.[31] The agreement (Toesteming/Permission) of both parties is regulated in Article 1320 paragraph (1) of the Civil Code, which refers to the alignment of intentions between one or more individuals and the other party. The term 'alignment' in this context refers to their statements, as intentions cannot be seen or known by others.

2. The implementation of the arrangement of bequest (legacy) of company shares through fidei commissum in the distribution of inheritance.

Fidei commissure is a form of inheritance aimed at preserving the integrity of inherited assets. The heir transfers their inheritance to a designated heir under the condition that the designated heir must safeguard and protect the assets and then pass them on to the fidei commissum recipient (usually another family member) upon their death. In practice, fidei commissum is often used in the context of family inheritance, such as inheritance from grandparents. Its purpose is to ensure that the assets remain within the family and are not divided among different heirs. Fidei commissure can be implemented in various forms, including wills or family agreements. However, fidei commissum can also have drawbacks, such as limitations on managing or utilizing the inherited assets, as well as the risk of conflicts between heirs and fidei commissum recipients. In some countries, fidei commissum is not permitted or restricted in its use because it is considered to violate the principles of freedom and equality in inheritance rights.

The philosophical essence of fidei commis is essentially to fulfill the desires of an heir who wishes to prevent the rapid depletion of their wealth by their children. Therefore, the heir is allowed to establish provisions that prohibit their children from selling inherited assets, ensuring that these assets can be passed on to future generations. Fidei commis can be implemented in various forms, including through wills or family agreements.

The exception to the prohibition of fidei commis means that despite being prohibited, there are still certain things that are exempted. Some of the exemptions include: ***Firstly, Fidei-commis de residue,*** which stipulates that an heir must pass on whatever remains of the inherited estate at a later date. Only the remainder has been predetermined to be given to another individual. In simple terms, if a third party who had previously passed away is granted the entire or a portion of an unsold or unspent inherited estate by a legitimate child, whether born or unborn or a recipient of a gift or testament. The prohibition of fidei commis is stated in Article 881 of the Civil Code (Burgerlijk Wetboek). An illustration of fidei commis de residue is as follows: The testator or the Settlor provides a testament to A as the burdened heir (bezwaarde) or the bearer of the burden to receive an inheritance share (erfstelling) or specific property (in the case of a gift by testament), including the right to utilize, spend, gift, or sell it unless explicitly prohibited by the testator.

Secondly, the Fidei commis vulgaire substitute is another variant of Fidei commis de residue. In this case, the testator (testator) bequeaths to A as the primary heir to receive an inheritance share (in the case of erf-stelling) or specific property (in the case of a testamentary gift). The testament also stipulates the application of a substitute provision for A, meaning that if, for any reason, A loses his rights or is unable to enjoy them, the designated third party appointed by the testator steps in as the substitute for A (substitute). In vulgar susubstitutethe main focus is not the successive appointment of third parties, where A is appointed as the first heir and then the third party is appointed as the second heir. Instead, it involves the replacement of the position of the

[29] Hukum Zone, *Hibah menurut Kitab Undang-Undang Hukum Perdata*, *http: // hukum zone. blogspot. Com /2011/05/hibah-menurut-kitab-undang-undang-hukum.html.*

[30] *The appointment of a bezwaarde by the insteller as the burden-bearer is referred to as institutie.*

[31] *The appointment of a verwachter by the insteller as a guardian is called substitution.*

first heir (A) by a third party. This means that there are not two bethinking or two testator provisions regarding the same inheritance share or testamentary gift. This characteristic distinguishes it from fidei commis de residue.

Thirdly, Fidei Commis through Double Provision (beschikking) occurs when there are two simultaneous provisions with different contents for the same object. The exception to fidei commis arises when there are double provisions (beschikking) with different contents for the same object. The provisions regarding this can be found in Article 883 of the Civil Code, which essentially states that inheritance will be valid through the establishment of a testament where the right of use is granted to one person and sole ownership is granted to another.

Regarding Article 883 of the Civil Code, it is interpreted that the testator can grant the right of use over the same testamentary object to one person (first provision) and then proceed to grant sole ownership of the same testamentary object to another person (second provision). These two provisions are not given sequentially as in the prohibited fidei commis, but they are given simultaneously. In these provisions, there is also no obligation to preserve the bequeathed object. The provisions described in Article 883 of the Civil Code do not constitute fidei commis, although they have similarities.[32]

The regulation of fidei commissum above represents an expansion of the regulation regarding fidei commissum, meaning that in the substance of civil law, as stipulated in the Civil Code, fidei commissum has exceptions. Therefore, this institution is still maintained. The institution of fidei commissum serves as a bridge for the distribution of inheritance through fiduciary management, which has been prohibited since ancient Roman times. Thus, the legislators intended to prohibit the testator (*testator/installer*) from making a provision that has a consecutive legal effect (*series/chain of liability*) on one or several identical items towards several individuals in sequence, resulting in the immovability of the said items or inherited assets for a long period

In practice, the Writer has come across several legal cases involving fidei commissum, where the civil court system extensively utilizes the institution of fidei commissum as a means to distribute inheritances.[33] This is evident in the verdict of Case Number 245/Pdt.G/2013/PN.Sby junction 565/Pdt/2013 / PT. Sby junction 1600K/PDT/2014. Furthermore, there was a widely publicized and viral case involving an inheritance dispute over a company owned by Hadi Putro Hadjojo, also known as Han Poo Hok. This inheritance dispute, which involved a testament (*will*) dating back to 1985, remained unresolved until 2022. This situation highlights the continued existence and enforcement of the institution of fidei commissum, which is utilized to protect and preserve inheritances by the wishes of the testator. It indicates that society still recognizes the necessity of fidei commissum to ensure the long-term preservation and integrity of wealth or inheritances, particularly when heirs may tend to spend it hastily.

The provisions regarding testamentary bequest (legacy) can be found in Article 957 of the Civil Code. It states that a testamentary bequest is a specific provision within a will (testament) through which the testator gives something to one or more individuals; specific items; goods of a particular kind; or the right to use all or part of their estate.[34] Regarding the reality of testamentary bequests (legacies) through fidei commissum, it is still present and utilized by some segments of society. A notable case is the one involving Mrs. Han Hiem Nio et al. against Mr. Budi Tedjamulia et al., registered under case number 686 K/Pdt./1987 at the Malang District Court (PN). In the civil law framework, the regulation of fidei commissum is not only governed by the Civil Code but also by several other laws, such as Law No. 5 of 1960 on Basic Agrarian Principles (PPA). Fidei commissure is recognized as one form of property rights over land that can be inherited. However, there are several challenges in the use of fidei commissum in Indonesia, including a lack of public understanding of fidei commissum, unclear regulations, and inconsistencies in legal treatment towards various types of inheritance. These factors contribute to the relatively low usage of fidei commissum in Indonesia.

The author has discovered a testamentary deed of inheritance by way of fidei commissum, as stated in Deed of Share Grant No. 85, 86, 87, 88 executed by Notary Maria K. Soeharyo, SH in Jakarta. This signifies that the legal culture in Indonesia still recognizes and even utilizes the institution of fidei commissum to distribute inherited assets in the future. The author's findings regarding the practice of inheritance through fidei commissum reveal allegations of an Unlawful Act since the testamentary deed was lawfully written. These findings are stated in Deed of Share Grant No. 85, 86, 87, 88 executed by Notary Maria K. Soeharyo, SH, in Jakarta. The author, after conducting an in-depth analysis of the text or manuscript of the deed using normative legal methods, concludes that the testamentary deed fails to meet the requirements of a valid agreement, namely a lawful cause. Because a testamentary

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[32] Bachrudin, *Kupas Tuntas Hukum Waris KUH -Perdata,* Ibid: 369.

[33] Lihat Pasal 10 ayat (1) Undang – Undang No. 48 Tahun 2009 *Tentang Kekuasaan Kehakiman*, *The court is prohibited from refusing to examine, adjudicate, and decide on a case based on the argument that the law does not exist or is unclear, but rather, it is obligated to examine and adjudicate it. This provision allows for the resolution of civil cases through peaceful means.*

[34] Ali Afandi, *Hukum waris Hukum Keluarga, Hukum Pembuktian,* Bina Aksara : Bandung, 1984, hlm: 16.

gift based on fidei commissum is prohibited, the agreement of such a gift is legally void. Therefore, all agreements contained in the aforementioned Deed of Share Grant amount to an Unlawful Act.

If we refer to the provisions of the legal regulations above, the legal action of one party of the burden bearer (*bezwaarder*) in the Deed of Stock Donation No. 85, 86, 87, 88 made by Notary Maria K. Soeharyo SH in Jakarta, in this case, it is in the position of Mr. Dr. Aloysius Winoto Doeriat, a businessman in Jakarta. Therefore, the act or process of donation is not against the law, as each of the heirs or the occupying parties (*verwachter*) is not harmed at all, as stated in Article 2 of Deed of Donation No. 86, which states that the donor guarantees the recipient of the donation that the donor has full rights to donate and transfer the shares; and the recipient of the donation will safely possess what is donated and will not be disturbed by anyone. The author's findings in the deed of testamentary donation are that the substantive recipient of the donation will become effective 1 (one) the day before the burden bearer (*rewarder*) passes away or the Effective Date of the Donation. Legally, this deed is not valid because it does not fulfill a valid cause. The deed of the stock donation does not achieve the values of legal certainty, and therefore, the value of justice is automatically absent in that deed. The issue is, what if the burden bearer (*bezwaerder*) and the occupying parties (*verwachter*) pass away simultaneously? Quoting the terminology of Teguh Prasetyo, this does not reflect dignified justice.

5. Conclusion

The regulations concerning fidei commissum lack legal certainty. There is no specific provision in the Civil Code that dictates when the property, which should be held by the burdened party (*bezwaarde*) and delivered to the recipient (*verwachter*), should be handed over to the heir. However, in practice, fidei commissum can generally only be transferred upon the death of the recipient. This creates legal uncertainty, which renders the testamentary gift agreement invalid. Regarding the testamentary gift (*legaat*) of company shares, the validity of its arrangement is stipulated in Article 60(1) of Law No. 40 of 2007 concerning Limited Liability Companies (PT), which classifies shares as movable property (*reference goederen*). Therefore, company shares can be transferred by the shareholders, including through inheritance. Thus, the property rights in share ownership can be upheld against any individual (droit de suite). The specific regulations for the distribution of inherited company shares through fidei commissum are not provided. However, the regulations concerning this matter follow the provisions of the Western Civil Code. In general, they refer to the regulations in Article 833(1) of the Civil Code, which essentially states that heirs automatically acquire ownership rights to all the property, rights, and debts of the deceased person by law.

Inheritance through fidei commissum (*fiduciary bequest*) is normatively regulated to be prohibited and not desired. However, in practice, there are certain circumstances where fidei commissum can still be carried out and implemented, for example, to preserve the integrity of the inherited property and ensure fairness in its distribution. Fidei commissure can be applied in various forms, including through wills or family agreements. In practice, there are several exceptions to fidei commissum, including Fidei-commis de residue; Fidei Commis Vulgaire substitute; Fidei Commis through double disposition (*beschikking*); Fidei commissure to verwachter, including children or descendants, regarding the free portion (*beschikibaardeel*).

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