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Abstract

This paper explains about the application of inheritance law in Indonesia which is strongly influenced by three law systems such as Islamic law, customary law, and Western law. At the beginning of Islam in Indonesia, Islamic law is very dominant in the implementation of Islamic inheritance law which is intergrated with culture and tradition among Muslim society. In Colonial period, the government of Dutch East Hindia started to establish Western law for European and East Asian people. But for the Muslim citizens in Indonesia was implementting the combination of Islamic law and customary law. In the independence period, the political of law has been changed through unification and codification of Islamic law into the Indonesia rules formally, including in the application of Islamic inheritance law.

Keywords: *Customary Inheritance Law; Inheritance Law***INTRODUCTION**

The plurality of Indonesian society is followed by plurality of civil law especially inheritance law. Inheritance law is a part of civil law that is an important factor in succession of property. It cannot be denied that Indonesia after the independence has not been able to form a law codification regarding inheritance law for Indonesians so currently Indonesia still follows three different inheritance systems.

Inheritance law is a part of family law that has an important role other than marriage law. It can happen because inheritance law is strongly related to the scope of human life. The legal experts define inheritance law in different ways. According to Soepomo, inheritance law contains regulations that govern the process of succession and transfer of property and tangible goods from a generation to the de-

scendants¹. Klaassen-Eggens states that inheritance law is a law that governs about transfer of property and the occurrence of legal relationship as a result of someone's death, with or without change². Hilman Hadi Kusuma states that inheritance refers to the property of someone who has died, hereinafter referred to as testator, whether the property has been divided or not divided yet³. Based on the definitions, a conclusion can be drawn that inheritance law includes the testator, the heir, and the inheritance property that need to be managed so that there is legal certainty in inheritance in order that the heirs obtain the inheritance property in accordance with their rights.

One of very sensitive social problems in the society is the inheritance, namely the division of inheritance property owned by someone who has died to his/her heirs. Inheritance or inheritance property or legacy is the property or rights and obligations that are transferred after the testator died to his/her heirs⁴. Inheritance law in Indonesia holds important role in social structure that consists of var-

ious ethnic groups, races, and religions, which certainly have their own style. The form and system of inheritance law is strongly related to the form of society and kinship⁵.

There are 3 (three) types of inheritance law systems so far applicable in the society and have different style with different legal characteristics, namely:

1. Islamic Inheritance Law that comes from Al Quran and Hadith;
2. Civil Inheritance Law that comes from BW (Burgerlijk Wetboek) or commonly known as Civil Code;
3. Custom Inheritance Law that comes from customs.

The diversity is the result of classification of people that happened during the invasion era. The classification of Indonesian people was based on Article 131 of IS (Indiesche Staatsregeling) that classifies Indonesian people into 3 (three) groups, namely native, East foreigner, and European. Furthermore, Wiryono classifies Indonesian people into some groups⁶.

1. For native Indonesians, the applicable is their respective custom law;
2. For native Indonesians who embrace Islam, it is affected by Islamic law;
3. For Arabians, basically the Islamic

¹ Soepomo. (2000). *Bab-bab Tentang Hukum Adat*. Jakarta: Universitas, page 25.

² R. Soetojo Prawirohamidjojo, (2000). *Hukum Waris Kodifikasi*. Surabaya: Airlangga University Press, page 1.

³ Hilman Hadi Kusuma. (1986). *Hukum Waris Adat*. Bandung: Alumni, page 12.

⁴ Hilman Hadikusuma. (1996). *Hukum Waris Indonesia Menurut Perundangan Hukum Adat, Hukum Agama Hindu-Islam*. Bandung: PT. Citra Aditya Bakti, page 33.

⁵ Hazairin. (1968), *Hukum Kekeluargaan Nasional*. Jakarta: Tinta Mas, page 34.

⁶ Wiryono Projodikoro. (1986) *Hukum Waris di Indonesia*. Bandung : Bale Bandung, page 19.

inheritance law is applicable;

4. For Chinese and European, the applicable is the inheritance law according to BW (Burgelijk Wetboek).

Because of the classification of people aforementioned, the inheritance law in Indonesia highly depends on which one applicable for the one who died. The choice of law in determining inheritance law to be used is based on the pluralism of inheritance law in Indonesia. Therefore, to determine the inheritance law to be used, we have to see the deceased comes from which classification. If the deceased is included in Chinese or European, for them the Western inheritance law (Civil Code) will be applicable. However, if the deceased is a native, for them the custom inheritance law will be applicable. However, in line with the development of era, there has been a shift related to which inheritance law to be used, especially the custom inheritance law.

Otje Salman Soemadiningrat states that juridically it shows that the practice of custom inheritance law has been shifted that can be seen from decisions of justice bodies that decide custom cases. Many decisions are not based on the originality of custom law, but on modified custom law in accordance with the development of society where the custom law lives.

Some statutory regulations also more or less take over the role in certain fields governed by custom law, and internal social factors that affect the process of acceleration of change of custom law⁷. Based on the background explained above, a problem was formulated as the focus of review in the writing: How is the existence of custom inheritance law in Indonesia?

METHOD

Type of Research

The type of research was a legal study that analyzed legal rules related to or governing certain category of legal issues, then gave explanation of legal issues that were difficult to understand systematically. In this case, it was Civil Code related to the existence of Custom Inheritance Law in Indonesia. Legal study is a process to find legal rules, legal principles, or legal doctrines to answer legal issues faced. The study was prepared using juridical normative research, namely a study focused to review the implementation of principles or norms in positive law⁸ existing in inheritance law in Indone-

⁷ Otje Salman Soemadiningrat. (2011). *Rekapitulasi Hukum Adat Kontemporer*. Bandung: Alumni, page 194.

⁸ Johnny Ibrahim. (2006). *Teori dan Metodologi Penelitian Hukum Normatif*. Malang : Bayumedia Publishing, page 295.

sia especially the shift of custom inheritance law.

Source of Legal Materials

In the writing of the journal, the legal materials used were primary legal materials in form of statutory regulations of Indonesia related to the problem discussed, among others:

- a. Law No. 7 Year 1988 regarding Religious Court and the issuance of Presidential Instruction No. 1 Year 1991;
- b. Decision of Supreme Court of the Republic of Indonesia Number: 3328/Pdt/1984 dated 29 April 1986;
- c. Decision of Supreme Court of the Republic of Indonesia Number: 2898K/Pdt/1989 dated 19 November 1989;
- d. Law No. 1 Drt/1951;
- e. Jurisprudence dated 17 January 1959b Number 320K/Sip/1958;
- f. Decision of Supreme Court No. 387K/Sip/1956 dated 29 October 1958;
- g. Jurisprudence of Decision of Supreme Court No. 3190K/Pdt/985 dated 26 October 1987;
- h. Decision of District Court of Mataram No. 051/Pid.Rin/1988 dated 23 March 1988;
- i. Supreme Court of the Republic of In-

onesia Number 481K/Pid/1986 dated 31 August 1989;

- j. Article 378 of Civil Code, Law of Drt Number 1 Year 1951, State Gazette Number 9 Year 1950 dated 13 January 1951.

While in the writing of the journal, the secondary legal materials used were in form of books and literature related to Custom Inheritance Law, scholars' opinions in books and literature, legal journals, internet, comments on court decision, and discussion with legal experts.

Data Collection and Data Analysis Technique

All of the legal materials inventoried were then arranged systematically. After that, they were connected to each other, arranged into a systematic subject matter to discuss, review, and analyze the legal issues raised in the writing of the journal. Therefore, it produced a solution to solve the legal issues appropriately and in directed manner. The analysis used on the primary and secondary legal materials identified, inventories, categorized, and classified was juridical-normative qualitative analysis⁹. The method was done systematically, so the existing legal materials could be used to interpret the answer to

⁹ Soerjono Soekanto. (1985). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Rajawali, page 34.

the legal issues and to be a legal argumentation. Therefore, certainly the conclusion produced still held on the applicable statutory regulations.

ANALYSIS AND DISCUSSION

Position of Custom Inheritance Law in Indonesia

Inheritance law in Indonesia so far has been very plural (diverse). In Indonesia, 3 (three) inheritance law systems are applicable, namely custom inheritance law, Islamic inheritance law, and Western inheritance law contained in Burgerlijk Wetboek (BW). The diversity of law is increasingly visible because custom inheritance law applicable is in fact not single, but also diverse following the form of society and kinship system in Indonesia. Soerojo Wignjodipoerno states that custom inheritance law includes legal norms that specify both material and immaterial property of someone that can be given to his/her heirs, and at the same time govern the time, way, and process of transfer. The kinship system in Indonesian society focuses on bloodline system. In general, 3 (three) kinship systems are known, namely:

1. Patrilineal System. The system in principle withdraws the bloodline of father or male ancestor. The system in

Indonesia exists in the society in Tanah Gayo, Alas, Batak, Ambon, Irian Jaya, Timor, and Bali;

2. Matrilineal System. Basically the system is a system that withdraws the bloodline of mother or female ancestor. The matrilineal kinship in Indonesia exists in a place, namely Minangkabau;

3. Bilateral or Parental System. The system withdraws the bloodline of father or mother, so in such kinship system in essence there is no difference between father and mother. The system in Indonesia exists in various areas, among others Java, Madura, Kalimantan, Sumatera, Riau, Aceh, Sulawesi, Ternate, and Lombok.

The existence of the three inheritance systems applicable in Indonesia apply together although at first they did not occur at the same time but they have been a part of social life far before the proclamation of Indonesian independence. In the development history, custom inheritance law system existed earlier than the other inheritance law systems. However, not every time the three inheritance law systems go hand in hand. The legal experts sometimes view them as a conflict, either as a result of pure research or for certain purpose. Christian van den Berg once is-

sued his theory with reception in complex that states that religious law is custom law where custom law has received Islamic law¹⁰. The theory was then denied by a theory by Christian Snouck Hurgronje with *receptie* theory¹¹. The theory assumes that Islamic law will be accepted after accepted by custom law¹². In the journey, the three inheritance law systems have experienced different development and institutional process. Western inheritance law relatively did not undergo any change, namely it comes from BW and therefore it is permanent as in the invasion era. The development of Islamic inheritance law in Indonesia is taken by national legislation, namely the enactment of Law No. 7 Year 1989 regarding Religious Court and the issuance of Presidential Instruction No. 1 Year 1991 known as the implementation of inheritance law in Indonesia. Although juridically the 1945 Constitution and its amendment do not recognize social classification anymore, but factually and empirically even juridi-

cally the social classification issues feel strong. It has effect on the legal subject of different inheritance law users. Commonly, Western inheritance law is implemented by Indonesians of Chinese descendants. Almost all of custom society must use custom inheritance law. In this case, new problem may occur, namely whether the custom society who embraces Islam must use custom inheritance law. Certainly it is not easy to answer. For everyone who embraces Islam, it is a must to use Islamic inheritance law, but the legal provision itself has not had legal certainty yet. It is because the provision enacted by the Government is only suggestive that the rules are not compulsory to implement. It can be seen from section “considering letter b of Presidential Instruction No. 1 Year 1991” that reads:

“That the compilation of Islamic law mentioned in letter a by Government Institution and by the people who need it can be used as a guide and solve the problems in the field.”

Therefore, whether Islamic inheritance law is used or not is an independent choice for Muslims. While custom inheritance law develops through various types of jurisprudence (judge-made law). It can happen because it is related to the characteristics of custom law itself that is mostly unwritten. The existence of custom law is

¹⁰ Mohammad Daud Ali. (2002). *Hukum Islam di Peradilan Agama, (Kumpulan Tulisan)*. Jakarta: Raja Grafindo Persada, page 225.

¹¹ Rahmad Rosyadi and M. Rais Ahma. (2006). *Formalisasi Syariat Islam Dalam Perspektif Tata Hukum Indonesia*. Bogor: Ghalia Indonesia, page 76.

¹² *Receptie* theory by Prof. Snouck Hurgronje that Islamic law will be accepted after recognized by custom law. It is proved with Article 134 verse (2) of IS Year 1929 that reads: “In civil case between fellow Muslims, it will be resolved by judge of Islam if their custom law allows and as long as it is not stated otherwise by ordinance.

contained in form of court decision, that later can be used as a basis of conflict resolution in the future. The development of custom law through jurisprudence can be tracked in some things, among others:

1. The principles of custom law are among others based on the principles: concord, decency, and harmony. It is expressed in the jurisprudence of Supreme Court of the Republic of Indonesia Number: 3328/Pdt/1984 dated 29 April 1986. In Decision of Supreme Court of the Republic of Indonesia Number: 2898K/Pdt/1989 dated 19 November 1989, based on custom conflict that occurred in Court of Kefamenanu, East Nusa Tenggara, Supreme Court explains:

“In facing civil case whose fundamentum petendi and petitum are based on violation against custom law and affirmation of custom sanction; if in the trial the plaintiff can prove his/her lawsuit proposition, the judge has to implement custom law regarding the article that is applicable in the concerned area after hearing from local traditional elder.”

Further legal principle:

“Resolution of violation against custom law, in addition to by civil action aforementioned, it can also be taken by criminal lawsuit as in Article 5 (3) b of Law No. 1 Drt/1951.”

2. The strengthening of position of core family of custom society in Indonesia consists of patrilineal society group, matrilineal society group, and parental (bilateral) society group. In the development, it turns out that more strongly recognized the shift of kinship system in matrilineal custom society and patrilineal custom society into parental or bilateral system. Jurisprudence dated 17 January 1959b Number: 320K/Sip/1958 as the following:
 - a. The wife can inherit the livelihood of the deceased husband;
 - b. The underage child is taken care and under custody of mother;
 - c. Because the child is under custody of mother, the child’s property is controlled and managed by mother;
 - d. The position of male and female is the same.
3. The Strengthening of Protection for Women in Inheritance Law
 - a. Position of daughter in inheritance law. Initially according to custom law in patrilineal society, daughter was not an heir. However, in the development, it is recognized by jurisprudence that daughter is an heir of her de-

- ceased parents;
- b. Position of widow in inheritance law. Initially a widow was not an heir, in fact then the widow suffered after her husband's death, then occurred a practice of giving grant by husband to wife to protect and maintain her socio-economic life after the husband's death, such practice has become more institutionalized. The next development of custom law was that widow was an heir together with the children of the deceased husband. Then widow was an heir with the same position as the children. The next development was that widow was an heir of prioritized group that closed other heirs. According to Jurisprudence of Decision of Supreme Court No. 387K/Sip/1956 dated 29 October 1958, widow can still control community property until she dies or remarries. The top is Jurisprudence of Decision of Supreme Court No. 319K/Pdt/985, dated 26 October 1987, widow has inheritance right on the husband's property, and her right equals to her children, if they do not have any children, she will be the barrier for heirs of her husband's sibling on prenuptial property and community property;
 - c. Principle of land sale-purchase. Land sale-purchase is valid if it meets the requirement of evident and cash, it is consistently held in the jurisprudence about land sale-purchase. Evident means the transaction of land transfer has to be witnessed by general official. Cash means land sale-purchase is valid only if the full payment and land handover take place at the same time;
 - d. Principle of waiver as a basis of occurrence or disappearance of non-expired right, custom law does not recognize expired institution. Waiver institution (*rechtsverwerking*) means if a plot of land is left, sooner or later will recede and finally be released, along with the more tenuous physical relationship between the owner and the land and otherwise;
 - e. Custom criminal law in custom law system. Actually there is no separation of criminal law and other laws as in Western law sys-

tem, criminal conviction is solely done to determine the law (*verklaring van recht*) in form of custom sanction (*adatreaktie*) to restore the custom law violated. Custom criminal law gets reference of validity in Article 5 verse 3 of Law No. 1/Drt/1951. Some important jurisprudences regarding custom criminal law are:

- a. Action against custom law of Logika Sanggraha in Bali;
- b. Decision of District Court of Mataram No. 051/Pid.Rin/1988 dated 23 March 1988. The court considered to mention violation against custom law of Nambarayang or Nagmpesake;
- c. Supreme Court of the Republic of Indonesia Number 481L/Pid/1986 dated 31 August 1989 from District Court of Ende regarding problematics of female body organs, several times the provision of Article 378 of Civil Code was implemented, placing female body organs as objects. The solution was the implementation of Article 5 (3) b of Law of Drt

Number 1 Year 1951 State Gazette Number 9 Year 1950 dated 13 January 1951.

Other than the provision above, there are many other court decisions that govern regarding development of custom inheritance law.

CONCLUSION

Therefore, the position of custom inheritance law in Indonesia is one on inheritance law so far applicable in Indonesia enforced in certain custom law environment. However, there has been a shift of custom inheritance law where the custom inheritance law used is no longer the original custom inheritance law but the custom law that has been developed either by court decision or jurisprudence. The existence of custom inheritance law is contained in form of court decision that later can be made as a basis of resolution of custom inheritance conflict.

BIBLIOGRAPHY

Books with an author

- Achmad Ali. (2012). *Menguk Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Interpretasi Undang-Undang (Legisprudence)*. Jakarta: Kencana.

- Hazairin. (1968). *Hukum Kekeluargaan Nasional*. Jakarta: Tinta Mas.
- Hilman Hadikusuma. (1986). *Hukum Waris Adat*. Bandung: Alumni.
- Hilman Hadikusuma. (1996). *Hukum Waris Indonesia Menurut Perundangan Hukum Adat, Hukum Agama Hindu-Islam*. Bandung: Citra Aditya Bakti.
- Mohammad Daud Ali. (2002). *Hukum Islam di Peradilan Agama, (Kumpulan Tulisan)*. Jakarta: Raja Grafindo Persada.
- Otje Salman Soemadiningrat. (2011). *Rekapitulasi Hukum Adat Kontemporer*. Bandung: Alumni
- R. Soetojo Prawirohamidjojo. (2000). *Hukum Waris Kodifikasi*. Surabaya: Airlangga University Press.
- Rahmad Rosyadi dan M. Rais Ahma. (2006). *Formalisasi Syariat Islam Dalam Perspektif Tata Hukum Indonesia*. Bogor : Ghalia Indonesia.
- Soepomo. (1966). *Bab-bab Tentang Hukum Adat*. Jakarta: Universitas.
- Soerjono Soekanto. (1985). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Rajawali.
- Wiryo Projodikoro. (1986). *Hukum Waris di Indonesia*. Bandung : Bale Bandung.
