

CONTRIBUTION OF ADAT LAW IN THE REFORM AND DEVELOPMENT OF NATIONAL INHERITANCE LAW IN INDONESIA

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ABSTRACT

Indonesia as the largest Muslim country in the world has a unique problem. In public life, there are some people who use customary inheritance system, western inheritance law and Islamic inheritance. In the establishment of national inheritance law in Indonesia, presumably we cannot deny that Indonesia is a nation rich in tradition that is very diverse and adat law has the rules or provisions relating to inheritance law as well, so it is necessary that, in national inheritance law reform in Indonesia, it should not override the rules of customary inheritance because Indonesian people still uphold their traditions inherited from their ancestors.

Keywords: Adat Law, National Inheritance Law.

A. Introduction

The people of Indonesia are trying to reestablish the constitution values of the State based on law. The rule of law requires that in solving any problems, legal system should be used as a handle and the only highest measure. Thus, the enforcement of the rule of law does not have to ignore the attention to other developmental aspects.

Development is a conscious effort made to change a condition from a level that is considered unfavorable to the new conditions on the level of the quality that is considered good or the best.¹ The development carried out is surely the development having a clear legal basis, accountable, effective, and proportionate between physical (growth) and non-physical aspects.

All the people who are developing are always characterized by changes no matter how the development is defined and any measure used for community development. The role of law in development is to ensure that changes occur in a peaceful and orderly atmosphere.²

The term law reform actually implies broadly covering the legal system. According to Friedman, legal system consists of legal structure, legal substance/ material, and legal culture.³ When discussing legal reform, the reform is meant to be the renewal of the legal system as a whole which includes legal structure, material, and culture.

In the process, development contributes to a consequence of changes or reform on other social aspects including the role of the law. It means that the changes made (in the form of development) in the process require the changes in the form of law. The law change has a positive meaning in order to create new laws in accordance with the condition of development and the values of community law.

Almost no legal experts disagree that law (always) requires renewal since people are always changing, not static. According to Satjipto Rahardjo, the changes that occur in people's lives can be classified into two categories:⁴

1. slow, gradual changes;
2. Large-scale, revolutionary changes.

Against the slow change, the adaptation between law and society is performed by making small changes in the framework of existing legislation, either by altering or adding it. The method of legal interpretation and construction is also included in the equipment to adapt to the changes that are not the large-scale ones. The other problem is when the change has large scale or nature. The small changes as mentioned above are sufficient to overcome them. Law can only become part of the political process that may also be progressive and reformative.

¹ Niniek Suparni, *Pelestarian Penegakan Hukum Lingkungan*, Sinar Grafika, Jakarta, 1992, page 36.

² Mochtar Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Hukum*, Bina Cipta Bandung, 1986, page 1.

³ Lawrence M. Friedman, *American Law*, W.W. Norton & Company, New York, 1930, page 5.

⁴ Satjipto Rahardjo, *Build and Remodel Indonesian Law*, Genta Publishing, Yogyakarta, 2009, page 190.

The legal reform here is then only meant as the reform of legislation. As the political process, in this case, law is the product of political activity of the sovereign people, which is driven by the interests of sovereign people which may be inspired by the economic needs, social norms, or cultural ideals of the people.

Abdul Manan explained that there are two dominant views related to the changes (in the sense of reform) of the applicable laws in the life of the people in a country, namely traditional and modern outlooks. In traditional view, society must change first and the law comes to set. In contrast to the modern view, law can accommodate all new developments, so law must always be in conjunction with occurring events. Abdul Manan also explained that, in the field of neutral law, the changes should be aimed at the birth of legal certainty, whereas, in the field of personal life, law should serve as a means of social control in the life of the society.⁵

According to Act No. 17 of 2007 on National Long-Term Development Plan of 2005-2025, which is summarized by the National RPJP 2005-2025, legal development is carried out through: "Renewal of legal matters with regard to the plurality of the prevailing legal order and the impact of globalization in order to increase legal certainty and protection, law enforcement and human rights, legal awareness, the legal service on justice and truth, the order and welfare within the framework of state administration which is more orderly, organized, smoothly, and globally competitive.

In the other parts, this statement appears again with the slight change of words (bolded) as below: "the development of law is carried out through legal reforms with regard to the plurality of the prevailing legal order and the impact of globalization in order to increase legal certainty and protection, law enforcement, and human rights, legal awareness and services based on justice and truth, the order and welfare in the framework of state administration which is more orderly so that the implementation of national development will run well". In the other section, there is also a statement that reads: "The construction of the legal matter is directed to continue the renewal of laws to replace the laws of the colonial legacy that reflected the social values and interests of the people of Indonesia".

The quotations above illustrate the National RPJP of 2005-2025 calling for legal reform, particularly in the form of the renewal of the legal matter, which means the renewal of laws. This is evidenced by the frequent emergence of new laws revising previous laws.

Pursuant to Article 5 paragraph (1) of Act Number 48 of 2009 on Judicial Power, it states that judges are given absolute authority to explore and understand the legal values and sense of justice in society. In practice, the law reform based on the Politics of National Law can also be seen from several revised legislations, including the Law on Judicial Power and some of the laws on the judiciary in the General Courts, Religious Courts and Administrative Courts.

In Indonesia, the form of the renewal of law is more revealed in the legislation. Although the other forms must not be ignored, such as the jurisprudence which became the principal legal concept in Anglo-Saxon countries such as the United States, the conceptual development of the law as a means of social reform in Indonesia surely has wider range and scope than that in its birthplace (America), for several reasons, i.e.:

1. Highlighting laws more in the process of legal reform in Indonesia although jurisprudence also plays a role. It is opposed to the one in the US where Pound's theory is aimed primarily at renewing the expected role of judicial decisions, particularly the decision of the Supreme Court as the highest court.
2. Anything which shows sensitivity to the reality of society rejects the mechanical application of the conception of law as a tool of social engineering. Such mechanical application described by the word tool will lead to results which are not much different from the application which was in the history of law in Indonesia (Dutch East Indies) strictly opposed. In Indonesian development, the conception of (theoretically) law as a tool/ means of reform is influenced by the Northrop's approaches of cultural philosophy and the approach of policy oriented of Laswell and Mc.Dougal.⁶

The legal reform in Indonesia is directed more to laws and regulations, but the unwritten laws experienced more progression and development that leads to the common good. Legal reform and development should be directed at building a good law, both private and public.

Unwritten Law has a considerable role for the development and construction of private law in Indonesia. One of them is the civil law, particularly regarding inheritance. Indonesia as the largest Muslim country in the world has a unique problem. In public life, some people use customary inheritance system, western inheritance law and Islamic inheritance law.

In the establishment of Islamic law in Indonesia, presumably we can not deny that Indonesia is a nation rich in tradition that is very diverse and in customary law that already has rules or provisions relating to inheritance law as well, so it is necessary in law reform Islamic inheritance in Indonesia should not override the rules of customary inheritance. This is because the Indonesian people still uphold their traditions inherited from their ancestors.

In the establishment of Islamic law in Indonesia, presumably we cannot deny that Indonesia is a nation rich in highly diverse adat law and the adat law has already had the rules or provisions relating to inheritance law as well, so it is

⁵ Abdul Manan, *Legal Aspects Modifiers*, Prenada Media, Jakarta, 2005, page 7.

⁶ Mochtar Kusumaatmadja, *Law society, and the National Lawdevelopment*,son of Bardin, Bandung ,, page 9.

necessary that, in the law reform of Islamic inheritance in Indonesia, it should not override the rules of customary inheritance because the Indonesian people still uphold their traditions inherited from their ancestors.

However, the influence of adat inheritance law in the Islamic inheritance law should be appropriate and in line with the provisions of Islamic laws. When adat inheritance law is not in accordance with Islamic law, the adat law system should have been rejected. It is called a *contrario receptio theory* which states that the laws that apply to society are religious law, and adat law applies only when it is not in conflict with the law.⁷ With the renewal of Islamic law in Indonesia, it is expected to form inheritance law that can be implemented by its adherents on the basis of justice for all parties. Then, it is relevant to discuss the contribution of adat law in the renewal and development of national inheritance law in Indonesia.

B. Discussion

Contribution of Adat Law in the Reform and Development of National Inheritance Law in Indonesian

In the reality of people's lives, sometimes the heirs live with non-relatives or non-offspring. For example, he/she lives with his/her foster child or adoptive parents. In the Islamic inheritance system, it does not set up a section for foster children. This will make the problem when, in the division of inheritance later, the adopted child or adoptive parents who have long been living, taking care of, and treating the Heir do not get any inheritance.

Ethically, the testator should allocate part of his/her wealth to the adopted child or adoptive parents by means of the enactment *wasiat wajibah*. In adat law, an adopted child or adoptive parents may receive inheritance assets. Even, the existence of an alternate system of inheritance is recognized.⁸ The Compilation of Islamic Law (KHI) also has to accommodate the provision of *wasiat wajibah* against adopted children or adoptive parents as stated in Article 209 of the Compilation of Islamic Law (KHI).

With regard to these problems, the balance of rights and status between the adopted child and adoptive father in inheritance relationship is formulated. Paragraph (1) describes: the adopted child's inheritance is divided based on Article 176 to Article 193 of KHI. For the adoptive parents who do not accept the will, they are given *wasiat wajibah* of 1/3 of the inherited assets of their adopted child; then, paragraph (2) reads: to the children who do not receive a will, they are given *wasiat wajibah* of 1/3 of the inheritance assets of their adoptive parents.

In this case, the adoptive parents and adopted children may inherit each other through *wasiat wajibah* of 1/3 of the inheritance assets. The presence of the provision and setting of inheritance for adoptive parents and adopted children is based on the legal construction of *wasiat wajibah* law. According to Abdullah Kelib, it will make the Islamic inheritance law in harmony with the values of life with a sense of justice in accordance with legal awareness.

According to the experts, the formulation of Article 209 of KHI is considered a new pattern that can be distribute wealth in an appropriate way (*ma'ruf*) to people who are not heirs. Therefore, this pattern can accommodate the parties with the merit to the heir but not listed in the order of heirs.

In the division of inheritance to the indigenous people, there is usually a result of cultural heritage to sell land to his/her relatives first. It is intended that the land they get from their fathers (inheritance) is not scattered, and it is even not sold to others so that they can someday buy back from their relatives.

In this case, the KHI accommodate it. In Article 189 paragraph (1), it says: when the inheritance assets will be divided in the form of agricultural land area of no more than 2 (two) hectares, in order to maintain its unity as before, and exploited for the mutual benefit of the heirs. The content of paragraph (1) of Article 189 of the KHI is affirmed through paragraph (2) which reads: "when the provisions in paragraph (1) of this article does not allow for some of the heirs need money, the land can be owned by a heir or by paying the cost to the beneficiary who is entitled in accordance with their share.

Therefore, the concept of maintaining the Integrity and Unity of Land is based on the spirit of the interests to maintain and increase the production in agriculture. However, the formulation of the law in Article 189 Paragraph (1) of the KHI is not strict. Due to the possibility and the opportunity not to be able to maintain the integrity and unity of the land is open when some of the heirs desperately need money and the other heirs do not have the ability to pay, either individually or jointly. Then, presumably the land can be sold to another party who can afford it.

The term substitute heirs in Indonesian Islamic inheritance law is popularized by Hazarin in the late 70s. He called the concept of substitute heirs with the term *Mawali*. In the concept of *Mawali*, his son and his brother were placed as a substitute and both are the direct heirs (children and siblings).⁹ The KHI has some principles in inheritance law, namely (1) the principle of *ijbari*, (2) the principle of bilateral (3) the principle of individual, (4) the principles of balanced justice, and (5) the principle that states that the inheritance is present if someone dies.

⁷ H. Ichtijanto, *development of Islamic Law Enactment Theory In Indonesia In Islamic Law in Indonesia: development and Establishment*, Rosdakarya, Bandung, 1991, page 102.

⁸ Soerojo Wignjodipoero, *Introduction and principles of Customary Law*, Alumni, Bandung, 1979, page 164.

⁹ Hazarin, *Inheritance Law Bilateral According to the Qur'an and the Hadith*, Tinta Mas, Jakarta, 1992, page 137.

According to Hazarin, "the principal line of substitution has nothing to do with replacement. It is just a way to show who the heirs are. Each heir stands alone as an heir, he/ she does not replace other heirs because the absent link is not a heir"¹⁰ A substitute heir here does not mean appointing someone who is not the beneficiary to become heir because the qualification of heirs get a clear legal certainty through the principle *ijbari* of the inheritance law.

KHI has been mentioned, substitute heirs is heir to "replace" the position of someone who has died first of the testator. In KHI heir substitute formulated into Article 185 by the editors as follows: "(1) an heir who died earlier than the heir to his position can be replaced by his son, except for those mentioned in Article 173, the person who in law because (a) the blame has been killed or tried to kill or heavy heir, or (b) is libelous blamed filed a complaint that the testator has committed a crime in the threatened with a sentence of 5 years imprisonment or more severe punishment. (2) Section for substitute heirs may not exceed the equivalent part of the heirs to that in the locker".

The existence of substitute heirs concept is the concept of impartial justice principle due to problems grandchildren whose parents died in advance of the heir, became a matter of justice that is true.¹¹ Heir pemganti formulation so it is reasonable, as it can satisfy the justice and humanity in the family community environment. It is at once can close the disappointment of certain parties. While in terms of brotherhood, is expected to maintain the integrity and harmony of relationships with family members.

Article 183 Compilation of Islamic Law revealed that the heirs may agree to make peace in the division of inheritance after each realized parts. With the existence of this formulation may allow the division of the estate in equal portions mathematically (1: 1) among all heirs through peace, as a deviation from Article 176 KHI governing provisions of boys and girls (2: 1); and the brother sister sibling to sibling, brother of the same father with his half sister as a deviation from Article 182 KHI.

The principle of peace (*al-shulh*) has got a justification as to which are listed in theal-Quransurat al-Nisa (4): 127, as long as the course is not intended to disregard the teachings. Indeed, in addressing this need for wise and prudent attitude on all the heirs so that all the heirs can receive their share, but they are still thinking about the state of other relatives who get a smaller portion of his life whereas a heavier burden. Thus, with this peace of a relative may give partial rations given to the next of kin to her relatives. It could also allow equal inheritance for all heirs.

Perhaps the presence of the peace, be used as an alternative settlement models, so it will not look any impression of "winners and losers", the "superior and inferior". Thus, the decision through the media of peace seem more useful, which can be reassuring and soothing all parties.

Discourse equal division (with the exclusion of the provisions of 2: 1 in the Qur'an) is a fairly radical discourse in the discourse of inheritance law reform. The most famous figure in terms of discourse inheritance equally between men and women is the former Minister of Religious Affairs H. Munawir Syadzali MA. He proposed the inheritance will practice Islam in reaktualisasikan with equal comparison. This happens because according to him in public and in particular in certain areas which significantly strong religious, in fact occurring inheritance in faraid not executed instead tend to customary laws.

They argued that by using customary inheritance laws can distribute evenly inheritance for heirs. In addition, often the family in solving the problems of kin tend to go to the District Court. Munawir Syadzali refers to this as a direct deviation. As for the practice of indirect deviation among the culture of the family who adopted a policy of *pre-emptive* days of life they have shared the majority of their wealth to their children, each gets equal parts, regardless of sex.¹²

Munawir Syadzali with this discourse is not meant to say the concept of inheritance in the Qur'an that's not fair, but rather he highlighted the attitude of people who seem to distrust the legal justice faraid. The scholarly have found verses about inheritance is a paragraph that *qoth'idalah* her. However, the reading of a text perceptions will vary. In the case of inheritance verses most contemporary scholars provide an opportunity for diligence in this area because they assume that they can be reinterpreted and this is what they mean is still in region. *dalah dzani* its Therefore, some scholars argue such a state that the verses of inheritance must be adapted to the context of his writings and spirit of the age.¹³

In the above explanation, there is inspiration from the reality of a society on the ground that we need to accommodate the principle cause equally in customary inheritance laws to reform Islamic law in Indonesia. Although it is still in the stage of discourse that is not accommodated by the Compilation of Islamic law as the basis of religious judges decide the problems, particularly in terms of the legacy.

¹⁰ *Ibid*, pages 24-25.

¹¹ Mohammad Daud Ali, *Islamic Law: Introduction to the Rules of Islamic law in Indonesia*, Rajawali Press, Jakarta, 2003, page 236.

¹² Munawir Syadzali, *Re-actualizing Islamic Teachings In Islamic law in Indonesia: Development and Establishment*, Rosdakarya, Bandung, 1991, page 84.

¹³ Mun'im A. Sirry, *Fiqh Interfaith: Building Inclusive-Pluralist Society*, Paramadina, Jakarta, 2004, page 167.

C. Conclusion

The renewal and development of inheritance law in Indonesia are directly or indirectly affected by the state of the reality of Indonesian society with customary inheritance laws. Therefore, by taking into account the state of Indonesian society (indigenous), the Islamic law in Indonesia can be implemented properly in the absence of irregularities and misuse of inheritance law, either directly or indirectly. All of them are surely still in the corridor of sharia and the spirit of Qur'an which are humane, equitable and universal.

D. Recommendation

The noble values of customary inheritance that have been mixed with the Islamic law basically need to be adopted in the national inheritance law system in Indonesia through the renewal of ideas, such as *wasiat wajibah*, maintaining land integrity and unity, substitute heirs, peace in the division of assets and equal inheritance discourse.

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